

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1386

2001 HOUSE POLITICAL SUE DIVISIONS

HB 1386

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date 2-08-01

Tape Number	Side A	Side B	Meter #
1		xx	3460-end
2	xx		1--4575
Committee Clerk Signature <i>P. M. [Signature]</i>			

Minutes: Chair Froseth opened the hearing on HB1386 relating to public improvement contracts.

Rep. Frank Wald, Dist 37, Dickinson : prime sponsor of HB1386. Section 1 is a new section to 48.01-01 if the public improvement needs money coming from economic development funds or sales tax revenues. Section 2 deals with bid requirements and we are increasing the amount of single and multiple bids for general, electrical, and mechanical portion of the project from \$100,000 to \$150,000. On page 2, we have some change in language there. In use of construction managers, it reads: if a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. A construction manager awarded a contract for construction of a public improvement shall bond the entire cost of the project through a single bond supporting all bid packages and the construction manager's services. In my mind, this is the most important part of the bill. (3719-0000) Rep. Wald gave an example of why this language is important.

Rep. N. Johnson : (3820) In the third part of the amendment, how does that work with the construction manager? Does it increase whatever they will charge to cover that large of a bond?

Rep. Wald : He has that all figured out when he submits his bid.

Rep. Delmore : I have received lots of e-mails on this bill, and they are all against it? Can you tell me who is responsible for the drafting of this bill and which organizations are in support?

Rep. Wald : Myself, Rep. Carlson, Rep. Svedjan, and Sen. Tollefson. I have had conversations with the Association of General Contractors, general and subcontractors at home, and have mailed a copy of the bill to all contractors in Dickinson in the Yellow pages. I did not receive any response.

Rep. Delmore : I problem that was mentioned most, was the multiple bid. The language, to allow but not require, was the problem.

Rep. Herbel : In section 3, does that mean that the subcontractor doesn't need to bond?

Rep. Wald : No. If A is the plumber, and B is the mechanical, and C is the electrical, and we all write a \$100,000 bid for a \$5 M project; the general contractor or construction manager furnishes the bond for the entire project. A, B, and C do not have to bond our work.

Rep. Ekstrom : (4170) I don't understand lines 16 and 17, page 1. This \$250,000 or less is what I need explained. Do you need multiple bids or not?

Rep. Wald : Yes, you need multiple bids.

Vice-Chair Severson : On page 1, line 8, it talks about sales tax revenue. Would this language put the economic development funds in my community in jeopardy?

Rep. Wald : gave an example (4330-4440) Someone else here can address that issue.



Leah K. Coghlan, Association of Contractors of ND, Bismarck : (4550) testified on behalf of Curt Peterson in support of HB1386. **(SEE ATTACHED TESTIMONY)** Passed out copy of amendment. We want to close the loophole for construction managers.

Vice-Chair Severson : Has there been circumstances within the state where this in fact has happened?

Leah : I don't know. I will have to ask Curt Peterson.

Rep. Ekstrom : I want to go back to the multiple bid situation. The amendment that you handed us, takes the whole situation from a \$250,000 project to a \$1 M project. We are now dealing with a larger project and not requiring multiple bids. It's usually smaller projects that you have trouble getting multiple bids, not larger projects. What is the rationale.

Leah : That's correct. It went to \$1 M to give the governmental body more control and flexibility with what is in the bid.

Kevin Mattson, Mattson Construction Co., Minot; Vice-Pres. ABC Builders Assoc. : (5645) I support this bill. We support the amendment. Right now the law says anything over \$50,000 has to be multiple bids. (Gave an example from Grand Forks)

Glenn Moen, Baukol Builders-Vice-Pres., Grand Forks, : (6048) here to support this bill. We agree with the greater protection to the governmental body. **(end tape 1, begin tape 2)** If you allow the public entities the flexibility, things will run smoother.

Jerry Horner, ND Dept. of Transportation, Maintenance Engineer, : (140) here to support HB1386. We particularly like section 2. **(SEE ATTACHED TESTIMONY)**

Rep. Delmore : (390) Does current law allow the contractor to now permit a single combined bid?

Jerry : The way we have to operate in current law is for buildings over \$100,000, we have to take bids for the electrical, mechanical and general and submit those available to bidding public.

Rep. Delmore : Won't this have a negative effect on those people?

Jerry : It will allow for smaller contractors more of a chance. We don't feel that this is limiting competition. Now, we have very few contractors that are bidding are bids. I think we would receive more bids if this is passed.

Rep. Ekstrom : Do you see any reason to raise this to \$1 M as is in one of the amendments?

Jerry : I think it's O.K. \$250,000 is too low for us.

Todd D. Kranda, ND Consultant Engineers Council : Just here to tell you we support HB1386. We like section 2. We weren't aware of the amendment to \$1 M.

Ken Cudy, C & C Plumbing/Heating, Minot : I come to support the first part of this bill. Feel this is a more fair and open playing field when bidding on projects.

