

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1125

2001 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1125

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1125 A

House Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 01-18-01

Tape Number	Side A	Side B	Meter #
#1		X	2131-END
#2	X		0-143
Committee Clerk Signature <i>Robin L. Small</i>			

Minutes:

REP. M. KLEIN called the meeting to order, with all members present.

In favor:

LINDA ENGMANN, DIRECTOR CENTRAL SERVICES DIVISION

Please see attached testimony and proposal of an amendment.

REP. M. KLEIN asks if it has now been coordinated with the board of higher ed., the university, and the attorney general's office?

ENGMANN replies that not specifically with those particular groups, but it has been seen by the auditor's office.

REP. M. KLEIN asks if this affects cities, townships and so forth.

ENGMANN replies no it does not.

REP. BRUSEGAARD asks if this would allow the state to contract certain items on a brand name basis?

ENGMANN says yes that it does allow for that.

REP. KLEMIN asks about purchases from an unregistered vendor.

ENGMANN replies that the purpose of the vendor registration is that it would put them all on an equal basis.

REP. KLEMIN asks if that would then reinstate that unfairness.

ENGMANN replies that yes it would.

PAM SHARP, OMB

SHARP states that she would like to see added wording to the affect. Work with the agency. The OMB suggests all agencies are required to follow related to the contract. Give us the authority to develop those guide lines and work with the agency. States that this bill needs a lot of work.

REP. KASPER asks how did they get along without this bill? SHARP replies that the performance audit is showing that they pretty much are doing whatever they want to do. That they are not required to bid the contracts.

REP. KASPER asks is the auditors office is responsible for increasing bureaucracy

SHARP replies with a laugh.

REP. HAAS asks about deleting of services, does that mean goods?

SHARP replies that they are deleting reference services. Then propose policies with services.

REP. KASPER do a number of agencies support this bill?

SHARP replies that they did meet with agencies last Tuesday, and maybe 40 or 50 people at the meeting. They were very concerned with the wording in the bill. Which is why they have proposed the amendment. That bill inadvertently could have transferred some judiciary responsibilities to OMB. Which they absolutely do not want.

REP. KASPER asks so as amended they support it?



SHARP replies that she believes they do support it.

REP. KROEBER asks for some examples that she is talking about.

SHARP then proceeds to explain some possibilities.

REP. KROEBER asks if they will then set up the forms within this group? And will you be doing all the deciding who gets the bid?

SHARP replies that absolutely not they will not decide who gets the bid. Only set up some policy and guide lines on how they should go through the contract procedure.

REP. GRANDE states to the committee that she is now going to ask OMB to take this bill back, rework it, rewrite it and bring it back to the committee in a proper form, and at that time she prefers that it does not come through administrative rule.

REP. KLEIN states that he is amazed with the quote that they spent \$99,000,000.00 in contracts for services without any specific guidelines.

GORDY SMITH, STATE AUDITORS OFFICE

SMITH states and talks about the issues that there are no guidelines set up. Talks about the contracts in the past years.

REP. M. KLEIN states that they could work with ENGMANN and SHARP.

STEVE COCHRANE, EXECUTIVE DIRECTOR OF THE RETIREMENT INVESTMENT OFFICE,

COCHRANE states that the bill has some very far reaching implications. They have close to \$ 4 Billion dollars in investments tied up in contracts. COCHRANE supports the amended bill.

ALAN HOBERG, DIRECTOR of the OFFICE of ADMINISTRATIVE HEARING,

HOBERG talks about contracting and if the committee would look at this a little closer.

Page 4  
House Government and Veterans Affairs Committee  
Bill/Resolution Number HB 1125 A  
Hearing Date 01-18-01

In opposition as the bill was drafted:

ILLONA A. JEFFCOAT-SACCO, PUBLIC SERVICE COMMISSION

Please see attached testimony.

CHUCK JOHNSON, INSURANCE DEPARTMENT, ATTORNEY.

JOHNSON supports the amendments but does not support the original drafted bill. Would like an opportunity to look at the amendments.

No action was taken on this day.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1125 B

House Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 2/2/01

Tape Number	Side A	Side B	Meter #
1		X	3802-END
2	X		0-67
Committee Clerk Signature <i>Rubin &amp; Small</i>			

Minutes:

REP. M. KLEIN called the hearing to order, with all members present except REP. HUNSKOR.

Action:

Amendments were proposed to the committee. General discussion.

REP. HAAS motioned to accept the amendments, seconded by REP. CLARK. REP. M. KLEIN took a voice vote. The voice vote passed. REP. CLARK then motions for a DO PASS AS AMENDED, seconded by REP. GRANDE. The roll call vote was taken with 14 YES, 0 NO, 1 ABSENT AND NOT VOTING. The CARRIER of the bill is REP KLEMIN.

HB 1125: DO PASS AS AMENDED 14-0

CARRIER: REP. KLEMIN

## FISCAL NOTE

Requested by Legislative Council

03/19/2001

Bill/Resolution No.:

Amendment to: Engrossed  
HB 1125

**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.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$55,000			
Appropriations						

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

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The \$55,000 will provide funding for OMB State Procurement Office to hire a consultant to assist with establishing standards and policies and working with the agencies to determine the appropriate standards and policies.

**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.*

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

OMB

Operating Line      \$55,000

Name:	Pam Sharp	Agency:	OMB
Phone Number:	328-4606	Date Prepared:	03/20/2001

**FISCAL NOTE**  
 Requested by Legislative Council  
 02/06/2001

Bill/Resolution No.:

Amendment to: HB 1125

**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.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>						
<b>Expenditures</b>			\$55,000			
<b>Appropriations</b>						

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

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The \$55,000 indicated in this fiscal note will provide funding for OMB State Procurement Office to hire a consultant to assist with establishing standards and policies, working with agencies and writing the Administrative Rules.

**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.*

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

OMB:

Operating Line \$55,000

Name:	Pam Sharp	Agency:	OMB
Phone Number:	328-4606	Date Prepared:	02/07/2001

**FISCAL NOTE**  
 Requested by Legislative Council  
 12/26/2000

Bill/Resolution No.: HB 1125

Amendment to:

**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.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$132,174			
Appropriations			\$132,174			

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

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

**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.*

Office of Management and Budget - State Procurement Office

Salaries and Wages \$95,774

Operating 31,400

Equipment 5,000

Includes 1 FTE



**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The executive budget recommendation includes an appropriation of \$132,174 in the Office of Management and Budget for this bill

<b>Name:</b>	Pam Sharp	<b>Agency:</b>	OMB
<b>Phone Number:</b>	328-4606	<b>Date Prepared:</b>	12/28/2000

February 2, 2001

VR  
2/2/01  
1063

HOUSE AMENDMENTS TO HB 1125 HOUSE GVA 2/2/01

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 54-44.4 of the North Dakota Century Code, relating to office of management and budget standards and guidelines for the acquisition of services; and to amend and reenact subsection 7 of section 54-44.4-02, section 54-44.4-05, and subsections 1 and 4 of section 54-44.4-09 of the North Dakota Century Code, relating to justification for emergency purchases, variations on competitive bidding, and exemptions from vendor registration.

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

**SECTION 1. AMENDMENT.** Subsection 7 of section 54-44.4-02 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

7. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or where immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file and reported to the office of management and budget.

**SECTION 2.** A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

**Contracts for services - Office of management and budget to establish guidelines - Agencies to comply - Exemptions - Definition.**

1. The office of management and budget shall develop and publish, and may amend from time to time, standards and guidelines for the procurement of contracts for services. Unless the director of the office of management and budget, or the director's designee, grants an exemption, or unless the standards and guidelines of the office of management and budget are directly contrary to the specified terms of a statute, all state agencies, boards, bureaus, commissions, and institutions shall comply with the standards and guidelines for all contracts for services. Exemptions may be granted on an agency basis or for specific services or service contracts. The standards and guidelines adopted under this section are administrative rules and must be adopted under chapter 28-32.
2. As used in this chapter, "services" includes any work performed by an independent contractor for this state when the service rendered does not consist primarily of the acquisition of commodities, equipment, or materials, or the rental of commodities, equipment, or materials.

**SECTION 3. AMENDMENT.** Section 54-44.4-05 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**54-44.4-05. Competitive bidding on, limited competitive, noncompetitive, and negotiated purchases - Other government purchasing contracts - Exempt records.**

- 203
1. Except as otherwise provided in ~~section~~ sections 44-08-01 and ~~section~~ 25-16.2-02, and in this section, purchasing contracts must be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability. The office of management and budget may reject any or all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services, and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state. Until the date and time set for receiving and opening bids and proposals pursuant to a request for bids or proposals, all bids and proposals received under this chapter are exempt records under subsection 5 of section 44-04-17.1.
  2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:
    - a. The commodity is available from only one supplier.
    - b. The commodity is available from another governmental entity's contract.
    - c. The commodity is to be purchased for experimentation or trial.
    - d. Competitive bidding has failed to produce a bidder.
    - e. Commodities are being purchased for over-the-counter resale.
    - f. Acceptable goods are produced or provided by correctional institutions or other government agencies.
    - g. The anticipated cost of purchasing specified goods is less than an amount determined by the office of management and budget which would justify the expense of competitive bidding.
    - h. A used commodity is advantageous to the state and the commodity is available only on short notice.
    - i. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
    - j. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
  3. If the director of the office of management and budget determines it to be in the best interest of the state, the office of management and budget may agree to purchase according to contracts entered into by the United States general services administration, or may enter into cooperative purchasing agreements with a cooperative purchasing group of other state governments.

**SECTION 4. AMENDMENT.** Subsections 1 and 4 of section 54-44.4-09 of the 1999 Supplement to the North Dakota Century Code are amended and reenacted as follows:

1. Every person or business entity that desires to bid or submit a proposal on contracts ~~for commodities~~ awarded under this chapter must be an approved vendor in order to receive a request for bids or proposals. Unless waived by the director of the office of management and budget, or the director's designee, a bid or proposal may not be considered under this section from any vendor that is not approved.
4. The director of the office of management and budget, or the director's designee, may waive the requirements for registration with the secretary of state as provided in this section and authorize receipt of a bid or proposal from a vendor that unqualifiedly refuses to register as provided in this section if the director or the director's designee makes a written determination that:
  - a. A commodity is so unique and possesses such specific characteristics essential to the government program in question that it is available only from one source and not through wholesalers or retailers; or
  - b. An emergency as defined in subsection 7 of section 54-44.4-02 exists; ~~or~~
  - c. The commodity to be purchased is a one-time purchase for which at least two approved vendors are not available and the director of the office of management and budget, or the director's designee, determines consideration of bids or proposals from unregistered vendors is in the best interest of the state. In the event of a tie bid or proposal, the registered vendor must be given preference."

Renumber accordingly

Date: 2-2-2001

Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1125

House GOVERNMENT AND VETERANS AFFAIRS Committee

☐ Subcommittee on \_\_\_\_\_

or

☐ Conference Committee

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

Action Taken accept the amendments

Motion Made By Haas Seconded By Clark

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN KLEIN			REP KROEBER		
VICE CHAIR GRANDE					
REP BELLEW					
REP BRUSEGAARD					
REP CLARK					
REP DEVLIN					
REP HAAS					
REP KASPER					
REP KLEMIN					
REP MEIER					
REP WIKENHEISER					
REP CLEARY					
REP HUNSKOR					
REP METCALF					

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

Absent \_\_\_\_\_

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

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

Date: 9-8-2001

Roll Call Vote #: 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1125

House GOVERNMENT AND VETERANS AFFAIRS Committee

☐ Subcommittee on \_\_\_\_\_

or

☐ Conference Committee

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

Action Taken do pass as amended

Motion Made By Clark Seconded By Grande

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN KLEIN	✓		REP KROEBER	✓	
VICE CHAIR GRANDE	✓				
REP BELLEW	✓				
REP BRUSEGAARD	✓				
REP CLARK	✓				
REP DEVLIN	✓				
REP HAAS	✓				
REP KASPER	✓				
REP KLEMIN	✓				
REP MEIER	✓				
REP WIKENHEISER	✓				
REP CLEARY	✓				
REP HUNSKOR					
REP METCALF	✓				

Total (Yes) 14 No 0

Absent 1

Floor Assignment Rep. Klemen

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

**REPORT OF STANDING COMMITTEE**

**HB 1125: Government and Veterans Affairs Committee (Rep. M. Klein, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1125 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 54-44.4 of the North Dakota Century Code, relating to office of management and budget standards and guidelines for the acquisition of services; and to amend and reenact subsection 7 of section 54-44.4-02, section 54-44.4-05, and subsections 1 and 4 of section 54-44.4-09 of the North Dakota Century Code, relating to justification for emergency purchases, variations on competitive bidding, and exemptions from vendor registration.

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

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**SECTION 2.** A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Contracts for services - Office of management and budget to establish guidelines - Agencies to comply - Exemptions - Definition.

1. The office of management and budget shall develop and publish, and may amend from time to time, standards and guidelines for the procurement of contracts for services. Unless the director of the office of management and budget, or the director's designee, grants an exemption, or unless the standards and guidelines of the office of management and budget are directly contrary to the specified terms of a statute, all state agencies, boards, bureaus, commissions, and institutions shall comply with the standards and guidelines for all contracts for services. Exemptions may be granted on an agency basis or for specific services or service contracts. The standards and guidelines adopted under this section are administrative rules and must be adopted under chapter 28-32.
2. As used in this chapter, "services" includes any work performed by an independent contractor for this state when the service rendered does not consist primarily of the acquisition of commodities, equipment, or materials, or the rental of commodities, equipment, or materials.

**SECTION 3. AMENDMENT.** Section 54-44.4-05 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**54-44.4-05. Competitive ~~bidding on~~, limited competitive, noncompetitive, and negotiated purchases - Other government purchasing contracts - Exempt records.**

1. Except as otherwise provided in ~~sections~~ sections 44-08-01 and ~~section~~ 25-16.2-02, and in this section, purchasing contracts must be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability. The office of management and budget may reject any or all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services, and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state. Until the date and time set for receiving and opening bids and proposals pursuant to a request for bids or proposals, all bids and proposals received under this chapter are exempt records under subsection 5 of section 44-04-17.1.
2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:
  - a. The commodity is available from only one supplier.
  - b. The commodity is available from another governmental entity's contract.
  - c. The commodity is to be purchased for experimentation or trial.
  - d. Competitive bidding has failed to produce a bidder.
  - e. Commodities are being purchased for over-the-counter resale.
  - f. Acceptable goods are produced or provided by correctional institutions or other government agencies.
  - g. The anticipated cost of purchasing specified goods is less than an amount determined by the office of management and budget which would justify the expense of competitive bidding.
  - h. A used commodity is advantageous to the state and the commodity is available only on short notice.
  - i. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
  - j. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
3. If the director of the office of management and budget determines it to be in the best interest of the state, the office of management and budget may agree to purchase according to contracts entered into by the United States general services administration, or may enter into cooperative purchasing agreements with a cooperative purchasing group of other state governments.



**SECTION 4. AMENDMENT.** Subsections 1 and 4 of section 54-44.4-09 of the 1999 Supplement to the North Dakota Century Code are amended and reenacted as follows:

1. Every person or business entity that desires to bid or submit a proposal on contracts for commodities awarded under this chapter must be an approved vendor in order to receive a request for bids or proposals. Unless waived by the director of the office of management and budget, or the director's designee, a bid or proposal may not be considered under this section from any vendor that is not approved.
4. The director of the office of management and budget, or the director's designee, may waive the requirements for registration with the secretary of state as provided in this section and authorize receipt of a bid or proposal from a vendor that unqualifiedly refuses to register as provided in this section if the director or the director's designee makes a written determination that:
  - a. A commodity is so unique and possesses such specific characteristics essential to the government program in question that it is available only from one source and not through wholesalers or retailers; or
  - b. An emergency as defined in subsection 7 of section 54-44.4-02 exists; or
  - c. The commodity to be purchased is a one-time purchase for which at least two approved vendors are not available and the director of the office of management and budget, or the director's designee, determines consideration of bids or proposals from unregistered vendors is in the best interest of the state. In the event of a tie bid or proposal, the registered vendor must be given preference."