Rep. Eliot Glassheim, Dist 18, Grand Forks : (900) I have been asked to read testimony from Dave McFarland against HB1386. (SEE ATTACHED) Section 1 is not a problem to me or Mr. McFarland. We do oppose the raising of the limit to \$ 1 M. The bill is changing the language to say "must" accept the single prime bid. It doesn't say whether the single prime bid has to be the lowest and best. This language is very important for the local government to have. I'm not clear about the fourth section.. You have kind of a David and Goliath situation. What do you want. The bill asks you to love Goliath, and current law protects David. The construction managers who can afford larger contracts and bonds, would be favored over smaller construction firms.

Rep. Ekstrom : Have you ever attended a bid opening and seen what goes on?

Rep. Glassheim : No. I would guess in 80-90% of the cases, the lowest bid is the best and is O.K. But the other 5-10%, the political subdivision needs to have some leeway to reject somebody who's buying the bid if they feel the work is not good.

Rep. Lonny Winrich, Dist. 18 : I am here in opposition to HB1386 and have a letter on behalf of Leon Comeau. (SEE ATTACHED)

Rep. Ekstrom : I have heard that it is very difficult to get multiple bids. Any comment?

Rep. Winrich : I have little experience in this area. I have not been involved with construction projects, so I can't speak to that issue.

Tom Tupa, NECA/NDPTMC : here in opposition to HB1386. With me are a number of contractors who are here in opposition to this bill. A number of letters were delivered to you. We really have a problem with section 2. Sections 1 and 3 are o.k.

Howard Wrigley, Pres. Wrigley Mechanical, Inc., Fargo : strongly opposed to HB1386. (SEE BROWN BOOKLET) Medium and small companies will not have the opportunity to grow. I think the amendments make it worse. We are mixing liability and bonding on page 4.

Rep. Ekstrom : (2980) If you drop down in the book "Note to bidders", is that present law?

Howard : Yes. I don't see why they want to fix anything, because it is not broken. This note covers the bases.

Tom Ke'sch, Economic Development Assoc. of ND : (3191) We are opposed to section 1. We need good paying jobs and don't need road blocks. My amendment would delete section 1. We don't have a position on sections 2 and 3.

Ralph Heintz, Edling Electric, Inc. Bismarek : (3500) opposed to this bill. (SEE ATTACHED)

Leon Comeau, NECA, Grand Forks : opposed to HB1386. (SEE ATTACHED)

Jim Fristad, Lunseth Plumbing/Heating, Grand Forks : opposed to HB1386 (SEE ATTACHED)

Rep. Ekstrom : (4199) On any of the jobs you have been on, have you noticed a lack of competition?

Jim Fristad : Not a great deal. Not on most projects.

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House Political Subdivisions Committee  
Bill/Resolution Number HB1386  
Hearing Date 2-08-01

Bill Wocken, City of Bismarck Admin. : (4250) here in opposition to HB1386 only in section 1.

We endorse the amendment brought by Tom Kelsch.

Jay Cofell, Cofell's Plumbing, Bismarck : opposed to section 2 of this bill. I have been in this business for close to 20 years. This law has been in place to 15 years and has been good for ND. This change will impact my industry negatively and I urge a "No" vote.

Chair Froese : Any more testimony. Hearing none, we are closed.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386 b

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date 2-15-01

Tape Number 1	Side A	Side B 88	Meter # 3500--4000
Committee Clerk Signature <i>Pam Allen</i>			

Minutes: Chair Froseth : Let's look at HB1386. This bill would include economic development sales tax revenues to be included to section 1. Section 2 raises the bidding requirements for multiply prime bids from \$100,000 to \$250,000. Section 3, is the body of it where one single bond by the general contractor is necessary. There seems to be a lot of concern with section 1 and section 2 in testimony. In opposition, the smaller contractors think they would be excluded from a lot of the bidding process. I have amendments 10432.0401 for you to look at. Section 3 is the only one left in the bill.

Rep. Maragos : I move a **DO PASS ON AMENDMENTS**.

Rep. N. Johnson : I second.

**VOICE VOTE: ALL YES.**

Rep. Delmore : I move a **DO PASS AS AMENDED**.

Rep. N. Johnson : I second.

**VOTE: 12 YES and 0 NO with 3 absent. PASSED. Rep. Disrud will carry the bill.**

## FISCAL NOTE

Requested by Legislative Council

03/30/2001

Bill/Resolution No.:

Amendment to:        Engrossed  
                             HB 1386

**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						
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.*

Possible costs for advertising. Although those costs cannot be determined, we believe they would be minimal.

**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.*

Name:	Pam Sharp	Agency:	OMB
Phone Number:	328-4606	Date Prepared:	04/02/2001

## FISCAL NOTE

Requested by Legislative Council  
01/23/2001

Bill/Resolution No.: HB 1386

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						
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.*

Fiscal impact cannot be determined.

**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.*

Name:	Curt Zimmerman	Agency:	OMB, Facility Management
Phone Number:	328-4002	Date Prepared:	01/24/2001

**Proposed Amendments to HD #1386**

**Page 1, Delete Section 1, Lines 5-12.**

**Page 1, Line 13, after Section, delete 2 and insert in lieu thereof 1.**

**Page 2, Line 1, after Section, delete 3 and insert in lieu thereof 2.**

*Kelsh*



10432.0401  
Title.0500

Prepared by the Legislative Council staff for  
Representative Froseth  
February 9, 2001

V/R  
2/15/01

**HOUSE AMENDMENTS to HB1386 HOUSE POL. SUBS. 2-16-01**  
Page 1, line 1, remove "subsection 6 of section 48-01.1-01 and sections"

Page 1, line 2, replace "48-01.1-06 and" with "section" and replace "public improvement" with  
"construction managers."

Page 1, remove line 3

Page 1, remove lines 5 through 24

Renumber accordingly

Date: 2-15-01  
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1386

House POLITICAL SUBDIVISIONS Committee

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

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

Action Taken DO PASS AS Amended 10432.0401 .0500

Motion Made By Rep. Delmore Seconded By Rep. N. Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman Glen Froseth	✓		Rep. Wayne W. Tieman	✓	
Vice-Chair Dale C. Severson	✓				
Rep. Lois Delmore	✓				
Rep. Rachael Disrud	✓				
Rep. Bruce Eckre	✓				
Rep. Mary Ekstrom	✓				
Rep. April Fairfield	AB				
Rep. Michael Grosz	✓				
Rep. Jane Gunter	AB				
Rep. Gil Herbel	✓				
Rep. Nancy Johnson	✓				
Rep. William E. Kretschmar	✓				
Rep. Carol A. Niemeier	AB				
Rep. Andrew G. Maragos	✓				

Total (Yes) 12 No 0

Absent 3 AB

Floor Assignment Rep. Disrud

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

REPORT OF STANDING COMMITTEE (410)  
February 16, 2001 8:38 a.m.

Module No: HR-29-3615  
Carrier: Disrud  
Insert LC: 10432.0401 Title: .0500

**REPORT OF STANDING COMMITTEE**

**HB 1386: Political Subdivisions Committee (Rep. Froseth, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1386 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "subsection 6 of section 48-01.1-01 and sections"

Page 1, line 2, replace "48-01.1-06 and" with "section" and replace "public improvement" with "construction managers."

Page 1, remove line 3

Page 1, remove lines 5 through 24

Renumber accordingly

2001 SENATE POLITICAL SUBDIVISIONS

HB 1386

# 2001 SENATE STANDING COMMITTEE MINUTES

## BILL/RESOLUTION NO. HB1386

Senate Political Subdivisions Committee

☐ Conference Committee

Hearing Date March 8, 2001

Tape Number	Side A	Side B	Meter #
1	X		0.0-End
		X	0.0-12.7
	X		49.0-50.5
March 16, 2001 1		X	0.0-16.4
March 22, 2001 1	X		18.3-28.6
March 29, 2001 1	X		0.0- 25.8
Committee Clerk Signature <i>Mary Jo Weber</i>			

### Minutes:

The hearing was opened on HB1386 which relates to public improvement contracts. All the senators were present except for Senator Lyson and Senator Lee. Senator Lyson returned after presenting testimony at another hearing.

CURT PETERSON, represents the Associated General Contractors of North Dakota. We are here in support of HB1386. This legislation is geared to provide some security to public owners on construction projects. The advent of construction management in the construction industry is relatively new as another way of delivering projects. However, we found a bit of a flaw in the fact that the construction managers really have no basis in qualifications or don't have to be. The only requirement for a construction manager is to have a contractors license which is not that difficult to obtain. The legislation that we're looking at here deals with the financial responsibility, that meaning that be the construction manager would need to have a bond in order

to work on a project. There will be members of our association, our building division who are very familiar with the process. There maybe an amendment for this bill. See written attached testimony, a letter from Peterson Construction. SENATOR MATHERN: Kurt, the way it is handled not, does each entity have their own bond? I am reading through this and wondering the real purpose in maybe the other individuals will help me understand that. But the way things are handled right now, does each contractor have their own bond? KURT PETERSON: That is correct. The obligation of the construction manager if there is one on a project is that he has to have a bond equivalent to whatever fee he is being paid. Which isn't, I don't what they get paid exactly but it is certainly not close to covering the cost of the building. SENATOR COOK: Mr. Peterson, if you have a general contractor, what's his bond requirement? KURT PETERSON: Generally, the general contractor will bond for at least a portion of the work that he is going to do, and in some cases, he'll bond the entire project in total. SENATOR WATNE: I see that this bill has been highly amended in the House, quite a bit was taken out. Can you tell me the reason, the objections to this portion with the amounts specified? KURT PETERSON: The first part of the bill as I recall dealt with the public improvements or improvements that were funded by economic development funds. That portion of the bill said that if there is a project that is funded by economic development funds than your ought to be viewed as a public entity or a public building. There was certainly some opposition to that and it was taken out of the bill. The second part of the bill was on multiple prime contracts. That ran into some difficulty also. So that was amended out. What you have before you is what's left of HB1386 which is probably the most important part of the bill, quite frankly or what the former bill was. We saved the good stuff. REP. AL CARLSON: District 41, Sponsor. Senator Watne question was well taken because I hardly recognize the bill after it came to the floor from the original intent of the bill. But I will