Renumber accordingly

2001 SENATE GOVERNMENT AND VETERANS AFFAIRS

HB 1125

# 2001 SENATE STANDING COMMITTEE MINUTES

## BILL/RESOLUTION NO. HB 1125

Senate Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date March 2, 2001

Tape Number	Side A	Side B	Meter #
1	X		34.3-End
1		X	0.0-54.6
2	X		23.0-26.4
March 9, 2001 1	X		26.4-56.2
March 15, 2001 2		X	46.4-End
March 15, 2001 3	X		0.0-7.2
Committee Clerk Signature <i>James A. Raib</i>			

Minutes: **Chairman Krebsbach** opened the hearing on HB 1125 which relates to office of management and budget and budget standards and guidelines for the acquisition of services and relating to justification for emergency purchases, variations on competitive bidding, and exemptions from vendor registration. **Linda Engmann**, director, Central Services of OMB appeared before the committee to introduce the legislation. A copy of her written testimony is attached. **Ms. Engmann** also presented the committee with a proposed amendment which states "Page 1, line 17, after "file" insert a period "." And remove the remainder of the line." **Senator T. Mathern** wanted to know what the general change was, what were the reasons for the hog house? "What is the dramatic difference between the bill as we have it now and as it was introduced? **Ms. Engmann** indicated the original bill under existing statute services along with other things professional service are exempt from agencies having to go to the state procurement office under OMB to procure those services. The original bill removed that exemption so that all

services then would come under the purview and authority of OMB. They would have to submit any request for a purchase of a service contract to the state procurement board. Now they can do that on their own. There was much concern among agencies about that giving authority to OMB for too much or too much control over what agencies do and would be usurping some of their own responsibilities. **Chairman Krebsbach** inquired if OMB was comfortable with the amendments put on by the house. **Ms. Engmann** indicated they were. **Senator Wardner** inquired if the agencies were OK with OMB writing administrative rules. **Ms. Engmann** indicated that the original bill did not make these guidelines and standards of administrative rules. They requested that they be part of the bill. **Gordie Smith**, representing the state auditors office appeared in a neutral position. The bill, a part of the bill, is the result of a performance audit that was conducted on contracts for services. For information purposes, so that the committee understands the significance of this kind of guidance, we went out and asked the agencies to provide us information on contracts for services that met certain criteria. Those criteria were if they made payments of over \$10,000 in a year for contracts for services where the contract over the life of the contract where they paid \$50,000, or if it crossed over a biennium. We wanted that contract so we could put it into our data base. What we ended up with was rather startling from our standpoint. I think it is from a legislative standpoint as well. We looked at over 2200 contracts for services in state government. In those contracts, in the last three years there were \$272 million of payments that went out the door on those 2200 contracts. I know those figures were low. From the audit we went out and visited 15 agencies. Some were colleges, some were agencies, some were chosen at random, some were large like Human Services. But when we went through those in all 15 agencies we found additional contracts that met that criteria that were not provided. So we know that there are more. There are virtually no

laws, no administrative rules, no OMB policies or procedures specifically guiding an agency. In a lot of instances when they visited the smaller agencies they welcomed the suggestion of OMB being a central point to provide some sort of guidance to policies because they needed it. We found a general lack of monitoring of these contracts for services. We found all sorts of problems that in this day and age we were surprised to find. We found payments for contracts for more than \$10,000 per year and nothing was in writing. It was well, we've always just worked with this person. Payments were made not in agreement with the terms of the contract that was in writing in some instances. Overall we just found a lot of problems with the way that state government was managing these contracts for services and that was why in the recommendation we felt that OMB should have the authority to make up some rules agencies would be involved in but we also wanted OMB to have the ability to exempt either a type of service because it is unique or to exempt an agency if maybe they are convinced if what is going on there. **Senator T. Mathern** made a couple of inquiries of Mr. Smith at this time. **Mr. Smith** offered his responses. **Rick Clayburgh**, state tax commissioner appeared before the committee. He indicated his testimony was in a neutral position. He indicated that he does have concerns, however, he did not want the committee to take that as meaning he is in opposition to the bill. He believes that HB 1125 does have a proper role in state government. It is unique, there are not rules in state government for dealing with service contracts and they are different than dealing with purchase if a computer. When you talk about service contracts you talk about the service of individuals that may have some unique nature. The side that the tax department really has some difficulty with is the confidentiality issue. The tax department has to deal with expert witnesses. We have a specific expert witness appropriation that is already in our budget to deal with experts as we deal with very complicated tax cases. Although the rules could be written to exempt the

tax department we would feel more comfortable in insuring because confidentiality a violation of it is a class felony and because it is specific to our statutes in North Dakota we would feel more comfortable if the tax department for that section of code, 57-01 would be exempt from the service contract requirement. **Senator Wardner** inquired if Mr. Clayburgh's concerns could be taken care of in the administrative rules. **Mr. Clayburgh** indicated that the tax department had amendments drafted on the house side to exempt the tax department. The committee tried to deal with it through administrative rules. Again his concern only because of the nature of income taxes and taxes as a whole, we are overzealous in protecting the confidentiality of taxes. We would feel more comfortable if it were specifically exempted from the law. I don't believe that OMB or any other agency has any ulterior motive. He supports the general concept of what the bill is trying to do, he just has an overriding problem because of the confidentiality. **Sparb Collins**, representing PERS, appeared before the committee. He indicated his testimony that he was appearing in a neutral position on HB 1125. A copy of his written testimony is attached. **Senator Wardner** inquired if this was brought to the attention of the house. **Mr. Collins** indicated they became aware of the bill about a week before the house heard it. He had no chance to talk to his board. There was some talk that the bill might become a voluntary bill. **Clifford Porter**, with the lignite energy council, presented testimony on behalf of John Dwyer, president of the lignite energy council. A copy of his written testimony is attached. A request for an amendment is included with his testimony. **Steve Cochran**, representing the North Dakota Retirement and Investment Office presented written testimony to the committee in a neutral position on HB 1125. **Ilona A. Jeffcoat-Sacco** representing the public service commission presented testimony in opposition. A copy of her written testimony is attached. **Judy Carlson**, project safe send coordinator, appeared before the committee in opposition. A copy of her

written testimony is attached. **Todd Cranda**, representing the ND Consulting Engineers Council indicated he and his group are opposed to HB 1125. He offered amendments to the committee which would them from this section of law. **Bonnie Larson Steiger**, Executive Director of the American Institute of Architects, ND Chapter indicated she appears in opposition. She and her group support the amendments Mr. Cranda is proposing. **Jeff Engelson**, Director of Investments, state land department presented written testimony in opposition to HB 1125. A copy of the testimony is attached. The remainder of the hearing involved questions from **Senators Wardner, Dever, and Kilzer**. Responses were offered by **Gordie Smith** (Tape 1, Side B, Meter #'s 36.6-52.4). There was nothing further at this time. **Chairman Krebsbach** closed the hearing at this time. Committee discussion of HB 1125 was opened at this time. **Senator T. Mathern** inquired he wondered if the committee shouldn't send someone up to OMB. He says he believes there is some rationale for this but he also understands the objections of the agencies. He indicated he is open to working with somebody on this. **Chairman Krebsbach** indicated she had spoken with some people and they seemed to think it would be fine to tack other portions of the bill that OMB wants to have passed in this legislative session and take the part out of the purchasing contracts and put them into a form of a possible study for the coming interim. That way we can get a very good handle on what we do have from agencies in regard to service contracts and where we are lacking. What she is finding is there is an awful lot of lack of education with some of the agencies that need to have implementation of some kinds of standards. Perhaps that would bring it to light. Perhaps that could result in some good legislation in the next session. **Senator T. Mathern** indicated he would go one step further and maybe permit or authorize some sort of development of the training and development of a standard form. Not necessarily everyone has to use it, but and even going from going to it

should have this, this and this, to actually have a completed form would be good if it was done. This is not going to be easy but he thinks this could be done during the interim also. **Senator Dever** indicated that somebody said that the Attorney General's Office has guidelines. He wondered if that would satisfy that. **Senator Wardner** indicated he thought the issue was that OMB is going to promulgate the rules for everybody. He guesses the way he sees it is that not everybody is sure they want to trust OMB to be sensitive to their needs. There will be hearings and everything because just like when you promulgate rules. They come in and say this is a problem for us and you'd hope they would be sensitive to the uniqueness of an agency.

**Chairman Krebsbach** indicated she sees where OMB may need to be the clearing house for the rules that are established by the other agencies at this time. If they meet standards set by them they could perhaps bow out of the picture and let them run their own, but perhaps they need a clearing house to have all rules submitted to. **Senator Dever** inquired if it would be appropriate to put an amendment that says that any agency that has rules that satisfy these requirements is exempt from this requirement. **Chairman Krebsbach** indicated this discussion was good but indicated that the committee needs more time to decide what is needed to make this bill work. On March 9, 2001 the committee took further input on HB 1125. **Gordy Smith** with the State Auditor's Office addressed the committee. **Mr. Smith** indicated the bill has merit even as modified by the house. From an auditor's standpoint one of the things in their standards is to use some professional skepticism. Look at everything but see if there are ways you can corroborate things or be more comfortable with some things. What bothers him is that we have no, some of the agencies that have complained, the one's that talk about fiduciary responsibilities with their investments, PERS, RIO, and LAND, those have some merit because there is nothing in the bill, nothing from the auditors office or nothing from OMB that wants to accidentally infringe on that



responsibility. He believes either those three could be exempted or language could be put in that specifically that it is not to be interpreted as infringing on the fiduciary responsibilities of those agencies. The other argument that he has is that at the initial hearing, Madame Chairman brought up the point as far as the IT bills we had four or five years ago. Agencies were concerned that the sky would fall if this was carried out. Now after some time has passed we have a very good system in place where every agency has an IT plan, there is an IT committee that legislators are on, they are kept abreast of what is going on. ITD has developed into a department. He sees a lot of similarities here where we have a hundred plus million dollars going out of the door every year. If something isn't done here to where we can at least pass the bill in somewhat similar form that it has now. If we wait two years, you've got 200 million dollars now that are out the door without any guidance and from an auditor's standpoint he doesn't know if that is the best route to go. In preparing for this bill we surveyed 14 other states to find out how they do it. 12 of those states have direct administrative oversight for contracts for services, some of them so strict because of the nature of it that would be in some positions would have to sign off on every contract for services. We are not proposing that but it does show that nationwide there are those types of similar concern. The better pattern here would be something that he heard from a number of the agencies when he discussed that with them before after hearing was well, we trust Rod, or Pam, or we trust the people at OMB now. We don't what it will be like in five years or ten years. You never know what that is going to be like. I don't think that a person can consider legislation good or bad based on protecting people. He would rather see that if the bill passed in somewhat of a similar form we could work with OMB to come up with procurement policies, have them put in place and see how they work. If it's absolute disaster, then the legislature during the next session can say well, this doesn't work

we'll have to modify the bill or whatever to make it work. Rather than do nothing this is a suggestion. For the 8 or 9 agencies who did have a problem with the bill there are still many other agencies that have said nothing about it. Many of the smaller agencies indicated they would like a structure of guidelines in which to operate. This is not intended to be a one size fits all bill. This will be some broad guidelines which will be generally acceptable. The bill also gives OMB authority to exclude departments or certain things if they want to. The discussion continued with **Senators Dever, Krebsbach, and T. Mathern** offered questions. **Mr. Smith** offered his responses (Tape 1, Side A, Meter #'s 34.6-43.8). **Rod Backman**, Director of OMB appeared before the committee. He indicated that Gordy Smith probably covered it as well as can be. He added to the information by saying the idea of OMB concerning guidelines and policies other agencies already have is that the guidelines and policies of OMB would be broad enough so that if an agency has good policies they will be able to work with them. When OMB develops the policies they will say these are the things you will have to take into account in acquiring services. If the agency already has good internal policies they are going to be in compliance today with what we are developing. Our intent is not to micro manage but to develop general guidelines so there is something, some consistency and some common sense in the procurement of services. This bill isn't the boogie man many are envisioning. One of the things we have considered and would throw out to you is the possibility that if you don't along with the bill somewhat in the fashion it is now that if section two was deleted maybe some intent language on your part that would say something to the effect that OMB shall develop guidelines in the interim as appropriate. Once the guidelines are established the agencies can see that it's not going to micro manage them. They just need to follow these general guidelines. He thinks it will take away a lot of the fears and concerns they have now. **Senators Wardner, T. Mathern,**

and **Dever** offered questions. Responses were offered by **Mr. Backman** ( Tape 1, Side A, Meter #'s 46.8-56.2). There was no further discussion at this time. Committee discussion on HB 1125 took place on March 15, 2001. **Chairman Krebsbach** indicated that she had visited with both Mr. Smith and Mr. Backman and she noted that in view of everything that is going on the committee has a responsibility to get a handle on what is happening with the contracts for services. There seems to be an awful lot of uneasiness about the OMB taking the lead and agencies tying in with what they would be doing. There were many who wanted to opt out or be exempted from the process. **Chairman Krebsbach** indicated that she would feel comfortable if the committee amended out the section 2 and instead put in the legislative intent language. That way in the two year period the office would have a chance to look at it, to establish the guidelines and then in so doing they would be able to let the agencies see them and feel comfortable with the fact that they are not going to take over the process, merely to get a handle on it. Senator Kilzer indicated that on the proposed amendment perhaps the language should be clarified to indicate that agencies should be encouraged to develop their own guidelines. Discussion of how to word the amendment exactly ensued. After the language of the amendments was agreed upon, a motion for adoption of the amendments was made by **Senator T. Mathern**, seconded by **Senator Kilzer**. Roll Call Vote indicated 6 Yeas, 0 Nays, 0 Absent or Not Voting. A motion for Do Pass as Amended and rerefer to Appropriations if necessary was made by **Senator T. Mathern**, seconded by **Senator Wardner**. Roll Call Vote indicated 6 Yeas, 0 Nays, 0 Absent or Not Voting. **Chairman Krebsbach** will carry the bill.

Date: 3/15/01  
Roll Call Vote #:

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1125 (Enrolled)

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

☐ Subcommittee on \_\_\_\_\_  
or  
☐ Conference Committee

Legislative Council Amendment Number

Action Taken	Amend
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Motion Made By Sen. Mathern Seconded By Sen. Kilzer

[illegible]

Total (Yes) 6 No 0

Absent

### Floor Assignment

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

Date: 3/15/01  
Roll Call Vote #:

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

HB 1125 (Engrossed)

Senate GOVERNMENT AND VETERAN'S AFFAIRS

Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken

Do Pass As Amended and Rereferral if Needed

Motion Made By

Sen. T Mathern

Seconded

By

Sen. Wardner

Senators	Yes	No	Senators	Yes	No
Senator Karen Krebsbach, Chr.	✓		Senator Carolyn Nelson	✓	
Senator Dick Dever, Vice-Chr.	✓		Senator Tim Mathern	✓	
Senator Ralph Kilzer	✓				
Senator Rich Wardner	✓				

Total (Yes)

6

No

0

Absent

0

Floor Assignment

Sen. Krebsbach

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

**REPORT OF STANDING COMMITTEE**

**HB 1125, as engrossed: Government and Veterans Affairs Committee (Sen. Krebsbach, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1125 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "for an Act to create and enact a new section to chapter 54-44.4 of the North"

Page 1, remove line 2

Page 1, line 3, remove "for the acquisition of services; and"

Page 1, line 6, after "registration" insert "; and to provide for legislative intent"

Page 1, line 17, remove "and reported to the office of management and budget"

Page 1, remove lines 18 through 24

Page 2, remove lines 1 through 11

Page 4, after line 17, insert:

**"SECTION 4. LEGISLATIVE INTENT.** It is the intent of the fifty-seventh legislative assembly that the office of management and budget in consultation with the attorney general develop standards and guidelines for the procurement of contracts for services and if appropriate, submit proposed legislation to the fifty-eighth legislative assembly regarding those standards and guidelines. State agencies are encouraged to follow the standards and guidelines as set forth by the office of management and budget and develop agency guidelines for procurement of contracts for service."

Renumber accordingly

2001 TESTIMONY

HB 1125

Presented by: Linda Engmann, Director  
Central Services Division

Before: Government and Veterans Affairs Committee  
Matthew Klein, Chairman

Date: January 18, 2001

### TESTIMONY

Chairman Klein and members of the committee, my name is Linda Engmann. I am the director of Central Services Division of the Office of Management and Budget.

OMB introduced this bill in response to recommendations as a result of the performance audit of contracts for services at the request of the Legislative Audit and Fiscal Review Committee (LAFRC). This request included a review of contracts for services entered into by state agencies and institutions and institutions of higher education. The goals of this audit were to determine whether current laws, rules, and policies for service contracts were adequate, and whether current practices provided for an efficient and effective use of resources.

Based upon their findings, the Office of the State Auditor concluded that better guidance for the procurement of services is needed. The following recommendations were made:

- Introduce legislation to give OMB the authority and responsibility to establish policies, guidelines, and procedures for the procurement of services.
- OMB ensure proper training is provided to state agencies.
- OMB establish master contracts for services to be used by all state entities including colleges and universities.
- OMB and the North Dakota University System make joint and cooperative purchases of services.
- With assistance from the Attorney General's Office, OMB establish one manual for contract drafting and establish an on-line contract system that would provide template and boiler plate language accessible by all state entities that would facilitate and standardize the creation of service contracts statewide.

However, since the bill's introduction, concerns have been expressed by agencies that this bill transfers the fiduciary responsibility of the PERS and RIO boards and possibly others to OMB. In addition, agencies are concerned that delegation of services back to the agencies may not occur resulting in OMB's making decisions they need to make when contracting for professional services that are very specific to the respective agencies.



We would like to offer an amendment to this bill.

The amendment reinstates the language that exempts services from procurement by OMB and removes references to services in the other sections of Chapter 54-44.4 of the original bill. OMB recognizes the need for the state to better manage its service contracting activities and plans to be the lead agency in that effort. It is our intention to go forward with the recommendations contained in the audit report with the exception of introducing legislation at this time. Together with the agencies, we will develop guidelines and procedures that all agencies will be encouraged to use. The goal of future legislation will be to improve the procurement system by enabling agencies and institutions to procure goods and services more efficiently and effectively by providing sound guidance, training, and procurement expertise to ensure that the state's procurement process is consistent, satisfies the needs of the state, and is fair to competing vendors.

#### **New Section 1** (Amended Section 5)

- Removes references to services.
- Allows OMB to adopt rules under which competition may be waived or limited. Those circumstances include:
  - sole source
  - the item is available from another governmental entity contract or inventory
  - the commodity or service is purchased for experimentation or trial
  - no bidder could be found
  - commodities are for re-sale
  - it would be more cost effective to waive the bidding process
  - a used item if it is in the best interest of the state to buy
  - limited availability of the item
  - replacement parts
  - compatibility with existing equipment.
- Buy off federal contracts issued by the General Services Administration.
- Enter into cooperative purchasing agreements with other cooperative purchasing groups or other state governments.