agree with Mr. Peterson that I think, both most important part to address is the last section of the bill. That is where it deals with construction managers and who is bonding and who is covering the cost of these projects. Rep. Wald will give some amendments that he is going to present to the bill that gives some options for that so construction manager would have the option to be able to come up with a bond and bond part of the project. And he is correct in saying that when a general contractor on the bigger projects, and this affects bigger projects, it doesn't affect the small ones, and as a small general contractor I do not bid jobs for the most part that require bonding. I do not a lot of public sector work, its mostly private sector work and then bonds are not required. But when you get into the public sector projects where bonds are required they are required for one reason to protect the consumer and the person who is having the project built for them.( Ex. Given. Meter #6.0) The contractor has bond for his work, where is the umbrella protection for the person who is building the project. That is what this is attempting to do. Right now in most cases, a construction manager is not bonding. He is relying on the bonds of the subcontractors below him. What we've trying to do with this bill is to make sure that as these projects are built that there is someone, number one not only in charge of the project, but that we are covering the costs related to the entire project as its being built. Mostly they are going to be of course public improvement projects. I think it is a worthy thing to look at. SENATOR COOK: Representative Carlson, doesn't the political subdivisions have or shouldn't they have the intelligence or the foresight or whatever, or the opportunity to require that project be completely protected right now without this? REPRESENTATIVE CARLSON: They should, but do they. I am not so sure in all cases. I think I can give you an example (Meter #7.5) SENATOR COOK: Represenatative Carlson, do they do it to save money then? REPRESENTATIVE CARLSON: Part of the problem is that it is the general contractor is usually has less problems getting the

bond because he deals with many large projects and the bonds are based upon a percentage and there based upon his ability to cover that bond if there were a problem. So he has more net worth in equipment in all the things that go with his business. Whereas, a construction manager in many cases doesn't have that. This general contractor in many cases can get that but he may not get the job and he is offered to be just the framing side or structural side of this project. But he is only going to have a bond there for to cover that section. Because he doesn't in many cases have the ability to secure the bond, I think that when you use that methodology to build a building your leaving yourself a gap. SENATOR COOK: Is safe to say then, that a general contractor or a construction manager would come along and say I can do this job, I can do it for you for less money, but I am not going to be able to have a bond for the whole thing and then the owner takes that risk and makes that decision? REPRESENTATIVE CARLSON: In many cases they could or that topic is not even discussed or it is discussed and we will group together the bonds of the other individuals. I don't want my claim to be taken against me in excess of anything more than the part of the job that I did. Everyone else in there and insurance companies are also going to make sure of that. There are not going to pay for anymore than they covered. So is there a gap in many cases, I believe there is. And is the sales pitch obviously is that I can provide all these services and save you money which they may or not do. I am here to argue is the whole project covered on a public project. SENATOR WATNE: There is great concern about the architect portion of this bill and how they are affected. And how this bill, will severely hurt small contractors. How do you manage to settle this objection? REPRESENTATIVE CARLSON: I don't think it hurts small contractors because in most cases I couldn't bid on those jobs anyway. Because I do not have the net worth and the ability to secure the bonds anyway. We're talking large companies here. They have the ability to secure that bond for the whole project. As far as



architects those involved in construction management. Yes it will affect because its going to require them to do two things. They have to be a licensed contractor number one, and number two they have to have the ability to secure the bond. It will affect them in that area. That is why I think you have to look at the common good of the project. If I were the general contractor and I had the ability to secure the bond for the entire project, but I was not picked and someone who was picked and does not have the ability to secure the bond for the entire project, then the people, the responsibility falls somewhere. This law just clarifies it, but in many cases the county or the city or whoever happens to be should probably be aware of the fact that there is a gap in the coverage on covering that project. SENATOR MATHERN: Representative Carlson, I am gathering from all this, that I am hearing that the bonds is going to be fairly expensive and that's going to rule out then some of the smaller people. Cause it would have to be the large contractors that could afford the bonds? REPRESENTATIVE CARLSON: In most cases its based on upon the ability to pay plus the net worth of the company. ( Ex given Meter#10.5- 10.7) In most cases those of us at that size would not take on a project the size of a brand new library, because we do not have the crew or capabilities to build those. So it is a select group. But we're talking bigger projects here in most cases. Small projects I could get the bond for, but I don't bid public projects. SENATOR POLOVITZ: Did I hear you say that architects under this bill would have to or would have to be a licensed contractor? REPRESENTATIVE CARLSON: That's what it says. Construction manager must be a licensed contractor. SENATOR COOK: An architect does not unless the architect wants to be the construction manager. REPRESENTATIVE CARLSON: Thanks for clarifying that. It only deals with the construction manager side. If he is going to do that, he must be able to have a contractors license. KEVIN MATTSON: I would to clarify what a bond really is. Payment in a performance bond is nothing more than an insurance company

guaranteeing that, through the owner, that the project will be completed. To a contractor it is nothing more than your giving the right of the insurance companies to spend your last dollar to complete the project if you fail anything. It is a guarantee that a project will be completed and all the bills will be paid. Getting a bond comes in the bonding company wants to make sure that they can attached someone's wallet before there wallet is used up. The bigger the wallet the bigger the bond you can get. See written attached testimony. SENATOR COOK: You said the word performance bond, KEVIN MATTSO: Payments and performance bond. Its' actually two bonds. A payment and a performance bond. SENATOR COOK: That's where I am getting to. There are different types of bonds and yet this bill does not reference performance or payment bond and I do believe that there is different bonds out there that all this says is the bond. And we can come to that, but..KEVIN MATTSO: And maybe it does, I don't know I'm not a professional quoter. I've come here to testify in favor of HB1386. I am the Vice-president of the North Dakota AGC Builders Chapter and the President of Mattson Construction Company. See written attached testimony. (Meter#13.6-18.1) SENATOR COOK: Did I hear you say that the Century Code somewhere, there is a separation between an architect and a general contractor? KEVIN MATTSO: oh yes. And again I am not an expert on the Century Code, but when we reviewed the construction management law, it was very few restrictions on it. Its is sort of ignored. Under the previous bills we have a criteria for, this is what was amended out in the House, multiple bidding, if the job is over \$100,00 you have to have at least three separate primes. If it goes conventional design bid built. If it goes construction and management the owner only has to talk to the construction manager. If the owner wants a single source contact. This construction management law they can pick one person who isn't an architect and wouldn't have a problem meeting the. We're were trying to give the owner the option of having a single

course contractor. But right now if they want it, they go through construction management. They only have to talk to the construction manager. REPRESENTATIVE WALD: District 37, and is a sponsor of the bill. We have an amendment that we would like to pass out, through the engrossed bill. We say there that the architect for public improvements or a member of the architects firm may not serve as construction manager or have a preexisting business relationship with the construction manager. It is my opinion Senator Cook, that there is a gross conflict of interest in being the architect and also the contractor doing the project. That is the reason for the amendment. SENATOR FLAKOLL: In the proposed amendments the relationship that they can't have a preexisting business relationship between the construction manager and the architect. Can you explain what that means? A for instance? REPRESENTATIVE WALD: Your question is Senator Flakoll, is what this preexisting business relationship mean? SENATOR FLAKOLL: Yes. REPRESENTATIVE WALD: I think exactly what it says. I don't think that the construction manager should have someone who may have been employed by the architectural firm. What we're trying to avoid here is wearing two hats. That of an architect and a construction manager. Senator, you had a question earlier about bonds? I think in the context of this bill we're talking about a performance bond. The normal procedure is that you get a bid bond and if your bonding can authorize depending on your financial strength. And then after they issue the bid bond, if your the successful bidder, they issue you a performance bond which means that the contractor doesn't perform as per their bid, the bonding company steps in and finishes the project. SENATOR COOK: Representative Wald, should it not say performance bond then? REPRESENTATIVE WALD: Yes, that would be a performance bond. SENATOR COOK: We should've probably put performance bond in the bill. REPRESENTATIVE WALD: I probably have to research the Century Code, but I think its a given that would be a performance bond.

SENATOR COOK: Can a general contractor hire his own architect, or have a in house architect?

REPRESENTATIVE WALD: I would hope not. SENATOR WATNE: It goes along with Senator Flakoll's question on the preexisting business relationship. If this team had done a very successful building and their going to do another one, this crew is very small, isn't that a preexisting business relationship, or do you mean a personal one in the same firm type of thing?

REPRESENTATIVE WALD: I think I would defer to Curt Peterson with the Association of General Contractors. CURT PETERSON: The intent is anything that would show up on a financial statement. In order to qualify for a bond or anything they will submit a financial statement to a bonding company and if the construction management firm is part of their assets or ownership is someone that is a principal of an architectural firm that would trigger that thing. It doesn't mean that an architectural firm cannot have a CM, it just means that they can't CM on jobs that the architectural firm is the design professional. JOHN EICKHOF: President of Construction Engineers Limited. See written attached testimony. It will guarantee that job will be completed, offering bonding covering the full value of the project. KIM CADY: C&C Plumbing and Heating in Minot. Spoke in favor of HB1386. See attached written testimony. GLENN MOEN: Vice Chairman of Baukol Builders from Grand Forks. See attached written testimony. Spoke in support of HB1386. SENATOR FLAKOLL: I see that you have a limit of \$2.5 million dollars for the bond now. Would you support that with the realization that if the Alerus roof fell in you would probably be in great chance of an excess of that amount? GLENN MOEN: I feel that amount is not nearly adequate and what happens is that you have \$2.5 million that covers that covers contractors A&B and half of C. Will contractor C, only write half a bond and the other contractors pick it up, no \$2.5 million dollars in my opinion is not nearly optimum. SENATOR COOK: Is the bond the only protection the owner has or if you have a contract, do