#### **New Section 2:** (Amended Section 6)

- Removes references to services
- Allows OMB to waive the requirement for a vendor to register with the Secretary of State's Office under certain circumstances. Currently, all vendors wishing to do business with the state must be registered with the Secretary of State's Office. However, there are circumstances under which the state must conduct its business with a vendor who refuses to register. This section adds an additional circumstance under which OMB may waive the registration requirement. Circumstances under which registration would be waived are:

- The commodity is so unique that it is available from only one source.
- An emergency purchase
- The purchase is a one-time purchase
- Gives the registered vendor a preference if there is a tie between a registered vendor and a non-registered vendor.

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

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1125

Page 1, line 1, replace "sections" with "section" and remove "54-44.4-01, 54-44.4-02, 54-44.4-03,"

Page 1, line 2, remove "54-44.4-04, and", and replace "subsections 1 and" with "subsection"

Page 1, line 3, remove "authorizing the" and replace "to procure" with "procurement"

Page 1, remove line 4

Page 1, remove lines 6 through 23

Page 2, remove lines 1 through 31

Page 3, remove lines 1 through 23

Page 3, line 24, replace "5" with "1"

Page 4, line 3, remove the overstrike over "commodity"

Page 4, line 4, remove "for goods or services, or both,"

Page 4, line 14, remove "or service"

Page 4, line 16, remove "or service"

Page 4, line 19, remove "or services"

Page 4, line 21, remove "or services, or both,"

Page 5, line 6, replace "6" with "2" and replace "Subsections 1 and" with "Subsection"

Page 5, remove lines 8 through 13

Page 5, line 22, remove the overstrike over "7" and remove "6"

Page 5, line 23, remove "or services, or both,"

Renumber accordingly

## **H.B. 1125**

**Presented by:** Illona A. Jeffcoat-Sacco  
Public Service Commission

**Before:** House Committee on Government and Veterans Affairs  
Honorable Matthew M. Klein, Chair

**Date:** 18 January 2001

### **TESTIMONY**

Chairman Klein and members of the House Committee on Government and Veterans Affairs, I am Illona Jeffcoat-Sacco, director of the Public Service Commission's Public Utilities Division. The Commission asked me to appear here today to oppose H.B. 1125 as it relates to procurement of services.

The Public Service Commission has several divisions that are involved in procurement of services. Our Abandoned Mine Lands Program is one hundred percent federally-funded with an annual budget between 1.5 and 2.0 million dollars. In AML, construction and professional services for the reclamation of abandoned mine sites are procured using procurement procedures patterned after the Federal Acquisition Regulations (FAR) and the Department of Transportation Standard Specifications for Road and Bridge Construction. Competitive sealed bidding is the primary method by which services are procured, except in the case of emergencies or where only one contractor is available to provide a service. All procurement procedures, including sole source procurement, are handled in strict compliance with the Commission's procurement policy, a copy of which is included with this testimony. The procurement

policy was initially adopted by the Commission in 1981 after extensive consultation with and approval of the Attorney General. The policy is updated as needed.

Another area in which the Commission depends on and uses the guidance provided by its procurement policy is in the procurement of professional services by the Public Utilities Division. In this division, the professional services of attorneys, accountants, economists and others are sometimes required to process rate cases, cost cases and cases involving competitive telecommunications issues. We procure these professional services by issuing a Request for Proposal (RFP), and we include in that request information on how we will judge the proposals we receive. Our RFPs conform to the Commission's procurement policy, as does any sole source procurement that we may use in special circumstances.

H.B. 1125 appears to inappropriately transfer the decision making for service procurement away from the elected Public Service Commissioners to the Office of Management and Budget (OMB). The statutorily mandated responsibility to implement the Commission's programs would be transferred to another agency. In addition, House Bill 1125 would create an additional level of clearance required to procure services and, hence, would slow the procurement process for construction and professional services. The period during which construction may occur in North Dakota is limited, and a timely procurement of services is critical.

We have an additional concern with the requirement that potential bidders for services be registered vendors in North Dakota. This requirement will limit the number of vendors available to the Commission and impose financial and administrative burdens on potential contractors. While each of our service contracts is very important

to successful implementation of our programs, we do not believe that the amount of business we may provide those vendors will justify their registration time and expense.

Finally, although the bill appears to allow OMB discretion to delegate authority back to the Commission, there is no requirement to do so and there are no specific standards included in the bill for doing so.

For all of these reasons, the Public Service Commission opposes H.B. 1125. In the alternative, the Public Service Commission respectfully requests an exemption from H.B. 1125 for the procurement of all professional services and for services procured for the reclamation of abandoned coal mines, authorized under N.D.C.C. 38-14-2.

**NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**  
**PROCUREMENT PROCEDURES**

**Adopted: January 12, 1981**

**6th Revision August, 1995**

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**NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**  
**PROCUREMENT PROCEDURES**

**Adopted: January 12, 1981**

**6th Revision: August, 1995**

**I. GENERAL STATEMENT**

- A. The purchase of goods and services through full and fair competition is Commission policy. All procurement will be conducted in a manner that provides maximum open and free competition. Unacceptable restrictions on competition include: (1) unreasonable qualification requirements placed on firms, (2) non-competitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience requirements.
- B. Whenever required, purchases will be made in accordance with statutes and rules through the Office of Management and Budget. N.D.C.C., Chapter 54-44.4.
- C. The Commission will take affirmative steps to use small and minority businesses when possible as sources of supplies, equipment, construction, and services. Affirmative steps may include:
  - 1. Placing qualified small, minority and women's businesses on solicitation lists.

2. Solicitation of small and minority businesses whenever they are potential sources.
  3. When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.
  4. Where possible, establishing delivery schedules which will encourage participation by small and minority business.
  5. Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as required by the Federal Government.
  6. If any subcontracts are to be let, the prime contractor will take the affirmative steps in 1 through 5 above.
- D. Except as otherwise provided by state law, the procurement policy will apply to the Commission, its contractors and subcontractors.
- E. Procurement policy provisions will be followed in procurements involving use of federal grant funds. However, in procurements involving uses of state funds, Commission compliance with procurement policy provisions is discretionary.
- F. Standard contract provisions will be incorporated into relevant Commission contracts. However, in any contract, the Commission may agree to change, add, or delete contract provisions to the extent that such

changes, additions, or deletions are not inconsistent with federal and state law.

## II. **DEFINITIONS AND MISCELLANEOUS POLICY PROVISIONS**

- A. **Audit Trail.** An audit trail is a series of records that makes it possible for an auditor to easily trace transactions. All procurement and contract administration actions should be documented to establish an audit trail.
- B. **Commission.** The Commission is the North Dakota Public Service Commission.
- C. **Contract.** A contract is a written agreement between the Commission and the contractor setting forth obligations, including: performance of work, furnishing of labor and materials, and the basis of payment. A Commission contract usually includes specified standard provisions and any other provisions and documents designated as part of the contract.
- D. **Contract Administration.** Contract administration is the process of monitoring a contractor's performance under a contract, insuring that all the terms and provisions of the contract are satisfied, and paying contract invoices. The contract administration function is jointly assigned to the procurement officer, the project manager, and contract officer.
- E. **Contract Execution.** A contractor may not begin work until a contract has been executed. The Commissioners or a designated representative,

as provided for in Policy No. 5-01-93(0), are the only persons authorized to execute contracts to which the Commission is a party.

- F. Contract Officer.** The contract officer is the Commission employee charged with the responsibility of monitoring contracts.
- G. Contractor.** The contractor is the individual, partnership, firm, corporation, company, or any acceptable combination or joint venture contracting with the Commission for performance of prescribed work.
- H. Contractor Selection.** Contractor selection is the process of choosing a contractor from all those that submitted a bid or proposal to provide goods or services sought by the Commission. Among factors which may be considered when selecting a contractor are:

  - 1. Whether the offeror's bid, proposal, or statement is responsive to the invitation to bid or request for proposal or standards for unsolicited proposals.
  - 2. Whether the offeror has the technical ability and resources to perform in the manner described in its bid or proposal.
  - 3. Whether the offeror has the financial ability and resources to complete the project.
  - 4. Whether the contractor is responsible as shown by its integrity, compliance with public policy, prior contracts with the Commission, and record of past performance with the State of North Dakota.

5. For construction bids, whether the bidder is the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.

6. The Commission reserves the right to waive minor irregularities in a bid or proposal and the right to reject any and all bids. The Commission has the authority to require literal and exact compliance with all requirements specified in its request for bids or proposals.

These factors will be evaluated by the Commission's procurement officer or a selection committee of knowledgeable people.

I. **Final Report.** Following project close-out and final payment, the project manager will submit, to the procurement office and the contract officer, a final report evaluating the quality of the contractor's performance, including: adequacy of communication, timeliness, reliability, attention to detail, interest in accomplishing quality project work, and interest in giving advice to produce the best value for the state. The final report may serve as a basis for subsequent procurement analysis. The procurement officer and contract officer will jointly present a report to the Commission when conditions may warrant removal of a contractor from a Commission Bidder List or Request For Proposal List.

J. **Invitation for Bid Request for Proposal.** An invitation for bid (IFB) or a request for proposal (RFP) is a solicitation issued by the Commission with

the intent of eventually procuring a contractor to perform a particular service or deliver a particular product. The IFB or RFP must contain information such as the scope of work required or product specifications; the date, time, and place of bid opening or proposal closing; and evaluation factors to be used. Bids and proposals will be solicited in a manner that is consistent with Commission policy and state and federal law.

- K. Preference.** Preference will be given to a resident North Dakota bidder when accepting bids for the provision of professional services, including research and consulting services, goods, merchandise, supplies, equipment, structures, and reclamation services. Nonresident bidders will be given preference equal to the preference given or required by the state of the nonresident bidder, seller, or contractor (N.D.C. C. 44-08-01).
- L. Procurement.** Procurement is the purchase of goods or services. There are four methods of procurement for goods or services: small purchase procedures, competitive sealed bids (formal advertising), competitive negotiation, and non-competitive negotiation (sole-source procurement).
- M. Procurement Officer.** The procurement officer is the Commission employee charged with the responsibility of directing the procurement process. This person may also draft a proposed contract and assist the contract officer in monitoring a contractor's performance. This person works with the Commission, Commission Executive Secretary, contract

officer, and project manager during the procurement and contract administration process.

- N. **Project Close-Out.** The project close-out is a written verification that all the requirements of the project have been satisfied; it is based on a final technical and financial review. The review may include an audit. When all the contract work has been completed, the project will be closed-out. Following Commission acceptance of the project close-out, the contractor will receive final project payment.
- O. **Proposal-Bid.** A proposal is any offer of other submission presented to the Commission by a potential contractor and used as a basis for contractor selection. Proposals are submitted by firms or individuals interested in undertaking projects for the Commission and, unless unsolicited, are based on the scope of work description set forth in the RFP issued by the Commission. Bids are similar to proposals. However, while proposals generally relate to the submission of work plans and costs for the provisions of services, bids usually involve the offer of specific materials and construction work and address physical specifications and fixed or unit prices.
- P. **Subcontractor.** A subcontractor is an individual, partnership, firm, corporation, company, or any acceptable combination or joint venture to which the contractor sublets part of the contract.



### **III. PSC EMPLOYEE AND PUBLIC CONTRACTOR CODE OF CONDUCT**

#### **A. General Rule**

No Commissioner, Commission employee, or agent will participate in selection, or in the award or administration of a contract if a conflict of interest, real or apparent, would be involved. A conflict would arise when the Commissioner, the employee, or agent; any member of his immediate family; his partner; or an organization which employs or is about to employ the Commissioner, Commission employee, his immediate family member, or partner has financial or other interest in the firm selected for award.

#### **B. Gifts**

1. Bidders and Commission contractors and subcontractors and their employees or agents will not directly or indirectly offer nor will Commissioners or employees directly or indirectly accept or solicit any gift, gratuity, entertainment, favor, loan, or any other thing of monetary value which might reasonably be interpreted as intended to secure a contract or favorable treatment in award, amendment, or administration of a contract.
2. During an audit or inspection, Commissioners, employees, or agents will neither solicit nor accept gratuities, food, favors, or anything of monetary value from a bidder, contractor, or party to a subagreement.

3. As a general rule, project managers, inspectors, and any other employees of the Commission should refrain from engaging in after-hour socialization with contractors and their employees during the contract performance period.
4. No political contribution may be offered, solicited, or accepted for the purpose of affecting the award, amendment, or administration of a contract.

#### **IV. Procurement Procedural Requirements**

##### **A. Proposed Procurement Action Review**

Before attempting to procure goods or services, the Commission Executive Secretary and designated procurement officer, in consultation with the Commission, will discuss and determine in written memorandum form whether or not:

1. Funds are available,
2. The purchase must be processed by the Office of Management and Budget;
3. The purchase may be avoided because it is unnecessary or duplicative;
4. The purchase should be consolidated or broken out to obtain a more economical purchase;

5. A lease versus a purchase or hourly rate versus fixed fee would be most economical;
6. Greater economy and efficiency would be fostered by entering into state cooperative agreements with other state agencies for procurements or use of common goods and services; and
7. Provisions of North Dakota law prescribe procedures applicable to the particular purchase.

**B. Procurement Procedure**

1. Solicitation of offers, whether by competitive sealed bids or competitive negotiation, will:
  - a. Incorporate a clear and accurate description of the technical requirements for the material, product, service, or professional requirements to be procured. The description will not, in competitive procurements, contain features which unduly restrict competition. The description may state the quality of the material, product, or service to be procured and, when necessary, will set forth essential characteristics and standards. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used to define the performance or other

salient requirement of a procurement. The specific features of the named brand which must be met by offerors will be clearly stated.

- b. Clearly set forth requirements which offerors must meet and factors to be used in evaluating bids, proposals, or statements of qualifications.

**C. Method of Procurement**

Procurement will be by one of the following methods: small purchase procedures, competitive sealed bids (formal advertising), competitive negotiation, or noncompetitive negotiation.

1. **Small Purchase Procedures.** Any procurement estimated by the procurement officer not to exceed ten thousand dollars (\$10,000) and not subject to Chapter 54-44.7, N.D.C.C., or the authority of the Office of Management and Budget may be made with small purchase procedures. Small purchase may be made when the item or service is available from more than one source, there is no public exigency or emergency, and time and expense does not justify competitive bidding. Small purchase procedure will include contact with an adequate number but not fewer than two qualified firms selected from the bidders list. The procurement officer will select the qualified firms. The selection of the qualified firms will be based on what the procurement officer knows about the

experience, past performance, integrity, compliance with public policy, and financial and technical resources of the firm. Qualified firms will be selected fairly without unreasonable restrictions or procedures calculated to restrict competition. The procurement officer will write each firm to explain the supplies or services needed and request an offer from each firm for described supplies or services. After a reasonable time during which all potential offers have been made, the procurement officer will recommend to the Commission which offer to accept. Acceptance will be based on what the Commission believes will be the best use of public funds.

2. **Competitive Sealed Bids (Formal Advertising).** Competitive sealed bids (formal advertising) will be publicly solicited and a firm-fixed-price contract (lump sum or unit price) will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price. Bidder's preference law will apply based on N.D.C.C. 44-08-01 with consideration of out-of-state bidders based on their state preference law.

- a. For formal advertising to be used, the following conditions must be present:

- 1) A complete and realistic specification or purchase description will be available.
- 2) Two or more responsible suppliers must be willing and able to compete effectively for the Commission's business.
- 3) The procurement lends itself to a firm fixed or fixed unit price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

b. If formal advertising is used for a procurement, the following requirements will apply:

- 1) At minimum, twenty-one (21) days prior to the date set for opening of bids, bids will be solicited from an adequate number of known suppliers or firms. The invitation will be adequately publicized. The public notice of invitation for bids (IFB) may be published in newspapers of general circulation and in trade or professional publications of general circulation calculated to reach the type of firms needed. If such publication is undertaken, the public notice will be published once prior to the date of bid opening. At a minimum, adequate public notice of invitation for bids

will include the mailing of invitation for bids to a reasonable number of parties on any applicable bidder list.

2) The invitation for bids, including specifications and pertinent attachments, will clearly define the items or services needed and state:

- a) When and where the plans, drawings, and specifications may be examined; and how copies may be obtained.
- b) The place where and the time when the bids will be publicly opened.
- c) That each bid will be accompanied by a bidder's bond, executed by a surety company authorized to do business in this state, a certified check or a cashier's check in the sum equal to five (5) percent of the bid. A certified check or a cashier's check must be drawn on the Bank of North Dakota or a federally insured, solvent bank. If, within ten days after notice of an award, the successful bidder should fail to execute a contract with the owner, then the surety will pay unto the owner

for the use and benefit of the owner five (5) percent of the bid or bids on the contract on which there is a default or the certified check or cashier's check of the bidder will be forfeited to the owner. If the principal's bid is accepted and the contract is awarded, the principal, within 10 days after notice of award, will execute a contract consistent with the terms of the bid and performance and payment bonds as specified by the Commission.

- d) That all public contractor bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
  - e) That the right of the Commission to reject any and all bids is reserved.
  - f) That inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.
- 3) Copies of all plans, drawings, and specifications will be filed in the Commission Executive Secretary's office. Copies may be filed at other places as



designated by the Executive Secretary or procurement officer. Upon written request, copies of all plans, drawings, and specifications will be mailed at cost to the office of any firm.