you carry liability insurance to protect you in some cases like that? GLENN MOFFN: We have company liability insurance typically on a project. You have a builders risk insurance and I am not a lawyer or an insurance expert. There has been some discussion about the types of bonds. When I issue a bond I usually performance and payment bonds, there are two bonds but every project requires full bonds. Payment bonds guarantees the owner that I paid for the everything, and if I go bankrupt they don't have to pay for it twice. A performance bond guarantees that I perform. PAT SEAWORTH: North Dakota University System. I speak neutral on this bill. The university officials have some concerns. A concern that perhaps not everyone is in agreement on exactly what this bill would do. We want to make sure that everyone understands that or is in agreement. UND is the only institution in the university system that has used the construction managers to any great extent. They started doing that a number of years ago when someone in their facility management dept. retired and they didn't replace person as a cost saving measure. They then start using construction managers and used as a large extent during the flood recovery efforts and they have continued to use construction managers. However, we don't use UND, and other government entities true construction management techniques. True construction management would mean the owner hires a construction manager and the CM then hires or then contracts with the contractors to do the project. We can't do that in this state because state law mandates the design bid, bill process for public improvements. Public entities are required to bid all projects in excess of \$100,000 so for those projects that design bid build concept is mandated and we really can't use tool for the purest form of construction managers. At UND they use the construction manager who performs largely construction administrative services, but the functions call the construction manager the contract with the person as a construction manager but that construction manager does not hire the contractors. The bids are received, UND awards

the bids just like any other projects. The bonding, payment performance bond. It is important that we not confuse performance bond issues with liability issues. Examples cited (Meter#40.9-41.2)

A performance bond does is it guarantees that contractor is going to do the work as required in the contract and pay all the bills. That is it. Liability insurance policy is required to cover the costs. We disagree that the result of the bill will lower costs. Under current law which you generally have because of the requirements for multiple prime bids, more often than not, for larger projects you have three prime contractors. You have the general, mechanical, electrical contract. This bill does not eliminate requirements for each contractor to furnish bonds.

SENATOR WATNE: Since you seem to know quite a bit about the law, when was the law put in that a construction manager could be used? That is pretty recent isn't it? PAT SEAWORTH: I

think it was about four years ago there was a requirement added the law was amended to require that a construction manager be a licensed contractor. SENATOR COOK: That is what opened up

the door then? PAT SEAWORTH: Before that, there was no such requirement, so that has imposed that additional requirement on use of construction managers. LONNIE LAFFEN:

Registered Architect in the state of North Dakota. I am a partner with Johnson Laffen Architect in Grand Forks. I am also a partner with Melby Construction Services in Grand Forks which is a General Contractor, both North Dakota Contractors license and we do construction management, started in 1992. See written attached testimony. SENATOR FLAKOLL: The proposed

amendments would they, in tying the proposed amendments to some of the things I believe that North Dakota State University does in terms of some collaborative work by their Department of Architecture and some of their building projects within campus, would that restrict some of their ability to do some of those activities? LONNIE LAFFEN: Yes, an example was given. (Meter

2.1- 3.5) BONNIE STAIGER, opposition of this bill. I am the Executive Director and represent

the American Institute of Architects, North Dakota chapter. We are very much opposed to this bill and would like to go on record as such. Basically we just want you to give this bill a Do Not Pass because it is restrictive, it is punitive, it is a classic of them versus us issue and ought not to be here in this legislature at all. Construction management is a deliberate system that is growing, it is a trend that is growing around the country. It is slower in coming to North Dakota as is typical in a lot of arenas. But it is a legitimate delivery system and by eliminating architects and other contractors from this process is blatantly restraining trade. We ask you give this bill a Do Not Pass recommendation. BILL WOCKEN: City Administrator for the City of Bismarek. I am appearing in opposition of Engrossed HB1386. See written attached testimony. I urge a Do Not Pass on this bill in its present form. SENATOR WATNE: You say that the political subdivision would be paying for both bonds, because it is a part of the overhead. Can you give me a general idea of what the cost of these bonds are? BILL WOCKEN: No, I am not able to tell you that. It is a general practice of a insurance, it can be issued by many of the insurance companies who need to deal with the bonding. A lot of it depends on the cost of the project, I think several of the previous testifiers talked about the cost of the first portion of the bonding, hirer than the instrumental bonding levels and that very well may be true. That is my understanding, but I can't speak to that from personal experience. TODD KRANDA: Appear on behalf of the North Dakota Consulting Engineers Council just to sign in opposition to testimony previously given. It is our concern as well and we express some concern with the position stated by Mr. Seaworth and the architects as well.

Hearing Closed on HB1386.

**March 16, 2001 Tape 1, Side A, Meter # 49.0-50.5; Side B Meter # 0.0-16.4**

Senator Cook asked the committee for discussion on HB1386.

Curt Peterson, Associated General Contractors of North Dakota came in and explained the amendments to the committee. In the first little part, use of construction manager, in discussion with the President of AIA, they have agreed with that language and its says intentionally in regards to the bond portion of this bill, that if a construction manager actually holds contract with the owner, then he will be obligated to bond that portion of the project, that could be mechanical, general contractor, lightning, or any number of things. If not, then he would not have to post a bond which is fine with us. So I think we've come to agreement with the opposition in terms of the bonding issue for construction managers. SENATOR COOK: If we were to look at 48:02-02, the definition for construction managers, if we look at that definition is there any way possible that they could hold a contract? CURT PETERSON: I think there is. Within a project, I am not saying they would have a \$10 million dollar building period, all encompassing, but there may be contracts for other part of the construction portion of the building. But if they do have a contract for a component of the building, as opposed as to just providing a service then I think it is appropriate, that he bond that and we don't know for sure whether that can happen, will happen, but there is that possibility and it gives them a little bit more latitude perhaps than they have right now. The language that follows in terms of construction management services is patterned after existing law in terms of the criteria by which an architect, land survey, engineer, and if a construction manager would be chosen. That criteria for the a fore mentioned has been in place for a long time and the agency who is ever contemplating the project, go through this drill, with an architect, in terms of an interview, there is a proposal, and it puts some structure to the entity



of a construction manager. Heretofore it has been quite simply an architect that said that he wants a specific person here to be the construction manager. They don't if that person is qualified to do the project and the only restriction he had up to this point, is that he's had a contractors license. Well, as I mentioned to Chairman Cook, we could've gone to Mr. Jaegers' office and probably had a contractors license by noon, so it is not exactly a difficult thing to do. It is not costly either. But we think the criteria that we've adopted from existing law might be in the best interest of the public entity because at this point I am not so sure they really know what they are getting, here at least they'll be some review of qualifications and experience and a track of history of what they may have done. I think it formalizes the process, a lot more of what it is now. It leads some formality to that process and they do at least need to make a proposal and they do need to go through an interview with the deciding body at whatever public entity they might be dealing with. SENATOR COOK: These last part of the amendments, exceptions, that is part of the same kind of language that's dealing with. CURT PETERSON: Yes. SENATOR COOK: And then splitting projects or services, contracts per use do not separate service contracts..oh okay I understand that. Where is there any requirement in here that they have liability insurance to cover the project? CURT PETERSON: No. Other than, no I don't believe so. SENATOR POLOVITZ: Example given on the building of Alerus in Grand Forks, (Meter#8.3- 10.7) Now in your bill are you making it more difficult for that type of activity to happen? CURT PETERSON: Not, at all. I don't recall who the architect was on the Alerus..SENATOR POLOVITZ: We even combined architects when it was shown...CURT PETERSON: Both of the architects would have gone through an interview with whatever board was in charge of the Alerus. SENATOR POLOVITZ: That would be the city council. CURT PETERSON: The construction manager in that case was basically hired, now he may have been interviewed. SENATOR POLOVITZ: He was. CURT

PETERSON: On a project that large, I guess that certainly made sense. ( Response Meter# 11.3-11.6) What this addendum would do is exactly what was done in Grand Forks in terms of the construction manager. If you are going to do that with an architect, which I think is appropriate and if you are going to have a construction manager, why wouldn't a board want to know what his competencies are? Why would they just hire someone off the street. I think it makes sense that entity, because it is becoming popular, its construction management wasn't heard of in this state until maybe five years ago or something. So it is emerging process in the construction industry.

SENATOR FLAKOLL: I am trying to develop a relationship, cause this has to do with like the bidding process and so on and so forth and that would be. In the case of an architecture who is selected and then there is a design on the bid letting, would we be making them jump throw some hoops we wouldn't necessarily do if we had a general contractor do that?

CURT PETERSON: I guess that would be up to the governing board, and the decision would have to be made by the governing board whether or not they deem necessary to have a construction manager or if the contractor in that case proposes to them that they would like to have a construction manager, they would go through this process of being interviewed. SENATOR FLAKOLL: So, if a general contractor doesn't necessarily have to do these things? SENATOR COOK: He's got to have the lowest bid, Senator Flakoll. SENATOR FLAKOLL: Lowest and best bid, right.

CURT PETERSON: And probably, importantly, be able to bond. SENATOR COOK: Be able to bond. CURT PETERSON: A financial standing. SENATOR WATNE: The very first sentence here "construction manager awarded a contract for construction of public improvement shall bond those contracts held by the construction manager". I am not quite sure this works? He still would have to get a bond on the whole project, or just the one held by him? For instance, like what? CURT PETERSON: If the construction manager is going to do or provide something other

or in addition to services of to kind of coordinate the project in total, if he also said there is a sprinkler system that needs to be put into this building, I happen to know all about that, and I would like a contract on it. Now he would be responsible for the sprinkling system in the building and if its \$80,000 he would have to put up an \$80,0000 bond. SENATOR WATNE: Thank you. SENATOR LEE: In reading the past testimony here, I see that there were concerns that had been expressed by Mr. Wocken and would be in order to ask what his response from the city perspective would be on this hog house bill and these amendments? SENATOR COOK: Except I am sure Mr. Wocken hasn't even seen the amendments, huh. SENATOR LEE: Okay. SENATOR COOK: Looking at the bill as it came to us, the Engrossed bill, and listening to the problems that we heard identified that generated the efforts to create a piece of legislation to find a solution. Would we be making a major step or major improvement if we just made mandatory that they had to have liability insurance for anything that were the manager of? CURT PETERSON: I guess I am not sure. SENATOR COOK: Okay. CURT PETERSON: Bad answer, but off the top of my head I am not sure. SENATOR COOK: If your not sure, that is the only answer.