- 4) Bids will be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and other relevant information as may be necessary, together with the name of each bidder, will be recorded; the record and each bid will be open to public inspection.
- 5) Bids will be unconditionally accepted without alteration or correction except as authorized in this policy. Bids will be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award will be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids will set forth

the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

- 6) Withdrawal of erroneous bids before award, or cancellation of awards or contracts based on such bid mistakes, will be permitted. After bid opening no changes in bid prices or other provisions of bids will be permitted. Except as otherwise provided, all decisions to permit the withdrawal of bids, or to cancel awards or contracts based on bid mistakes, will be supported by a written determination made by the procurement officer.
- 7) Upon Commission approval, Commission will award a firm fixed or fixed unit price contract with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids for a construction project exceed available funds as certified by the procurement officer, and the low responsive and responsible bid does not exceed such funds by more than five (5) percent, the procurement officer is

authorized, in situations where time or economic considerations preclude resolicitation of work of a reduced scope, to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in an attempt to bring the bid within the amount of available funds.

**3. Competitive Sealed Bidding - Construction Maintenance**

Competitive sealed bids for construction maintenance on abandoned coal mine reclamation sites will be publicly solicited and a firm-fixed-price contract (lump sum or unit price) will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

- a. A complete and realistic specification or purchase description will be available.
- b. Two or more responsible suppliers must be willing and able to compete effectively for the Commission's business.
- c. The procurement lends itself to a firm fixed or fixed unit price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

- d. At a minimum, five (5) days prior to the date set to receive bids, bids will be solicited from an adequate number of known suppliers or firms. This solicitation will be in written form and provided to prospective bidders on-site.
  - e. All public contractor bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
  - f. The right of the Commission personnel to reject any and all bids is reserved.
  - g. The inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.
  - h. Contract award, based on the lowest responsive bid, may be made by Commission personnel or through formal Commission action.
  - i. Provisions of this section do not apply to abandoned mine land emergencies.
4. **Competitive Negotiation.** In competitive negotiation, qualification statements or proposals are requested from a number of sources and the request is publicized. Negotiations may be conducted with sources submitting statements or proposals. Either a fixed price or cost reimbursable not-to-exceed contract will be awarded. Under

some circumstances, competitive negotiation may be required. Under other circumstances, competitive negotiation is discretionary and may be used if conditions are not appropriate for the use of formal advertising or small purchase.

a. When purchasing architect, engineering, or land surveying, research or professional services, the Commission will follow the competitive negotiation procedures specified in Chapter 54-44.7, N.D.C.C., and consider relevant Office of Management and Budget policy, e.g., Policy 312 dated July 1, 1986, "Procurement of Architect, Engineering, and Land Surveying Services by State Agencies". The Commission may use the procedures described in Chapter 54-44.7, N.D.C.C., to procure other professional services including lawyers, accountants, economists, and real estate appraisers. When using the procedures described in Chapter 54.44.7, N.D.C.C., the following apply:

- 1) Notice of invitation may be published in newspapers of general circulation and in trade or professional publications of general circulation calculated to reach the type of firms needed. Adequate public notice includes mailing of the invitation to a reasonable

number of individuals or firms on a relevant trade or professional list maintained by the Commission.

- 2) The invitation will state the relative importance of evaluation criteria used to select and rank the most qualified firms. No other factors or criteria will be used in the evaluation.

b. An alternative to the procedures prescribed by Chapter 54-44.7 may be used to procure services other than architect's, engineer's, and surveyor's professional services, e.g., lawyers, accountants, and real estate appraisers.

- 1) Proposals will be solicited through a request for proposal (RFP). The request for proposal will state:

- a) The relative importance of price and other evaluation factors.
- b) That the right of the Commission to reject any and all proposals is reserved.
- c) That inadvertent Commission failure to meet all procurement policy requirements will not invalidate the procurement.

- 2) Notice of the need for services will be given by the Commission through a request for proposal. At minimum, twenty-one (21) days prior to closing of the

request for proposal, proposals will be solicited from an adequate number of known firms. The request will be adequately publicized. The public notice of the request for proposal may be published in newspapers of general circulation and in trade or professional publications of general circulation calculated to reach the type of firms needed. If publication is undertaken, the public notice will be published at least twenty-one days prior to the closing of the request for proposal. At minimum, adequate public notice of the request for proposal will include the mailing of the request for proposal to a reasonable number of parties on any applicable bidder list.

- 3) The invitation should include the following:
  - a) Project title
  - b) Scope of work
  - c) Description of professional services required
  - d) Submittal of a flat rate or line item price quote
  - e) Resume of personnel providing the services
  - f) Documentation of related work experiences
  - g) Scheduled performance period
  - h) Rating system used in evaluating proposals

- i) Provide at least three client references
  - j) Conflict of interest disclaimer
- 4) Proposals will be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals will be prepared and will be open for public inspection after contract award.
- 5) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors will be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there will be no disclosure of information derived from proposals submitted by competing offerors.



- 6) Upon recommendation by the procurement officer, award will be made to the responsible offeror whose proposal is determined by the Commission to be the most advantageous to the state taking into consideration price and the evaluation factors set forth in the request proposal. No other factors or criteria will be used in the evaluation. The contract file will contain the basis on which the award is made and contract negotiation minutes.

1.

**5. Noncompetitive Negotiation (Sole-Source Procurement)**

A sound procurement system should provide for full and open competition that is both fair and equitable to all potential bidders. However, there are times when circumstances are such that the desired action cannot be accomplished through the lengthy process of solicitation of bids. Under those unique conditions sole-source contracting may be warranted.

Sole source procurement (noncompetitive negotiation) is a method of solicitation of a proposal from only one source. When this method of procurement is proposed, written justification must be presented to the Commission or the person designated by the Commission for approval.

The following reasons may be justification for sole-source procurement:

- a. The proposed item or service is available only from a single source.
- b. The person or organization has the unique product or the special skills, knowledge, abilities to provide the required services (at the exclusion of others) and is considered the preeminent deliverer of that product or service at the time of selection.
- c. Emergency or severe time constraints preclude issuing a formal Request for Proposals.
- d. The service is available within the existing structure of state or local government.

The following steps should be followed to secure a sole-source contract:

- 1) Draft a written justification for sole-source procurement and present it to the Commission or the designated authority for approval.
- 2) If approved, contact the proposed provider and proceed to negotiate the contract. Minutes of the negotiation session will be taken and the prepared minutes sent to the other party for concurrence.

- 3) Prepare the contract and present it to the Commission for action. If approved, execute the contract.

**D. Unsolicited Proposal.**

1. **General.** An unsolicited proposal is a proposal submitted by a potential supplier which is not solicited by the Commission. The unsolicited proposal is an effective tool by which unique or innovative methods or approaches developed outside the Commission can be made available to the Commission. The offeror who submits an unsolicited proposal hopes the Commission will enter into a sole source contract with the offeror for further development of the innovative idea contained in the unsolicited proposal. If the Commission finds an offer sufficiently innovative, it will not become the subject of a competitive procurement.

2. **Required Information.**

- a. **Introduction.** The Introduction should identify the general subject matter of the proposal. It should explain the need for the work, study, or research. The need should be expressed in terms of past work or research and the manner in which the offeror believes that the proposed work study or research will support Commission activities or functions.

- b. **Objectives.** The objectives must be stated as specifically as possible. The objectives are the foundation of the project and the basis of all work, study, or research plans. They may be described as hypotheses to be tested. Objectives or hypotheses may be changed, but only after a demonstration that the change is warranted. They must describe the direction of the work, study, or research to those not technically familiar as well as to those who are.

If the project is contemplated to continue for more than one year, the proposal should state long-term objectives as well as short-term objectives. The stated short-term objectives, i.e., those to be accomplished within one year, should be presented in such a manner as to show their relevance in meeting the long-term goals or objectives.

The proposal should convince the reader that meeting the projected objectives is necessary and feasible. That is, the work, study, or research is needed; and the project objectives are likely to be accomplished in a reasonable time at a reasonable cost.

The short-term objectives should be natural and discrete elements of the long-term objectives.

Both long-term and short-term objectives should include statements of the nature and extent of the anticipated results.

c. **Work, Study, or Research Plan.** The work, study, or research plan should include statements regarding: methodology, a work schedule, and reports.

1) **Methodology.** The statement of project methodology should explain how the objectives will be met or how hypotheses will be tested. The statement should specify a work plan or study or research design that describes the data to be collected and the methods to be used in collecting and analyzing the data. All elements of the methodology statement should be shown to be relevant in meeting the stated objectives or testing the stated hypotheses.

2) **Schedule.** The schedule should be a statement that explains when each natural element (e.g. test, procedure, method, or other associated task) of the proposed methodology will start and finish. The schedule should indicate the time to be allocated for named individuals and institutions to accomplish defined tasks.

3) **Reports.** The proposal should state when reports will be delivered to the Commission. The proposal should also state what the reports will cover. All reports should be written in a form acceptable to the relevant professional or scientific community and the Commission. Each final report should stand alone as a finished product which meets the stated objectives of the proposal.

- d. **Personnel and Management.** All project staff, including the principal investigator, should be identified, their relevant qualifications described, and vitae attached. The skills and experience appropriate to the proposal should be stated. The project responsibilities of all staff should be stated.
- e. **Related Experience.** Proposals should include a brief description of previous experience relevant to the proposed project, including the identification of specific projects undertaken and completed and a bibliography of relevant resulting publications.
- f. **Facilities and Equipment.** A description of physical facilities and relevant, available project equipment to be used should be included.

- g. **Other Work.** The proposal should include a projection of other foreseeable work load for the period of the proposed work.
- h. **Budget.** The proposal must include a budget. The budget is a representation of the project expressed in dollars of estimated expenses. At minimum, where federal grant funds are involved, the budget must be submitted in a form that meets the standards of the federal grantor agency. The budgeted amounts must be realistic and well justified. Cost estimates must be in sufficient detail to enable the Commission to conduct an evaluation. Unless self-explanatory, the proposer should submit a separate explanation of how budget items were estimated. The budget must correspond to the proposer's narrative materials.
- i. **Contract Details.** The proposer should set forth the type of contract anticipated and the period the proposal is available for Commission acceptance. Clear statements should be included regarding the proposed duration of the effort together with any statements regarding cost sharing.

3. **Commission Review and Evaluation**

- a. **Timely Proposal Submission.** Unsolicited proposals should be submitted sufficiently in advance of the time work is to start.
- b. **Sufficiency Review.** After receiving an unsolicited proposal, the Commission Executive Secretary and designated procurement officer will expeditiously review the proposal to see if it contains sufficient information to enable a meaningful evaluation. If the unsolicited proposal meets this criterion, it may be evaluated in detail.
- c. **Detailed Evaluation.** For detailed evaluation the proposal will be circulated among and evaluated by Commission personnel and if necessary others. In the circulation process, a cover memorandum will be attached to the proposal clearly identifying it as unsolicited. This identification is to insure that a private, i.e. non-governmental proposal is treated as proprietary and unique to the proposer. The purpose of the evaluation is to identify whether the proposal in fact contains unique or innovative ideas or concepts which have not independently been conceived by the Commission or other government agencies. Additionally, the potential contribution to the



Commission's function will be evaluated together with the capabilities and qualifications of the potential contractor.

4. **Proposed Procurement Action Review.** If after the detailed evaluation, a favorable finding is issued by the relevant designated procurement officer, the Commission Executive Secretary and designated procurement officer in consultation with the Commission will discuss and determine in written memorandum form if:

- a. Funds are available;
- b. The purchase must be processed by the Office of Management and Budget;
- c. The purchase may be avoided because it is unnecessary or duplicative;
- d. The substance of the proposal is available to the Commission from another source without restriction;
- e. The proposal closely resembles a pending competitive solicitation or is otherwise not sufficiently unique to justify acceptance;
- f. The purchase should be broken out to obtain a more economical purchase;
- g. A lease versus a purchase or hourly rate versus fixed fee would be most economical;

- h. Greater economy and efficiency would be fostered by entering into state cooperative agreements with other state agencies for procurements or use of common goods and services;
  - i. There are compelling reasons for non-competitive procurement; and
  - j. North Dakota law sets purchase procedures.
- 5. **Method of Procurement.** If in addition to receiving a favorable detailed evaluation the unsolicited proposal passes the proposed procurement action review, the Commission may direct the relevant procurement officer to conduct a negotiated non-competitive procurement.
- 6. **Limited Commission Use of Data.** Restrictive statements inserted by the private or non-governmental proposer that restrict the Commission's use of the submitted data to evaluation of the unsolicited proposal will be heeded. Even when the Commission receives an unsolicited proposal which does not contain such restrictive statements, if the Commission determines that detailed evaluation by personnel outside of state government is required, the Commission will obtain written permission from the prospective private or non-governmental contractor prior to release of the proposal for evaluation. When an unsolicited proposal is submitted

to a non-governmental evaluator, the Commission will secure a written agreement from the evaluator not to disclose the information contained in the proposal.

**E. Procurement Officer.**

1. **Designation.** The procurement officer will be designated by motion of the Commission. Ordinarily, the procurement officer for a project will be the Commission division director of the division most closely connected with the project goals.
2. **Duties.** The procurement officer will:
  - a. Administer Commission procurement policy.
  - b. Cooperate with the Commission Executive Secretary and the Office of Management and Budget to ensure orderly procurement of goods and services.
  - c. With the approval of the Commission, appoint, when necessary, a sufficient number of evaluation committee members from Commission staff and other state agencies.
  - d. Establish and maintain programs for inspection, testing and acceptance of supplies, services, and construction.
  - e. Make written evaluation committee and other reports to the Commission recommending award.

- f. After Commission approval, send a notification of Commission procurement decisions to all interested persons.

3. **Powers.** In addition to other powers prescribed, the procurement officer will have the power to:

- a. Adopt operational procedures consistent with Commission procurement policy and sound procurement practices on such matters including but not limited to bid or proposal solicitation, evaluation, and contract negotiation, award, administration, and enforcement; and
- b. Designate a project manager from within the Commission. If none is designated, the procurement officer will also be the project manager.

F. **Executive Secretary.**

1. The Commission Executive Secretary will supervise Commission procurement officers and cooperate with the Office of Management and Budget to establish and maintain Commission procurement in compliance with Commission policy and state law.
2. The Commission Executive Secretary will maintain bidder lists. The lists will be used as a basis for making future solicitations. A mailing list need not be limited to the firms on a bidder list and a mailing list need not include all firms on the bidder list. In

cooperation with the procurement officer, the Executive Secretary may adopt procedures on bidder list use and bidder removal or suspension from bidder lists.

**G. Evaluation Committee.**

1. The procurement officer may establish with Commission approval a formal selection committee to evaluate proposals received for consultant and other professional services. The committee should contain broad-based representation with a variety of skills needed to perform proposal evaluation.
2. The committee will recommend the most economical proposal expected to meet the state's needs. The evaluators will exercise impartial judgment in evaluating the relative merits of each proposal. When appropriate, legal counsel should be involved to assist in making the final recommendation.

**H. Notice and Appeal.**

1. Those participating in a small purchase, competitive sealed bid, or competitive negotiation will receive by mail notice of the Commission's intent to award or notice of the Commission's selection and ranking of firms. The notice will state:
  - a. The interested person has the right to appeal the Commission's decision for cause;
  - b. The right must be exercised within a specified time;

- c. The right must be exercised in writing; and
  - d. The reasons for appeal must be stated.
2. If there is an appeal a formal hearing will be scheduled and interested parties notified as the Commission deems just and reasonable.

**I. Project Manager.**

- 1. The key person in the state-contractor relationship is the state's project manager. This individual will control and monitor the contractor's activities and provide the proper level of leadership and coordination which will satisfy the Commission's obligations under the contract and which will be conducive to a healthy business relationship.
- 2. Since a professional service contract may contain only a limited description of the overall scope of the project of service to be performed by the contractor, the project manager must be able to distinguish between specific provisions in the contract and that which he desires from a professional point of view.
- 3. The project manager does not have unilateral authority to change the scope of work or specification under a contract. Should circumstances arise where the project manager deems immediate changes, suspensions or delays are necessary or prudent, the Commission Executive Secretary and the contract officer will be

notified. The project manager will write detailed contemporaneous memoranda regarding the change, suspension or delay, and report to the full Commission at the earliest opportunity. A change, suspension, or delay will not take effect without formal Commission action unless the Commission has otherwise formally authorized the project manager to effect changes, suspension, or delays.

4. Among the many responsibilities assigned by the procurement officer to the project manager, the following tasks should be given serious consideration:

- a. The project manager should initiate a contract review with the contractor's team leader and prime assistants. This conference should include a detailed examination of the contract documents, project time schedules, and the establishment of procedures for submission of contract progress reports. Required interviews with Commission staff should be scheduled through the project manager to minimize disruption of the Commission operation.
- b. The project manager should require frequent and periodic conferences with the contractor and staff, even though the quality and performance of the contractor has been excellent. Such conferences should be divided into two parts. The first part should address past performance and

the second should address the future activities of the contractor. Matters of substance should be fully documented.

- c. The project manager must recognize that indecision and procrastination will be two major problems in working with a professional service contractor. Time is money to a consultant, and he is prepared to demand payment for downtime and delays if the fault lies with the agency regardless of the contractual stipulations related to price. The project manager must comprehend that time does not normally cure or solve technical problems and may very well compound them beyond repair; timely decisions are crucial to the success of the project.
  - d. The project manager must establish himself as a leader in the state-contractor relationship. Experience has shown that where a vacuum exists in state leadership, professional service contractors tend to move forward and fill the void in order to complete and deliver the end products. Consequently, quality control may not be maintained in the process.
5. While input from various levels of state management is necessary to insure acceptability of the end product, certain limitations must



be noted. In order for the professional service contractor to accomplish his tasks, the various opinions, needs, and desires of state management must be polarized into one unit or else he is faced with changing directions with each level of management and individual. The state must be of one voice. This single voice must be the contract document with the project manager as its spokesman.

**J. The Commission**

The Commission will make the final determination of award based on recommendation of the procurement officer.

**K. Contract Officer**

1. The contract officer insures that terms of the contract are met. The contract officer will:
  - (a) Insure that all laws, executive orders, clearances, and approvals are met and that sufficient funds are available;
  - (b) Insure that contractors receive impartial, fair, and equitable treatment.
2. The contract officer should establish an internal accounting system for the contractor's invoices and supporting documentation and correspondence. This system is necessary if the contract is based upon a not-to-exceed price or contains any variables which may affect payment. A clear, precise audit trail of all activities related to

payment of funds and acceptances of deliverables must be maintained and accessible to the contract officer at all times.

## **V. BONDS**

### **A. Bid Security**

1. Bid security is required for all competitive sealed bidding for construction contracts when the procurement officer exceeds \$100,000. Bid security must be either a bond provided by a security company authorized to do business in this state, a certified check, or a cashier's check. This does not prevent the requirement of bid securities on construction contracts under \$100,000 when the circumstances warrant.
2. Bid security will be in an amount equal to at least five (5) percent of the amount of the bid.
3. When the invitation for bids requires security, noncompliance requires that the bid be rejected.
4. After the bids are opened, they will be irrevocable for the period specified in the invitation for bids, except as provided in competitive sealed bidding. If a bidder is permitted to withdraw its bid before award, no action will be taken against the bidder or the bid security.

**B. Contract Performance and Payment Bonds.**

1. When a construction contract is awarded, the following bonds or security will be delivered to the Commission and will become binding on the parties upon execution of the contract:
  - a. A performance bond satisfactory to the Commission, executed by a surety company authorized to do business in this state in an amount equal to 100 percent of the price specified in the contract; and
  - b. A payment bond satisfactory to the Commission, executed by a surety company authorized to do business in this state and by the U.S. Treasury Department, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond will be in an amount equal to 100 percent of the price specified in the contract.
2. Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, for which a payment bond is furnished under this section and who has not been paid in full therefore before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, will have the right to sue

on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractor furnishing said payment bond, will have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice will be personally served or served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.

3. Every suit instituted upon a payment bond will be brought in a North Dakota court, but no suit will be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

### **C. Bond Forms and Copies**

1. The Commission will supply the form of the bonds required.
2. Any person may request and obtain from the Commission a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond will be prima facie evidence of the contents, execution and delivery of the original.

## **VI. CONTRACT PRICING**

The cost plus, a percentage of cost and percentage of construction cost method of contracting, will not be used. The procurement officer will perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants will be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles.

## **VII. PROCUREMENT RECORDS**

The procurement officer will maintain records sufficient to detail the significant history of a procurement. These records will include information on: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and basis for the cost or price.

## **Amendment to HB 1125**

- ▶ Gives authority to OMB to set standards and guidelines for service contracts and requires agencies to follow them unless exempted or if the guidelines are contrary to the specific terms of a statute.
- ▶ Defines services
- ▶ Requires emergency purchases be made with the level of competition practicable, documented and reported to OMB.
- ▶ Allows OMB to make term contracts for services and make multiple awards to term contracts
- ▶ Specifies the conditions under which competition may be waived or limited
- ▶ Allows the purchasing from GSA contracts and allows cooperative purchasing agreements.

PROPOSED AMENDMENTS TO HOUSE BILL 1125

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 54-44.4 of the North Dakota Century Code, relating to office of management and budget standards and guidelines for the acquisition of services; and to amend and reenact subsection 7 of section 54-44.4-02, section 54-44.4-05, and subsections 1 and 4 of section 54-44.4-09 of the North Dakota Century Code, relating to justification for emergency purchases, variations on competitive bidding, and exemptions from vendor registration.

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

**SECTION 1. AMENDMENT.** Subsection 7 of section 54-44.4-02 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

7. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or where immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file and reported to the office of management and budget.

**SECTION 2.** A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

**Contracts for services - Office of management and budget to establish guidelines - Agencies to comply - Exemptions - Definition.**

1. The office of management and budget shall develop and publish, and may amend from time to time, standards and guidelines for the procurement of contracts for services. Unless the director of the office of management and budget, or the director's designee, grants an exemption, or unless the standards and guidelines of the office of management and budget are directly contrary to the specific terms of a statute, all state agencies, boards, bureaus, commissions, and institutions shall comply with the standards and guidelines for all contracts for services. Exemptions may be granted on an agency basis or for specific services or service contracts. The standards and

guidelines adopted under this section are not administrative rules and need not be adopted under chapter 28-32.

2. In this chapter, "services" includes any work performed by an independent contractor for this state when the service rendered does not consist primarily of the acquisition of commodities, equipment, or materials, or the rental of commodities, equipment, or materials.

**SECTION 3. AMENDMENT.** Section 54-44.4-05 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**54-44.4-05. Competitive bidding-on, limited, noncompetitive, and negotiated purchases - Other government purchasing contracts - Exempt records.**

1. Except as otherwise provided in section sections 44-08-01 and section 25-16.2-02, and in this section, purchasing contracts must be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability. The office of management and budget may reject any or all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services, and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state. Until the date and time set for receiving and opening bids and proposals pursuant to a request for bids or proposals, all bids and proposals received under this chapter are exempt records under subsection 5 of section 44-04-17.1.
2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:
  - a. The commodity is available from only one supplier.
  - b. The commodity is available from another governmental entity's contract.
  - c. The commodity is to be purchased for experimentation or trial.



this section and authorize receipt of a bid or proposal from a vendor that unqualifiedly refuses to register as provided in this section if the director or the director's designee makes a written determination that:

- a. A commodity is so unique and possesses such specific characteristics essential to the government program in question that it is available only from one source and not through wholesalers or retailers; ~~or~~
- b. An emergency as defined in subsection 7 of section 54-44.4-02 exists; or
- c. The commodity to be purchased is a one-time purchase for which at least two approved vendors are not available and the director of the office of management and budget, or the director's designee, determines consideration of bids or proposals from unregistered vendors is in the best interests of the state. In the event of a tie bid or proposal, the registered vendor must be given preference."

Renumber accordingly

Presented by: Linda Engmann, Director  
Central Services Division

Before: Government and Veterans Affairs Committee  
Karen Krebsbach, Chair

Date: March 2, 2001

### TESTIMONY

Chairman Krebsbach and members of the committee, my name is Linda Engmann. I am the director of Central Services Division of the Office of Management and Budget.

House Bill 1125 does several things. I will briefly discuss the main points of each section.

Section 1 requires agencies to

- Make emergency purchases at the level of competition that is practical under the circumstances,
- Document the purchase, and
- Report the purchase to OMB.

We would at this time like to introduce an amendment to the bill. On Page 1, Line 17, insert a period after the word "file" and strike the words "and reported to the office of management and budget." It is not OMB's intent that agencies be in violation of statute if an emergency purchase is not reported.

Section 2 requires OMB to develop standards and guidelines for the procurement of services that all agencies are required to follow unless OMB grants an exemption. The conclusion of a performance audit of contracts for services conducted by the State Auditor in March of 2000 was that better guidance for the procurement of services in the state is needed. This section is a result of recommendations from that audit.

In the implementation of those recommendations, it is OMB's intent to assume an oversight and training role by:

- Setting up a training and certification program for state agency personnel.
- Establishing dollar thresholds for the procurement of services similar to the procurement of goods unless OMB grants an exemption or it is contrary to existing statute.
- Working with the Attorney General's Office and the Risk Management Division and other interested agencies in developing and establishing guidelines and procedures for all agencies to follow including an on-line procurement system and standard templates.
- Establishing master contracts for commonly used services by all state agencies and institutions of higher education.
- Assisting agencies in the monitoring and management of their contracts.
- Establishing an appeal and complaint procedure for agencies and vendors.

The goal is to improve the procurement system by enabling agencies and institutions to procure goods and services more efficiently and effectively by providing sound guidance, training, and procurement expertise to ensure that the state's procurement process is consistent, satisfies the needs of the state, and is fair to competing vendors.

Attached to my testimony is a brief outline some of the areas OMB intends to include in the standards and guidelines.

Section 2 of this bill also defines services as used in this chapter.

Section 3 allows OMB to:

- Establish term contracts for both services and goods and make multiple awards for those contracts.
- Adopt rules under which competition may be waived or limited. Those circumstances include:
  - sole source
  - the item is available from another governmental entity contract or inventory
  - the commodity or service is purchased for experimentation or trial
  - no bidder could be found
  - commodities are for re-sale
  - it would be more cost effective to waive the bidding process
  - a used item if it is in the best interest of the state to buy
  - limited availability of the item
  - replacement parts
  - compatibility with existing equipment.
- Buy off federal contracts issued by the General Services Administration.
- Enter into cooperative purchasing agreements with other cooperative purchasing groups or other state governments.

Section 4:

- Requires vendors wishing to submit a bid or proposal for goods be an approved vendor. An approved vendor is one that is registered with the Secretary of State's Office and has a completed application on file with the State Procurement Office.
- Allows OMB to waive the requirement for a vendor to register with the Secretary of State's Office under certain circumstances. Currently, all vendors wishing to do business with the state must be registered with the Secretary of State's Office. However, there are circumstances under which the state must conduct its business with a vendor who refuses to register. This section adds an additional circumstance under which OMB may waive the registration requirement. Circumstances under which registration would be waived are:
  - The commodity or service is so unique that it is available from only one source.
  - An emergency purchase
  - The purchase is a one-time purchase
- Gives the registered vendor a preference if there is a tie between a registered vendor and a non-registered vendor.

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

## Outline for Guidelines/Procedures for Contracting for Services

### Bidding Requirements

- Informal vs. sealed/formal bid
- Dollar thresholds
- Escalator clause
- Sole source documentation
- Evaluation and selection criteria included in RFP
- Specifications

### Standard Terms and Conditions

- Funding out clause
- Alternate bids
- Risk management issues
- Rights reserved by the state
- Tie Bids – how to handle
- Non-responsive bids
- Rejection of bids
- Responsibility of the bidder
- Conflict of interest
- Attempt to influence award
- Collusion bids
- Assignment of contract
- Termination or rescission of contract
- Cancellation of contract
- Vendor protest - right to appeal
- Agency complaint process
- Definitions unique to the contract, if necessary
- Signature requirements
- Payment requirements – How payments are to be made
- Withdrawal or changes to a proposal response

### Contract Monitoring/Management

- Changes or modifications to existing contracts
- Contract extensions
- Vendor performance
- Re-bidding of contracts

Office of Management and Budget  
March 2, 2001

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1125

Page 1, line 17, after "file" insert a period "." and remove the remainder of the line

Renumber accordingly

**TESTIMONY**  
**OF**  
**SPARB COLLINS**  
**ON**  
**ENGROSSED HB 1125**

Madam Chair, members of the Committee, good morning. My name is Sparb Collins. I am Executive Director of the North Dakota Public Employees Retirement System, or PERS.

I appear before you today neither in favor nor opposed to House Bill 1125.

Rather I am here to request an amendment on HB 1125 which would exempt the Public Employees Retirement System (PERS) from the provisions of this bill. The proposed amendment is attached for your consideration. We are requesting this exemption for two reasons:

1. Because of the fiduciary responsibility of the PERS Board.
2. The statutory provisions relating to the Public Employees Retirement System (PERS).

The fiduciary responsibilities of PERS are entrusted to the Board of Directors who are the trustees of the system under the state statute. As trustees of PERS their sole responsibility is the benefit programs that they administer. Therefore, in order to fulfill their responsibilities they must be assured that they have a level of independence sufficient to permit them to perform these duties and to do so effectively and efficiently.

As trustees they are somewhat different from other state agencies in that they are subject to an extensive and stringent set of fiduciary obligations to the program participants and beneficiaries. These obligations both require and justify the need for independence.

Further the independence is required because it permits the trustees to perform their duties in the face of pressures from others who may not be subject to such obligations. In the absence of independence, trustees must be forced to decide between fulfilling their fiduciary obligations to participants and beneficiaries and or complying with the direction of others that may be responding to a wider ranging set of interest. In this sense, the independence required by the trustees is an integral part of the fiduciary obligations that govern the operations of the Board.

Any interference with the Boards procurement of goods and services interferes with both the independence the retirement Board needs to fill its fiduciary responsibilities and the strict accountability in personal liability Board members have for a breach of fiduciary duty.

By requiring the retirement Board contracts to comply with regulations designed for all state agencies we believe that OMB could in effect exercise control over the retirement Boards choice of service providers. This type of interference impairs the ultimate accountability of the trustees for selecting service providers, making it unclear whether they may be held responsible for the consequences of an imprudent selection of a service provider. Therefore, we feel that from a fiduciary standpoint it remains clearer that the Board is not subject to this provision.

The statutes also do something for PERS that is unique in that the PERS Board is granted the powers and privileges of a corporation. This does make PERS somewhat distinct among other agencies and does suggest a prior legislative intent that the Board should be fulfilling its duties in a way that is consistent with the fiduciary obligation discussed above.

Lastly, we note that one of the concerns of the auditor was the lack of guidelines for agencies in contracting. We note that the legislature in enacting the PERS statutes is clear concerning the requirements for the PERS Board as it relates to the contracting that they must do. PERS statutes that directly relate to contracting include:

1. NDCC 54-52-04(4)- this section establishes the Board authority for retaining actuarial and medical advisors and time frames for certain duties that must be conducted relating to the actuarial reports.
2. NDCC 54-52-.1-04 – this statute establishes specific requirements for the Board as it relates to the Uniform Group Insurance Program and the assignment of contracts pursuant to that program for health insurance, life insurance, dental insurance, long-term care insurance, employee assistance program and vision care.
3. NDCC 54-52.1-04.1 – this section establishes specific provisions relating to health maintenance organization contracting.
4. 54-52.2-02 and 54-52.01– these sections establish specific authority and provisions relating to contracting for the Deferred Compensation Program.
5. NDCC 54-52.6-04 – establishes the Board as the entity for contracting for the defined contribution plan and as the fiduciary and trustee of that plan.



As the above indicates the PERS Board has responsibility for contracting in many program areas.

In summary we believe that exempting PERS from HB 1125 is justified in order to maintain the PERS Board's fiduciary responsible for its programs and accountable to its members for the programs. Further, we believe it is consistence with the intent of prior legislatures in establishing the Board as the fiduciary and setting up the agency with the powers and duties of a corporation. Finally, we believe it is justified since the legislature has already established for PERS specific statutory requirements that direct PERS in its contracting.

Therefore, we would request your consideration of the attached amendments for PERS.

Madam Chair, members of the Committee, thank you for allowing me this opportunity to provide you our agencies thought and opinions on this bill.

This concludes my testimony.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1125

Page 2, after line 11 insert the following:

"3. The retirement board of the public employees retirement system is specifically exempt from complying with the standards and guidelines promulgated under this section."

Renumber accordingly

**Testimony of John W. Dwyer**  
**President, Lignite Energy Council**

**On**  
**House Bill 1125**  
**March 2, 2001**

For the record, my name is Clifford Porter and I am Director and Technical Advisor for the Lignite Research, Development and Marketing Program. I am presenting this testimony on behalf of John Dwyer, who is on National Guard Duty. John Dwyer is President of the Lignite Energy Council and Chairman of the Lignite Research Council.

The Lignite Research Council is an advisory group to the Industrial Commission for the Lignite Research, Development and Marketing Program. The Lignite Research, Development and Marketing Program (Program) is important to our state. The Program provides solutions for meeting new environmental regulations and developing competitive technology for existing lignite facilities, thereby maintaining existing jobs, economic activity and tax revenue. In addition the Program provides incentives to develop new lignite-fired power plants that will create additional jobs, tax revenue and business activity.

Since the Program was started in 1987 over 125 research projects have received over \$23,000,000 from the Lignite Research Fund and generated over \$265,000,000 in total matching research funds. A recent development is the Lignite Vision 21 Project that has generated three proposals to construct state-of-the-art lignite-fired power plants. A state-of-the-art lignite power plant could exceed \$700,000,000.

The Program is a private public partnership. The Lignite Research Council, whose members include both the private and public sectors, provides advice on policy and guidelines and recommendations on project funding. The Industrial Commission administers the program, approves or disapproves funding for research and development projects and activities, accepts and distributes funds, and enters into contracts.

The Industrial Commission provides funding for diverse lignite-based scientific studies, engineering activities and research services, which require unique and complex expertise. The Lignite Research Council and Industrial Commission have developed a process of independent peer review to evaluate these diverse and complex scientific, engineering and research studies.

House Bill 1125 would complicate the existing peer review process, and could jeopardize project funding and individual matching funds, as well as unnecessarily lengthening project lead time. Typically, the Program has received \$10 from industry for each \$1 from the State. A recent specific example is our Lignite Vision 21 Project, where we have received three applications where the State request is for \$10 million and industry participation is over \$700 million. Subcontracts subject to this bill could conceivably impose state mandated contracting and bidding procedures on industry. Many of the highly technical subcontracts are developed by industry-based on experience, expertise and successful working history between industry and subcontractors. It is important to maintain proprietary rights and confidential information. Therefore, the Lignite Energy Council submits the following amendment for your consideration that exempts the Lignite Research, Development and Marketing Program from OMB oversight in House Bill 1125.

Page 2, line 8, after "2." insert:

The requirements of this chapter do not apply to the industrial commission in the exercise of its powers under chapter 54-17.5.

3.

Renumber accordingly.

I'll be happy to answer any questions you may have.

# Senate GVA Committee, March 2, 2001

## TESTIMONY OF STEVE COCHRANE ON HB 1125

Good morning, Madam Chair and members of the Committee. My name is Steve Cochrane. I am Executive Director of the North Dakota Retirement and Investment Office. Our agency has responsibility for the administration of the benefits program for the Teachers' Fund for Retirement and the investment program for the State Investment Board. Due to the many similarities in our organizational missions and circumstances, our concerns with House Bill 1125 are consistent with those of PERS.

I am here to request an amendment to HB 1125 that would exempt the State Investment Board and the board of trustees of the Teachers' Fund for Retirement from the provisions of this bill. The proposed amendment is attached for your consideration. We are requesting this exemption for two reasons:

1. Because of the fiduciary responsibility of the State Investment Board and the board of trustees of the Teachers' Fund for Retirement, and
2. The statutory provisions relating to the State Investment Board and the Teachers' Fund for Retirement.

Having had the opportunity to review in advance Sparb's eloquent testimony on this bill, I will simply make this contribution: I underline, capitalize, italicize, and punctuate with an exclamation point everything Sparb had to say.

I would sincerely appreciate it if this committee would amend this bill to reflect our circumstances. Thank you.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1125

Page 2, after line 11 insert the following:

"3. The state investment board and the board of trustees of the teachers' fund for retirement are specifically exempt from complying with the standards and guidelines promulgated under this section."

Renumber accordingly

## **H.B. 1125**

**Presented by:** Illona A. Jeffcoat-Sacco  
Public Service Commission

**Before:** Senate Committee on Government and Veterans  
**Affairs** Honorable Karen K. Krebsbach, Chair

**Date:** 2 March 2001

### **TESTIMONY**

Madam Chairman and members of the Senate Committee on Government and Veterans Affairs, I am Illona Jeffcoat-Sacco, director of the Public Service Commission's Public Utilities Division. The Commission asked me to appear here today to oppose H.B. 1125 as it relates to procurement of services.

The Public Service Commission has several divisions that are involved in procurement of services. Our Abandoned Mine Lands (AML) Program is one hundred percent federally-funded with an annual budget between 1.5 and 2.0 million dollars. In AML, construction and professional services for the reclamation of abandoned mine sites are procured using procurement procedures patterned after the Federal Acquisition Regulations (FAR) and the Department of Transportation Standard Specifications for Road and Bridge Construction. Competitive sealed bidding is the primary method by which services are procured, except in the case of emergencies or where only one contractor is available to provide a service. All procurement procedures, including sole source procurement, are handled in strict compliance with the Commission's procurement policy, a copy of which is included

with this testimony. The procurement policy was initially adopted by the Commission in 1981 after extensive consultation with and approval of the Attorney General. The policy is updated as needed.

Another area in which the Commission depends on and uses the guidance provided by its procurement policy is in the procurement of professional services by the Public Utilities Division. In this division, the professional services of attorneys, accountants, economists and others are sometimes required to process rate cases, cost cases and cases involving competitive telecommunications issues. We procure these professional services by issuing a Request for Proposal (RFP), and we include in that request information on how we will judge the proposals we receive. Our RFPs conform to the Commission's procurement policy, as does any sole source procurement that we may use in special circumstances.

We initially opposed H.B. 1125 in the House because it appeared to inappropriately transfer the decision making for service procurement away from the elected Public Service Commissioners to the Office of Management and Budget (OMB). The statutorily mandated responsibility to implement the Commission's programs should be carried out by the officials elected by the people of the state to do so. Engrossed HB 1125 now requires OMB to promulgate rules that set standards and guidelines for the procurement of services by the Commission and all other agencies. We oppose these new provisions for the same reasons we opposed the original version of the bill.

There are no definitions in the engrossed bill describing the standards and guidelines OMB should write, and no statutory guidance on the parameters of those



standards and guidelines. OMB's rulemaking could very easily result in the inappropriate transfer of Commission decision making for service procurement away from the elected Public Service Commissioners to an appointed official who is not statutorily charged with or responsible for implementation of Commission programs. These provisions threaten the Commission's ability and responsibility to carry out its legislative mandate.

For example, in some cases the retention of professional services for an accountant or economist is an integral part of how the Commission carries out its statutory responsibility to ensure reasonable utility rates. Contracting for such professional services is very different than contracting for copier or printer repair services. Likewise, there is a similar distinction between such maintenance and repair contracts and contracts for assistance in projects intended to abate degradation of the environment or threats to public health and safety. In these and other areas it is appropriate that the Commission retain the authority to make the decisions required to implement legislative policy. The Commission maintains a professional staff representing a broad spectrum of disciplines including engineering, environmental science, public administration, law and accounting. The Commissioners and staff are best equipped to make contract decision regarding required services.

Another reason for our original objection to the bill was that it created an additional level of clearance required to procure services and, hence, would slow the procurement process for construction and professional services. The period during

which construction may occur in North Dakota is limited, and a timely procurement of services is critical. The House amendments do not eliminate this concern.

We had one additional concern with the requirement in the original bill that potential bidders for services be registered vendors in North Dakota because such a requirement would limit the number of vendors available to the Commission and impose financial and administrative burdens on potential contractors. We appreciate that Engrossed HB 1125 now excludes this provision and we support that exclusion.

Finally, although the bill appears to allow OMB discretion to exempt the Commission or other agencies from the applicability of its rules, there is no requirement that OMB do so and there are no specific standards included in the bill for doing so. This discretion in OMB is not sufficient to mitigate the concerns we note above.

For all of these reasons, the Public Service Commission opposes Engrossed H.B. 1125. In the alternative, the Public Service Commission respectfully requests an exemption from H.B. 1125.

Thank you for the opportunity to appear here today. This completes my testimony and I will be happy to answer any questions you may have.

**NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**  
**PROCUREMENT PROCEDURES**

**Adopted: January 12, 1981**

**7th Revision February, 2001**

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**NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**  
**PROCUREMENT PROCEDURES**

**Adopted: January 12, 1981**

**6th Revision: August, 1995**

**I. GENERAL STATEMENT**

- A. The purchase of goods and services through full and fair competition is Commission policy. All procurement will be conducted in a manner that provides maximum open and free competition. Unacceptable restrictions on competition include: (1) unreasonable qualification requirements placed on firms, (2) non-competitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience requirements.
- B. Whenever required, purchases will be made in accordance with statutes and rules through the Office of Management and Budget. N.D.C.C., Chapter 54-44.4.
- C. The Commission will take affirmative steps to use small and minority businesses when possible as sources of supplies, equipment, construction, and services. Affirmative steps may include:
  - 1. Placing qualified small, minority and women's businesses on solicitation lists.

2. Solicitation of small and minority businesses whenever they are potential sources.
  3. When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.
  4. Where possible, establishing delivery schedules which will encourage participation by small and minority business.
  5. Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as required by the Federal Government.
  6. If any subcontracts are to be let, the prime contractor will take the affirmative steps in 1 through 5 above.
- D. Except as otherwise provided by state law, the procurement policy will apply to the Commission, its contractors and subcontractors.
- E. Procurement policy provisions will be followed in procurements involving use of federal grant funds. However, in procurements involving uses of state funds, Commission compliance with procurement policy provisions is discretionary.
- F. Standard contract provisions will be incorporated into relevant Commission contracts. However, in any contract, the Commission may agree to change, add, or delete contract provisions to the extent that such

changes, additions, or deletions are not inconsistent with federal and state law.

## II. **DEFINITIONS AND MISCELLANEOUS POLICY PROVISIONS**

- A. Audit Trail.** An audit trail is a series of records that makes it possible for an auditor to easily trace transactions. All procurement and contract administration actions should be documented to establish an audit trail.
- B. Commission.** The Commission is the North Dakota Public Service Commission.
- C. Construction Maintenance.** Repair of previously reclaimed abandoned mine land sites.
- CD. Contract.** A contract is a written agreement between the Commission and the contractor setting forth obligations, including: performance of work, furnishing of labor and materials, and the basis of payment. A Commission contract usually includes specified standard provisions and any other provisions and documents designated as part of the contract.
- DE. Contract Administration.** Contract administration is the process of monitoring a contractor's performance under a contract, insuring that all the terms and provisions of the contract are satisfied, and paying contract invoices. The contract administration function is jointly assigned to the procurement officer, the project manager, and contract officer.



**EE. Contract Execution.** A contractor may not begin work until a contract has been executed. The Commissioners or a designated representative, as provided for in Policy No. 5-01-93(0), are the only persons authorized to execute contracts to which the Commission is a party.

**FG. Contract Officer.** The contract officer is the Commission employee charged with the responsibility of monitoring contracts.

**GH. Contractor.** The contractor is the individual, partnership, firm, corporation, company, or any acceptable combination or joint venture contracting with the Commission for performance of prescribed work.

**HJ. Contractor Selection.** Contractor selection is the process of choosing a contractor from all those that submitted a bid or proposal to provide goods or services sought by the Commission. Among factors which may be considered when selecting a contractor are:

1. Whether the offeror's bid, proposal, or statement is responsive to the invitation to bid or request for proposal or standards for unsolicited proposals.
2. Whether the offeror has the technical ability and resources to perform in the manner described in its bid or proposal.
3. Whether the offeror has the financial ability and resources to complete the project.

4. Whether the contractor is responsible as shown by its integrity, compliance with public policy, prior contracts with the Commission, and record of past performance with the State of North Dakota.
5. For construction bids, whether the bidder is the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.
6. The Commission reserves the right to waive minor irregularities in a bid or proposal and the right to reject any and all bids. The Commission has the authority to require literal and exact compliance with all requirements specified in its request for bids or proposals.

These factors will be evaluated by the Commission's procurement officer or a selection committee of knowledgeable people.

- J. **Emergency.** Any catastrophic event to property or person that requires an immediate remedy.
- K. **Final Report.** Following project close-out and final payment, the project manager will submit, to the procurement office and the contract officer, a final report evaluating the quality of the contractor's performance, including: adequacy of communication, timeliness, reliability, attention to detail, interest in accomplishing quality project work, and interest in giving advice to produce the best value for the state. The final report may serve as a basis for subsequent procurement analysis. The procurement officer

and contract officer will jointly present a report to the Commission when conditions may warrant removal of a contractor from a Commission Bidder List or Request For Proposal List.

**JL.** **Invitation for Bid Request for Proposal.** An invitation for bid (IFB) or a request for proposal (RFP) is a solicitation issued by the Commission with the intent of eventually procuring a contractor to perform a particular service or deliver a particular product. The IFB or RFP must contain information such as the scope of work required or product specifications; the date, time, and place of bid opening or proposal closing; and evaluation factors to be used. Bids and proposals will be solicited in a manner that is consistent with Commission policy and state and federal law.

**K.M.** **Preference.** Preference will be given to a resident North Dakota bidder when accepting bids for the provision of professional services, including research and consulting services, goods, merchandise, supplies, equipment, structures, and reclamation services. Nonresident bidders will be given preference equal to the preference given or required by the state of the nonresident bidder, seller, or contractor (N.D.C. C. 44-08-01).

**LN.** **Procurement.** Procurement is the purchase of goods or services. There are four methods of procurement for goods or services: small purchase procedures, competitive sealed bids (formal advertising), competitive negotiation, and non-competitive negotiation (sole-source procurement).

**MO. Procurement Officer.** The procurement officer is the Commission employee charged with the responsibility of directing the procurement process. This person may also draft a proposed contract and assist the contract officer in monitoring a contractor's performance. This person works with the Commission, Commission Executive Secretary, contract officer, and project manager during the procurement and contract administration process.

**NP. Project Close-Out.** The project close-out is a written verification that all the requirements of the project have been satisfied; it is based on a final technical and financial review. The review may include an audit. When all the contract work has been completed, the project will be closed-out. Following Commission acceptance of the project close-out, the contractor will receive final project payment.

**OQ. Proposal-Bid.** A proposal is any offer of other submission presented to the Commission by a potential contractor and used as a basis for contractor selection. Proposals are submitted by firms or individuals interested in undertaking projects for the Commission and, unless unsolicited, are based on the scope of work description set forth in the RFP issued by the Commission. Bids are similar to proposals. However, while proposals generally relate to the submission of work plans and costs for the provisions of services, bids usually involve the offer of specific

materials and construction work and address physical specifications and fixed or unit prices.

**PR. Subcontractor.** A subcontractor is an individual, partnership, firm, corporation, company, or any acceptable combination or joint venture to which the contractor sublets part of the contract.

### **III. PSC EMPLOYEE AND PUBLIC CONTRACTOR CODE OF CONDUCT**

#### **A. General Rule**

No Commissioner, Commission employee, or agent will participate in selection, or in the award or administration of a contract if a conflict of interest, real or apparent, would be involved. A conflict would arise when the Commissioner, the employee, or agent; any member of his immediate family; his partner; or an organization which employs or is about to employ the Commissioner, Commission employee, his immediate family member, or partner has financial or other interest in the firm selected for award.

#### **B. Gifts**

1. Bidders and Commission contractors and subcontractors and their employees or agents will not directly or indirectly offer nor will Commissioners or employees directly or indirectly accept or solicit any gift, gratuity, entertainment, favor, loan, or any other thing of monetary value which might reasonably be interpreted as intended

to secure a contract or favorable treatment in award, amendment, or administration of a contract.

2. During an audit or inspection, Commissioners, employees, or agents will neither solicit nor accept gratuities, food, favors, or anything of monetary value from a bidder, contractor, or party to a subagreement.
3. As a general rule, project managers, inspectors, and any other employees of the Commission should refrain from engaging in after-hour socialization with contractors and their employees during the contract performance period.
4. No political contribution may be offered, solicited, or accepted for the purpose of affecting the award, amendment, or administration of a contract.

#### **IV. Procurement Procedural Requirements**

##### **A. Proposed Procurement Action Review**

Before attempting to procure goods or services, the Commission Executive Secretary and designated procurement officer, in consultation with the Commission, will discuss and determine in written memorandum form whether or not:

1. Funds are available;

2. The purchase must be processed by the Office of Management and Budget;
3. The purchase may be avoided because it is unnecessary or duplicative;
4. The purchase should be consolidated or broken out to obtain a more economical purchase;
5. A lease versus a purchase or hourly rate versus fixed fee would be most economical;
6. Greater economy and efficiency would be fostered by entering into state cooperative agreements with other state agencies for procurements or use of common goods and services; and
7. Provisions of North Dakota law prescribe procedures applicable to the particular purchase.

**B. Procurement Procedure**

1. Solicitation of offers, whether by competitive sealed bids or competitive negotiation, will:
  - a. Incorporate a clear and accurate description of the technical requirements for the material, product, service, or professional requirements to be procured. The description will not, in competitive procurements, contain features which unduly restrict competition. The description may state the quality of the material, product, or service to be procured

and, when necessary, will set forth essential characteristics and standards. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used to define the performance or other salient requirement of a procurement. The specific features of the named brand which must be met by offerors will be clearly stated.

- b. Clearly set forth requirements which offerors must meet and factors to be used in evaluating bids, proposals, or statements of qualifications.

**C. Method of Procurement**

Procurement will be by one of the following methods: small purchase procedures, competitive sealed bids (formal advertising), competitive negotiation, or noncompetitive negotiation.

- 1. **Small Purchase Procedures.** Any procurement estimated by the procurement officer not to exceed ten thousand dollars (\$10,000) and not subject to Chapter 54-44.7, N.D.C.C., or the authority of the Office of Management and Budget may be made with small purchase procedures. Small purchase may be made when the item or service is available from more than one source, there is no



public exigency or emergency, and time and expense does not justify competitive bidding. Small purchase procedure will include contact with an adequate number but not fewer than two qualified firms selected from the bidders list. The procurement officer will select the qualified firms. The selection of the qualified firms will be based on what the procurement officer knows about the experience, past performance, integrity, compliance with public policy, and financial and technical resources of the firm. Qualified firms will be selected fairly without unreasonable restrictions or procedures calculated to restrict competition. The procurement officer will write each firm to explain the supplies or services needed and request an offer from each firm for described supplies or services. After a reasonable time during which all potential offers have been made, the procurement officer will recommend to the Commission which offer to accept. Acceptance will be based on what the Commission believes will be the best use of public funds.

2. **Competitive Sealed Bids (Formal Advertising).** Competitive sealed bids (formal advertising) will be publicly solicited and a firm-fixed-price contract (lump sum or unit price) will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

Bidder's preference law will apply based on N.D.C.C. 44-08-01 with consideration of out-of-state bidders based on their state preference law.

a. For formal advertising to be used, the following conditions must be present:

- 1) A complete and realistic specification or purchase description will be available.
- 2) Two or more responsible suppliers must be willing and able to compete effectively for the Commission's business.
- 3) The procurement lends itself to a firm fixed or fixed unit price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

b. If formal advertising is used for a procurement, the following requirements will apply:

- 1) At minimum, twenty-one (21) days prior to the date set for opening of bids, bids will be solicited from an adequate number of known suppliers or firms. The invitation will be adequately publicized. The public notice of invitation for bids (IFB) may be published in newspapers of general circulation and in trade or

professional publications of general circulation calculated to reach the type of firms needed. If such publication is undertaken, the public notice will be published once prior to the date of bid opening. At a minimum, adequate public notice of invitation for bids will include the mailing of invitation for bids to a reasonable number of parties on any applicable bidder list.

- 2) The invitation for bids, including specifications and pertinent attachments, will clearly define the items or services needed and state:
  - a) When and where the plans, drawings, and specifications may be examined; and how copies may be obtained.
  - b) The place where and the time when the bids will be publicly opened.
  - c) That each bid will be accompanied by a bidder's bond, executed by a surety company authorized to do business in this state, a certified check or a cashier's check in the sum equal to five (5) percent of the bid. A certified check or a cashier's check must be drawn on

the Bank of North Dakota or a federally insured, solvent bank. If, within ten days after notice of an award, the successful bidder should fail to execute a contract with the owner, then the surety will pay unto the owner for the use and benefit of the owner five (5) percent of the bid or bids on the contract on which there is a default or the certified check or cashier's check of the bidder will be forfeited to the owner. If the principal's bid is accepted and the contract is awarded, the principal, within 10 days after notice of award, will execute a contract consistent with the terms of the bid and performance and payment bonds as specified by the Commission.

- d) That all public contractor bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
- e) That the right of the Commission to reject any and all bids is reserved.

- f) That inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.
- 3) Copies of all plans, drawings, and specifications will be filed in the Commission ~~Executive Secretary's~~ Abandoned Mine Lands office. ~~Copies may be filed at other places as designated by the Executive Secretary or procurement officer.~~ Upon written request, copies of all plans, drawings, and specifications will be mailed at cost to the office of any firm.
- 4) Bids will be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and other relevant information as may be necessary, together with the name of each bidder, will be recorded; the record and each bid will be open to public inspection.
- 5) Bids will be unconditionally accepted without alteration or correction except as authorized in this policy. Bids will be evaluated based on the requirements set forth in the invitation for bids, which

may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award will be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids will set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

- 6) Withdrawal of erroneous bids before award, or cancellation of awards or contracts based on such bid mistakes, will be permitted. After bid opening no changes in bid prices or other provisions of bids will be permitted. Except as otherwise provided, all decisions to permit the withdrawal of bids, or to cancel awards or contracts based on bid mistakes, will be supported by a written determination made by the procurement officer.
- 7) Upon Commission approval, Commission will award a firm fixed or fixed unit price contract with reasonable promptness by written notice to the lowest

responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids for a construction project exceed available funds as certified by the procurement officer, and the low responsive and responsible bid does not exceed such funds by more than five (5) percent, the procurement officer is authorized, in situations where time or economic considerations preclude resolicitation of work of a reduced scope, to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in an attempt to bring the bid within the amount of available funds.

**3. Competitive Sealed Bidding - Construction Maintenance.**

Competitive sealed bids for construction maintenance on abandoned coal mine reclamation sites will be publicly solicited by mail, FAX or through the Internet and a firm-fixed-price contract (lump sum or unit price) will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

- a. A complete and realistic specification or purchase description will be available.
- b. Two or more responsible suppliers must be willing and able to compete effectively for the Commission's business.
- c. The procurement lends itself to a firm fixed or fixed unit price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.
- d. At a minimum, five (5) days prior to the date set to receive bids, bids will be solicited from an adequate number of known suppliers or firms. This solicitation will be in written form and provided to prospective bidders ~~on-site~~.
- e. All ~~public contractor~~ bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
- f. The right of the Commission personnel to reject any and all bids is reserved.
- g. The inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.
- h. Contract award, based on the lowest responsive bid, may be made by Commission personnel or through formal Commission action.



- i. Provisions of this section do not apply to abandoned mine land emergencies.

4. **Competitive Negotiation.** In competitive negotiation, qualification statements or proposals are requested from a number of sources and the request is publicized. Negotiations may be conducted with sources submitting statements or proposals. Either a fixed price or cost reimbursable not-to-exceed contract will be awarded. Under some circumstances, competitive negotiation may be required. Under other circumstances, competitive negotiation is discretionary and may be used if conditions are not appropriate for the use of formal advertising or small purchase.

- a. When purchasing architect, engineering, or land surveying, research or professional services, the Commission will follow the competitive negotiation procedures specified in Chapter 54-44.7, N.D.C.C., and consider relevant Office of Management and Budget policy, e.g., Policy 312 dated July 1, 1986, "Procurement of Architect, Engineering, and Land Surveying Services by State Agencies". The Commission may use the procedures described in Chapter 54-44.7, N.D.C.C., to procure other professional services including lawyers, accountants, economists, and real estate

appraisers. When using the procedures described in Chapter 54.44.7, N.D.C.C., the following apply:

- 1) Notice of invitation may be published in newspapers of general circulation and in trade or professional publications of general circulation calculated to reach the type of firms needed. Adequate public notice includes mailing of the invitation to a reasonable number of individuals or firms on a relevant trade or professional list maintained by the Commission.
  - 2) The invitation will state the relative importance of evaluation criteria used to select and rank the most qualified firms. No other factors or criteria will be used in the evaluation.
- b. An alternative to the procedures prescribed by Chapter 54-44.7 may be used to procure services other than architect's, engineer's, and surveyor's professional services, e.g., lawyers, accountants, and real estate appraisers.
- 1) Proposals will be solicited through a request for proposal (RFP). The request for proposal will state:
    - a) The relative importance of price and other evaluation factors.

- b) That the right of the Commission to reject any and all proposals is reserved.
  - c) That inadvertent Commission failure to meet all procurement policy requirements will not invalidate the procurement.
- 2) Notice of the need for services will be given by the Commission through a request for proposal. At minimum, twenty-one (21) days prior to closing of the request for proposal, proposals will be solicited from an adequate number of known firms. The request will be adequately publicized. The public notice of the request for proposal may be published in newspapers of general circulation and in trade or professional publications of general circulation calculated to reach the type of firms needed. If publication is undertaken, the public notice will be published at least twenty-one days prior to the closing of the request for proposal. At minimum, adequate public notice of the request for proposal will include the mailing of the request for proposal to a reasonable number of parties on any applicable bidder list.
- 3) The invitation should include the following:

- a) Project title
  - b) Scope of work
  - c) Description of professional services required
  - d) Submittal of a flat rate or line item price quote
  - e) Resume of personnel providing the services
  - f) Documentation of related work experiences
  - g) Scheduled performance period
  - h) Rating system used in evaluating proposals
  - i) Provide at least three client references
  - j) Conflict of Interest disclaimer
- 4) Proposals will be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals will be prepared and will be open for public inspection after contract award.
- 5) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors will be accorded fair and equal treatment with respect to any

opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there will be no disclosure of information derived from proposals submitted by competing offerors.

- 6) Upon recommendation by the procurement officer, award will be made to the responsible offeror whose proposal is determined by the Commission to be the most advantageous to the state taking into consideration price and the evaluation factors set forth in the request proposal. No other factors or criteria will be used in the evaluation. The contract file will contain the basis on which the award is made and contract negotiation minutes.

#### **5. Noncompetitive Negotiation (Sole-Source Procurement)**

A sound procurement system should provide for full and open competition that is both fair and equitable to all potential bidders. However, there are times when circumstances are such that the desired action cannot be accomplished through the lengthy

process of solicitation of bids. Under those unique conditions sole-source contracting may be warranted.

Sole source procurement (noncompetitive negotiation) is a method of solicitation of a proposal from only one source. When this method of procurement is proposed, written justification must be presented to the Commission or the person designated by the Commission for approval.

The following reasons may be justification for sole-source procurement:

- a. The proposed item or service is available only from a single source.
- b. The person or organization has the unique product or the special skills, knowledge, abilities to provide the required services (at the exclusion of others) and is considered the preeminent deliverer of that product or service at the time of selection.
- c. Emergency or severe time constraints preclude issuing a formal Request for Proposals.
- d. The service is available within the existing structure of state or local government.

The following steps should be followed to secure a sole-source contract:

- 1) Draft a written justification for sole-source procurement and present it to the Commission or the designated authority for approval.
- 2) If approved, contact the proposed provider and proceed to negotiate the contract. Minutes of the negotiation session will be taken and the prepared minutes sent to the other party for concurrence.
- 3) Prepare the contract and present it to the Commission for action. If approved, execute the contract.

6. **Emergency.**

An emergency includes, but is not limited to, abandoned coal mine sites. Pursuant to an amendment, dated May 25, 1993, to the North Dakota State Abandoned Mine Land (AML) Reclamation Plan, and Chapter 38 14.2-03-12, N.D.C.C. and Chapter 69-05.3-01-09, N.D.A.C., the Commission has the authority to act to address AML emergencies in a timely fashion.

- a) Right-of-Entry documentation will be obtained from the landowner, or at a minimum, permission will be received from the landowner to begin the emergency work, and a

completed Right-of-Entry form will be obtained when possible.

- b) An QSM Emergency Investigation Report will be completed prior to beginning work if time permits, and then faxed to QSM. A letter of eligibility is required to be completed by the Commission Commerce Counsel.
- c) Attempt to receive bids from at least two contractors. Interested contractors will receive a faxed copy of the emergency bid sheet documents, detailing plans and specifications of the proposed work, or contractors will be handed the bid documents to be completed on-site if a pre-bid meeting is scheduled.
- d) A contractor that is currently under contract to the PSC may be utilized, providing they offer a bid that is considered reasonable by a PSC Project Manager. Commission personnel have the authority to reject any and all bids.
- e) An emergency contract will be issued (SFN 19716 Rev. 05-2000) to the contractor selected for emergency reclamation work.
- f) The successful bidder will provide a current North Dakota Contractor's license within the classification value of the project, and be covered by a liability insurance policy of no



less than \$500,000 per person and \$1,000,000 per occurrence.

**D. Unsolicited Proposal.**

1. **General.** An unsolicited proposal is a proposal submitted by a potential supplier, which is not solicited by the Commission. The unsolicited proposal is an effective tool by which unique or innovative methods or approaches developed outside the Commission can be made available to the Commission. The offeror who submits an unsolicited proposal hopes the Commission will enter into a sole source contract with the offeror for further development of the innovative idea contained in the unsolicited proposal. If the Commission finds an offer sufficiently innovative, it will not become the subject of a competitive procurement.

2. **Required Information.**

a. **Introduction.** The introduction should identify the general subject matter of the proposal. It should explain the need for the work, study, or research. The need should be expressed in terms of past work or research and the manner in which the offeror believes that the proposed work study or research will support Commission activities or functions.

- b. **Objectives.** The objectives must be stated as specifically as possible. The objectives are the foundation of the project and the basis of all work, study, or research plans. They may be described as hypotheses to be tested. Objectives or hypotheses may be changed, but only after a demonstration that the change is warranted. They must describe the direction of the work, study, or research to those not technically familiar as well as to those who are.

If the project is contemplated to continue for more than one year, the proposal should state long-term objectives as well as short-term objectives. The stated short-term objectives, i.e., those to be accomplished within one year, should be presented in such a manner as to show their relevance in meeting the long-term goals or objectives.

The proposal should convince the reader that meeting the projected objectives is necessary and feasible. That is, the work, study, or research is needed; and the project objectives are likely to be accomplished in a reasonable time at a reasonable cost.

The short-term objectives should be natural and discrete elements of the long-term objectives.

Both long-term and short-term objectives should include statements of the nature and extent of the anticipated results.

c. **Work, Study, or Research Plan.** The work, study, or research plan should include statements regarding: methodology, a work schedule, and reports.

1) **Methodology.** The statement of project methodology should explain how the objectives will be met or how hypotheses will be tested. The statement should specify a work plan or study or research design that describes the data to be collected and the methods to be used in collecting and analyzing the data. All elements of the methodology statement should be shown to be relevant in meeting the stated objectives or testing the stated hypotheses.

2) **Schedule.** The schedule should be a statement that explains when each natural element (e.g. test, procedure, method, or other associated task) of the proposed methodology will start and finish. The schedule should indicate the time to be allocated for named individuals and institutions to accomplish defined tasks.

3) **Reports.** The proposal should state when reports will be delivered to the Commission. The proposal should also state what the reports will cover. All reports should be written in a form acceptable to the relevant professional or scientific community and the Commission. Each final report should stand alone as a finished product, which meets the stated objectives of the proposal.

- d. **Personnel and Management.** All project staff, including the principal investigator, should be identified, their relevant qualifications described, and vitae attached. The skills and experience appropriate to the proposal should be stated. The project responsibilities of all staff should be stated.
- e. **Related Experience.** Proposals should include a brief description of previous experience relevant to the proposed project, including the identification of specific projects undertaken and completed and a bibliography of relevant resulting publications.
- f. **Facilities and Equipment.** A description of physical facilities and relevant, available project equipment to be used should be included.

- g. **Other Work.** The proposal should include a projection of other foreseeable workload for the period of the proposed work.
- h. **Budget.** The proposal must include a budget. The budget is a representation of the project expressed in dollars of estimated expenses. At minimum, where federal grant funds are involved, the budget must be submitted in a form that meets the standards of the federal grantor agency. The budgeted amounts must be realistic and well justified. Cost estimates must be in sufficient detail to enable the Commission to conduct an evaluation. Unless self-explanatory, the proposer should submit a separate explanation of how budget items were estimated. The budget must correspond to the proposer's narrative materials.
- i. **Contract Details.** The proposer should set forth the type of contract anticipated and the period the proposal is available for Commission acceptance. Clear statements should be included regarding the proposed duration of the effort together with any statements regarding cost sharing.

### 3. **Commission Review and Evaluation**

- a. **Timely Proposal Submission.** Unsolicited proposals should be submitted sufficiently in advance of the time work is to start.
- b. **Sufficiency Review.** After receiving an unsolicited proposal, the Commission Executive Secretary and designated procurement officer will expeditiously review the proposal to see if it contains sufficient information to enable a meaningful evaluation. If the unsolicited proposal meets this criterion, it may be evaluated in detail.
- c. **Detailed Evaluation.** For detailed evaluation the proposal will be circulated among and evaluated by Commission personnel and if necessary others. In the circulation process, a cover memorandum will be attached to the proposal clearly identifying it as unsolicited. This identification is to insure that a private, i.e. non-governmental proposal is treated as proprietary and unique to the proposer. The purpose of the evaluation is to identify whether the proposal in fact contains unique or innovative ideas or concepts, which have not independently been conceived by the Commission or other government agencies. Additionally, the potential contribution to the

Commission's function will be evaluated together with the capabilities and qualifications of the potential contractor.

4. **Proposed Procurement Action Review.** If after the detailed evaluation, a favorable finding is issued by the relevant designated procurement officer, the Commission Executive Secretary and designated procurement officer in consultation with the Commission will discuss and determine in written memorandum form if:

- a. Funds are available;
- b. The purchase must be processed by the Office of Management and Budget;
- c. The purchase may be avoided because it is unnecessary or duplicative;
- d. The substance of the proposal is available to the Commission from another source without restriction;
- e. The proposal closely resembles a pending competitive solicitation or is otherwise not sufficiently unique to justify acceptance;
- f. The purchase should be broken out to obtain a more economical purchase;
- g. A lease versus a purchase or hourly rate versus fixed fee would be most economical;

- h. Greater economy and efficiency would be fostered by entering into state cooperative agreements with other state agencies for procurements or use of common goods and services;
  - i. There are compelling reasons for non-competitive procurement; and
  - j. North Dakota law sets purchase procedures.
- 5. **Method of Procurement** If in addition to receiving a favorable detailed evaluation the unsolicited proposal passes the proposed procurement action review, the Commission may direct the relevant procurement officer to conduct a negotiated non-competitive procurement.
- 6. **Limited Commission Use of Data.** Restrictive statements inserted by the private or non-governmental proposer that restrict the Commission's use of the submitted data to evaluation of the unsolicited proposal will be heeded. Even when the Commission receives an unsolicited proposal, which does not contain such restrictive statements, if the Commission determines that detailed evaluation by personnel outside of state government is required, the Commission will obtain written permission from the prospective private or non-governmental contractor prior to release of the proposal for evaluation. When an unsolicited proposal is submitted



to a non-governmental evaluator, the Commission will secure a written agreement from the evaluator not to disclose the information contained in the proposal.

**E. Procurement Officer.**

1. **Designation.** The procurement officer will be designated by motion of the Commission. Ordinarily, the procurement officer for a project will be the Commission division director of the division most closely connected with the project goals.
2. **Duties.** The procurement officer will:
  - a. Administer Commission procurement policy.
  - b. Cooperate with the Commission Executive Secretary and the Office of Management and Budget to ensure orderly procurement of goods and services.
  - c. With the approval of the Commission, appoint, when necessary, a sufficient number of evaluation committee members from Commission staff and other state agencies.
  - d. Establish and maintain programs for inspection, testing and acceptance of supplies, services, and construction.
  - e. Make written evaluation committee and other reports to the Commission recommending award.

- f. After Commission approval, send a notification of Commission procurement decisions to all interested persons.
- 3. **Powers.** In addition to other powers prescribed, the procurement officer will have the power to:
  - a. Adopt operational procedures consistent with Commission procurement policy and sound procurement practices on such matters including but not limited to bid or proposal solicitation, evaluation, and contract negotiation, award, administration, and enforcement; and
  - b. Designate a project manager from within the Commission. If none is designated, the procurement officer will also be the project manager.

**F. Executive Secretary.**

- 1. The Commission Executive Secretary will supervise Commission procurement officers and cooperate with the Office of Management and Budget to establish and maintain Commission procurement in compliance with Commission policy and state law.
- 2. The Commission Executive Secretary will maintain bidder lists. The lists will be used as a basis for making future solicitations. A mailing list need not be limited to the firms on a bidder list and a mailing list need not include all firms on the bidder list. In

cooperation with the procurement officer, the Executive Secretary may adopt procedures on bidder list use and bidder removal or suspension from bidder lists.

**G. Evaluation Committee.**

1. The procurement officer may establish with Commission approval a formal selection committee to evaluate proposals received for consultant and other professional services. The committee should contain broad-based representation with a variety of skills needed to perform proposal evaluation.
2. The committee will recommend the most economical proposal expected to meet the state's needs. The evaluators will exercise impartial judgment in evaluating the relative merits of each proposal. When appropriate, legal counsel should be involved to assist in making the final recommendation.

**H. Notice and Appeal.**

1. Those participating in a small purchase, competitive sealed bid, or competitive negotiation will receive by mail notice of the Commission's intent to award or notice of the Commission's selection and ranking of firms. The notice will state:
  - a. The interested person has the right to appeal the Commission's decision for cause;
  - b. The right must be exercised within a specified time;

- c. The right must be exercised in writing; and
  - d. The reasons for appeal must be stated.
2. If there is an appeal a formal hearing will be scheduled and interested parties notified as the Commission deems just and reasonable.

**I. Project Manager.**

- 1. The key person in the state-contractor relationship is the state's project manager. This individual will control and monitor the contractor's activities and provide the proper level of leadership and coordination which will satisfy the Commission's obligations under the contract and which will be conducive to a healthy business relationship.
- 2. Since a professional service contract may contain only a limited description of the overall scope of the project of service to be performed by the contractor, the project manager must be able to distinguish between specific provisions in the contract and that which he desires from a professional point of view.
- 3. The project manager does not have unilateral authority to change the scope of work or specification under a contract. Should circumstances arise where the project manager deems immediate changes, suspensions or delays are necessary or prudent, the Commission Executive Secretary and the contract officer will be

notified. The project manager will write detailed contemporaneous memoranda regarding the change, suspension or delay, and report to the full Commission at the earliest opportunity. A change, suspension, or delay will not take effect without formal Commission action unless the Commission has otherwise formally authorized the project manager to effect changes, suspension, or delays.

4. Among the many responsibilities assigned by the procurement officer to the project manager, the following tasks should be given serious consideration:

- a. The project manager should initiate a contract review with the contractor's team leader and prime assistants. This conference should include a detailed examination of the contract documents, project time schedules, and the establishment of procedures for submission of contract progress reports. Required interviews with Commission staff should be scheduled through the project manager to minimize disruption of the Commission operation.
- b. The project manager should require frequent and periodic conferences with the contractor and staff, even though the quality and performance of the contractor has been excellent. Such conferences should be divided into two parts. The first part should address past performance and

the second should address the future activities of the contractor. Matters of substance should be fully documented.

- c. The project manager must recognize that indecision and procrastination will be two major problems in working with a professional service contractor. Time is money to a consultant, and he is prepared to demand payment for downtime and delays if the fault lies with the agency regardless of the contractual stipulations related to price. The project manager must comprehend that time does not normally cure or solve technical problems and may very well compound them beyond repair; timely decisions are crucial to the success of the project.
  - d. The project manager must establish himself as a leader in the state-contractor relationship. Experience has shown that where a vacuum exists in state leadership, professional service contractors tend to move forward and fill the void in order to complete and deliver the end products. Consequently, quality control may not be maintained in the process.
5. While input from various levels of state management is necessary to insure acceptability of the end product, certain limitations must

be noted. In order for the professional service contractor to accomplish his tasks, the various opinions, needs, and desires of state management must be polarized into one unit or else he is faced with changing directions with each level of management and individual. The state must be of one voice. This single voice must be the contract document with the project manager as its spokesman.

**J. The Commission**

The Commission will make the final determination of award based on recommendation of the procurement officer.

**K. Contract Officer**

1. The contract officer insures that terms of the contract are met. The contract officer will:
  - (a) Insure that all laws, executive orders, clearances, and approvals are met and that sufficient funds are available;
  - (b) Insure that contractors receive impartial, fair, and equitable treatment.
2. The contract officer should establish an internal accounting system for the contractor's invoices and supporting documentation and correspondence. This system is necessary if the contract is based upon a not-to-exceed price or contains any variables which may affect payment. A clear, precise audit trail of all activities related to

payment of funds and acceptances of deliverables must be maintained and accessible to the contract officer at all times

## **V. BONDS**

### **A. Bid Security**

1. Bid security is required for all competitive sealed bidding for construction contracts when the procurement officer exceeds \$100,000. Bid security must be either a bond provided by a security company authorized to do business in this state, a certified check, or a cashier's check. This does not prevent the requirement of bid securities on construction contracts under \$100,000 when the circumstances warrant.
2. Bid security will be in an amount equal to at least five (5) percent of the amount of the bid.
3. When the invitation for bids requires security, noncompliance requires that the bid be rejected.
4. After the bids are opened, they will be irrevocable for the period specified in the invitation for bids, except as provided in competitive sealed bidding. If a bidder is permitted to withdraw its bid before award, no action will be taken against the bidder or the bid security.



**B. Contract Performance and Payment Bonds.**

1. When a construction contract is awarded, the following bonds or security will be delivered to the Commission and will become binding on the parties upon execution of the contract:
  - a. A performance bond satisfactory to the Commission, executed by a surety company authorized to do business in this state in an amount equal to 100 percent of the price specified in the contract; and
  - b. A payment bond satisfactory to the Commission, executed by a surety company authorized to do business in this state and by the U.S. Treasury Department, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond will be in an amount equal to 100 percent of the price specified in the contract.
2. Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, for which a payment bond is furnished under this section and who has not been paid in full therefore before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, will have the right to sue

on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractor furnishing said payment bond, will have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice will be personally served or served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.

3. Every suit instituted upon a payment bond will be brought in a North Dakota court, but no suit will be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

### **C. Bond Forms and Copies**

1. The Commission will supply the form of the bonds required.
2. Any person may request and obtain from the Commission a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond will be prima facie evidence of the contents, execution and delivery of the original.

## **VI. CONTRACT PRICING**

The cost plus, a percentage of cost and percentage of construction cost method of contracting, will not be used. The procurement officer will perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants will be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles.

## **VII. PROCUREMENT RECORDS**

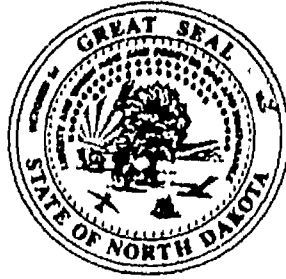
The procurement officer will maintain records sufficient to detail the significant history of a procurement. These records will include information on: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and basis for the cost or price.

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## VIII. APPENDIX

- A. Evaluation Criteria for Request for Proposals/Competitive Negotiations
- B. Sample Scoring System for Competitive Negotiation Type Contracts
- C. Procedures for Competitive Negotiation Type Contracts
- D. Sample Contract Negotiation Minutes
- E. Procedures for Sole Source Procurement
- F. Checklist for Work Statement (Specific Provisions) Contracts and Requests for Proposals

COMMISSIONER OF AGRICULTURE  
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**Testimony of Judy Carlson, Project Safe Send Coordinator  
HB 1125  
Senate Government and Veterans Affairs, March 2, 2001**

Chairman Krebsbach, Committee members, I'm Judy Carlson, the Project Safe Send coordinator for the department of agriculture. I'm here to testify in opposition to HB1125.

Our agency uses service contracts for many programs. These contracts are approved by the Attorney General's office for form.

One example where we use contracts is for Project Safe Send—the collection and disposal of hazardous pesticides. We have an advisory board that helps draft the request for proposals (RFP), contract, reviews bids and recommends a contractor. Our attorney thoroughly reviews the 30- page RFP. I am concerned that this negates the work of our advisory board and legal counsel.

This bill would make the OMB guidelines, rules. Page 2, lines 17-20, indicate OMB would have oversight and allow that agency to reject any or all bids or require that the low bid be accepted. Also, OMB could negotiate for a lower price with a successful bidder. This goes well beyond providing "guidelines".

Occasionally, we pay for services without a formal contract. One example is hiring local entertainment for a national meeting our agency hosted. Should the guidelines for hiring home grown talent be the same as for a hazardous waste contractor?

One can only imagine the enormous number of service contracts that exist within state government. I'm concerned that the fiscal note on this bill does not adequately reflect the scope or intent of this legislation.

Thank you for your consideration.

Todd Cranda - ND Cons. Engineers

**PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1125**

Page 2, after line 11, insert:

"3. Contracts for services provided under section 24-02-07.3 and chapter 54-44.7 are exempt."

Renumber accordingly

**24-02-07.3. Prequalification, selection, and contracting for consultants - Solicitations.**

The director may prequalify, select, and contract for consultants in the area of engineering, land surveying, architecture, traffic safety, business administration, and related matters. The prequalification of the consultant must be based on detailed information regarding firm organization, qualifications of personnel, type of work the firm is qualified to perform, previous work experience, and financial status. If a consultant meets the criteria set by the director, the director shall prequalify the consultant, noting any limitations as to the type or amount of the work the consultant may perform. When a consultant is prequalified, the consultant is entitled to receive requests for proposals, proposals, and other solicitations for work without any other screening or qualification process. The period of prequalification may not exceed three years. The qualifications of the consultant for a specific project must be determined according to the criteria in subsection 5 of section 54-44.7-03. The director shall publish a prequalification solicitation at least once each year and need not comply with the provision in subdivision c of subsection 2 of section 54-44.7-03 requiring the publication of an invitation for a specific project. The selection and contract negotiation must be performed according to subsections 6 and 7 of section 54-44.7-03.



## **CHAPTER 54-44.7**

### **ARCHITECT, ENGINEER, AND LAND SURVEYING SERVICES**

**54-44.7-01. Definition.** "Architect, engineer, and land surveying services" are those professional services associated with the practice of architecture, professional engineering, professional land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this state, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming, conceptual designs, plans and specifications, cost estimates, inspections, construction management, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services, except for professional services related to prefabricated steel for bridge purposes.

**54-44.7-02. Applicability - Policy.** Architect, engineer, and land surveying services must be procured as provided in this chapter. It is the policy of this state that all North Dakota state agencies shall negotiate contracts for services on the basis of demonstrated competence and qualification for the particular type of services required.

#### **54-44.7-03. Procurement procedures.**

1. Each using agency shall establish its own architect, engineer, and land surveying services selection committee hereinafter referred to as the agency selection committee, which must be composed of those individuals whom the agency head determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The head of the using agency or his qualified, responsible designee shall sit as a member of the agency selection committee for the purpose of coordinating and accounting for the committee's work.
2. The agency selection committee is responsible for all of the following:
  - a. Developing a description of the proposed project.
  - b. Enumerating all required professional services for that project.
  - c. Preparing a formal invitation to firms for submission of information. The invitation must include, but not be limited to, the project title, the general scope of work, a description of all professional services required for that project, and the submission deadline. The invitation or notice thereof must be published. Upon written request, the agency shall also mail copies of the invitation to any interested party. The manner in which this must be published, the content of the publication, and the frequency of the publication, must be established by regulation of the agency selection committee.
3. The date for submission of information from interested persons or firms in response to an invitation must be not less than twenty-one days after publication of the invitation. Interested architect, engineer, and land surveying persons or firms must be required to respond to the invitation with the submission of the information required in general services administration forms SF 254 and SF 255, architect-

engineer related services questionnaire for specific project, or such similar information as the agency selection committee may prescribe by rule.

4. Following receipt of information from all interested persons and firms, the agency selection committee shall hold interviews with at least three persons or firms who have responded to the committee's advertisement and who are deemed most qualified on the basis of information available prior to the interviews. If less than three persons or firms have responded to the advertisement, the committee shall readvertise or hold interviews with those who did respond. The agency selection committee's determination as to which will be interviewed must be in writing and must be based upon its review and evaluation of all submitted materials. The written report of the committee must specifically list the names of all persons and firms that responded to the advertisement and enumerate the reasons of the committee for selecting those to be interviewed. This written report must be available to the public upon written request. The purpose of the interviews must be to provide such further information as may be required by the agency selection committee to fully acquaint itself with the relative qualifications of the several interested persons or firms.
5. The agency selection committee shall evaluate each of the persons or firms interviewed on the basis of the following criteria:
  - a. Past performance.
  - b. The ability of professional personnel.
  - c. Willingness to meet time and budget requirements.
  - d. Location.
  - e. Recent, current, and projected workloads of the persons or firms.
  - f. Related experience on similar projects.
  - g. Recent and current work for the agency.

Based upon these evaluations, the agency selection committee shall select the three which, in its judgment, are most qualified, ranking the three in priority order. The agency selection committee's report ranking the interviewed persons or firms must be in writing and must include data substantiating its determinations. This data must be available to the public upon written request.

6. The agency selection committee shall submit its written report ranking the interviewed persons or firms to the governing body of the using agency for its evaluation and approval. When it is determined that the ranking report is final by the agency, written notification of the selection and order of preference must be immediately sent to all of those that responded to the agency selection committee's invitation to submit information.
7. The governing body of the using agency or its designee shall negotiate a contract for services with the most qualified person or firm, at a compensation which is fair and reasonable to the state, after notice of selection and ranking. Should the governing body of the using agency or its designee be unable to negotiate a satisfactory contract with this person or firm, negotiations must be formally terminated. Negotiations must commence in the same manner with the second and then the third most qualified until a satisfactory contract has been negotiated. If no agreement

is reached, three additional persons or firms in order of their competence and qualifications must be selected after consultation with the agency selection committee, and negotiations must be continued in the same manner until agreement is reached.

**54-44.7-04. Exception.**

1. All state agencies securing architect, engineer, or land surveying services for projects for which the fees are estimated not to exceed ten thousand dollars may employ the architects, engineers, and land surveyors by direct negotiation and selection, taking into account all of the following:
  2. The nature of the project.
  3. The proximity of the architect, engineer, or land surveying services to the project.
  4. The capability of the architect, engineer, or land surveyor to produce the required services within a reasonable time.
  5. Past performance.
  6. Ability to meet project budget requirements.

This procedure shall still follow state policy set forth above.

7. Fees paid pursuant to this section during the twelve-month period immediately preceding negotiation of the contract by any single state agency for professional services performed by any one architectural, engineering, or land surveying person or firm may not exceed twenty thousand dollars. All persons or firms seeking to render professional services pursuant to this section shall furnish the state agency with which the firm is negotiating a list of professional services, including the fees paid, performed for the state agency during the twelve months immediately preceding the contract being negotiated.

**54-44.7-05. Splitting projects or services contracts prohibited.** No using agency may separate service contracts or split or break projects for the purpose of circumventing the provisions of this chapter.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL 1125

Page 2, line 3, before the comma insert "or is a contract for services entered into under chapter 57-01"

Page 2, line 21, replace "The" with "Except for a contract for services entered into under chapter 57-01. the"

Renumber accordingly

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**TESTIMONY OF JEFF ENGLESON**  
Director, Investments

**IN OPPOSITION TO**  
**HOUSE BILL 1125**  
**Senate Government and Veterans Affairs Committee**

**March 2, 2001**

Section 2 of HB1125 contains language that requires the Office of Management and Budget (OMB) to develop and publish standards and guidelines for the procurement of contracts for services. This section also states that all state agencies must comply with these standards and guidelines, unless OMB grants an exemption, or unless the standards and guidelines are directly contrary to specific terms of a statute. The section also says that any standards and guidelines adopted would be administrative rules and must be adopted under chapter 28-32. Although we understand why the legislature would be interested in having the state develop standards and guidelines for the procurement of contracts for services, we feel that HB1125, as currently written, conflicts with the Board's fiduciary responsibilities under the State Constitution and current North Dakota law.

Article IX of the Constitution of North Dakota places responsibility for managing the state's permanent trust funds on the Board of University and School Lands. As a trustee, the Board has a fiduciary responsibility to manage trust assets for the best interests of the various beneficiaries. NDCC 15-01-02 gives the Land Board "full control" over the investments, land and other assets of the permanent trusts. In order to fulfill its responsibilities under the constitution and North Dakota law, the Land Board contracts for investment management services, and other services, that cannot be performed in-house as efficiently or effectively as by outside firms. As currently written, HB1125 takes the Board's authority to enter into these service contracts, and gives control of the contracting process to OMB.

Contracting for investment services is not the same as contracting for the purchase of goods. When purchasing investment services, many factors, both tangible and intangible, weigh into our decisions. More often than not, price is not the most important criteria. When searching for investment service, staff develop criteria that potential service providers must meet. Data is analyzed, RFPs are reviewed and meetings are held with only those companies that best meet the established criteria. The entire process is documented to ensure that a fair and impartial decision has been made.

At the present time, all service contracts entered into by the Land Board must be approved by a representative of the Attorney General's Office. Our attorney works with us to make sure we understand the language in the contracts and to make sure that trusts' interests are being protected. The process used by the Land Board not only protects the interests of the trust funds, it also gives us the flexibility we need to best manage the trust assets in an ever changing business world.

HB 1125

Testimony of Jeff Engleson

Senate Government and Veterans Affairs Committee

March 2, 2001

In the past, the Legislature has recognized the Land Board's fiduciary responsibilities and need for flexibility in managing the assets entrusted to it by exempting the Land Department from the administrative rules process. If the Land Board is required to follow administrative standards and guidelines over which it has no control, investment and other management decisions could be delayed, or prevented, potentially costing the permanent trusts millions in lost revenues.

As I stated earlier, we understand why the legislature would want to develop standards and guidelines that would help the state better manage the many services contracts entered into by various agencies. In fact, we would gladly work with OMB, and other agencies, to develop standards and guidelines that would help us better manage our service contracting process. However, we believe that requiring the Land Board to follow standards and guidelines that it has no control over, is not the answer. If guidelines are going to be developed they should be just that; guidelines, not requirements.

For the reasons outlined above, we respectfully request that you amend HB1125 to either:

- exempt the Board of University and School Lands from the provisions in this bill
- make the standards and guidelines voluntary, rather than requirements

Office of Management and Budget  
March 9, 2001

PROPOSED LEGISLATIVE INTENT TO ENGROSSED HOUSE BILL 1125

**LEGISLATIVE INTENT.** It is the intent of the fifty-seventh legislative assembly that the Office of Management and Budget develop standards and guidelines for the procurement of contracts for services, and if appropriate, submit a bill to the fifty-eighth legislative assembly regarding those standards and guidelines. Agencies are encouraged to follow the standards and guidelines once they are made available by the Office of Management and Budget.