Committee discussion closed until next Thursday, 3/22/01.

**March 22, 2001 Tape 1, Side A, Meter # 18.3- 28.6**

Senator Cook had the committee convene to discuss this bill. No action was taken on the bill at this time. However, there was some discussion among the committee members concerning the amendments offered on this bill.

**March 29, 2001 Tape 1, Side A, Meter # 0.0-25.6**

Senator Cook asked the committee to come together to take final action on this bill if at all possible. All the senators were present and in attendance.

Senator Cook asked the respective parties for their input concerning the new amendments prepared by the Legislative Council staff for Senator Cook, numbered .0505. I am wondering if some gentlemen in the room, I think somebody is going to explain these amendments probably.

BILL WOCKEN, Administrator of the City of Bismarek. In looking at the amendments to Engrossed HB1386, the .0503 draft prepared by the Legislative Council for Senator Cook, Cities, Bismarek at least has a problem with this particular amendment if the cities are included. I would call your attention to these are unnumbered paragraphs, but I would call your attention to the applicability of the third paragraph down in the proposed amendment. On the second line of that amendment it says that every state agency that negotiates a contract for construction management, etc.,.

SENATOR COOK: Bill, what is your question. SENATOR FLAKOLL: Are you talking about the new amendments, we're talking about the old ones? SENATOR COOK: What ones are you talking about? .503? BILL WOCKEN: Oh, I am sorry. I didn't have a copy of .505 in front of me. He then bowed out for a moment to look at the amendments. I would prefer to testify on.

SENATOR COOK: Okay. CURT PETERSON: Representative of the Associated General Contractors of North Dakota. There have been kind of a flurry of amendments on this particular bill and obviously with that going on I think perhaps I am almost confused at what were doing here. But the intent, I hope of the amendments that you have will accomplish what we kind of started out to do to in the large part. That is, we had started out with the construction manager being required to bond the entire project. Obviously that didn't fly. We have now, in that particular part of the bill, gotten to requiring liability insurance and that is a part of the bill that we certainly can live with. On the balance, on the more lengthy amendments I think we've addressed the concern of making sure that the construction manager, if utilized, would have some qualifications and would go through a review with the governing body. That, for all of the long

statements in here and all of the different sections that came into play was basically have added the term " construction management" to the typical architect engineer and land surveyors. So we add in the "classification of" construction management with the intent that person would go through the same review by a governing board as the architect in terms of qualifications, experience, and certainly the negotiation of the dollars. That is a quick and dirty on what the amendments say, but that is our intent and the one thing that Mr. Wocken and I have just been talking about is whether or not these amendments address the other political subdivisions rather than just the state. We thought we had it all inclusive here, but I am not certain that, maybe Bill can address that. I think we probably left out the cities in terms of that hiring. I think with the cities not included, I don't see that as a huge problem, because city government is closer to the community, so to speak and probably would receive that kind of analysis anyway. With those amendments we would agree to them as they are stated. SENATOR POLOVITZ: Where are referring to as far as cities are concerned? CURT PETERSON: That is not included in here. That what my fault. SENATOR POLOVITZ: Oh, its not included in here, CURT PETERSON: Not in these amendments. SENATOR POLOVITZ: Where is this included in the old amendments that we had? CURT PETERSON: It would be, well what we would do, would come from Section 48:02-13, that deals with the employment of architects, engineers and construction managers. SENATOR WATNE: This was the other amendment was under Section 48 which dealt with all the public buildings, its now under Section 54 which deals with qualifications. Part of this says and construction management as defined by the laws of this state. Is construction management defined in 54? CURT PETERSON: Um. SENATOR WATNE: Cause you never heard of it even five years ago. CURT PETERSON: No. SENATOR WATNE: It's not found anywhere in the code is it? CURT PETERSON: And that has been part of our problem in dealing with this

because we don't. If I was going to draw a picture of a construction manager I don't know how to do it. BILL WOCKEN: Mr. Peterson and I have discussed the amendments as they have appeared in your draft 0505. The last couple of days the amendments as you had them in .0505 do as Mr. Peterson, have applicability to state agencies. I would call your attention to the language about the middle of the page 54-44.7.02, applicability, the second sentence on the third line it says "it is the policy of this state that all North Dakota state agencies shall negotiate contract for services based on demonstrate competence qualifications for the particular type of services required. For the applicability section for 54-44.7 appears to be set by that particular section. So I would interpret and my legal counsel who I visited with yesterday on this issue also would interpret that this respects all state agencies. If you were to draw political subdivisions into the equation, political subdivisions select architects and engineers on the basis of Century Code, Chapter 48:02:13. Bill also had a copy of that section. It is a very short paragraph. It simply says that the "governing body which would encompass local jurisdictions shall employ the architect or engineer furnishing the plans as provided in this section or some other qualified persons provide construction administration and construction observation services for which the plans or specifications are prepared as provided by section 48:01.104. So while state agencies are apparently selected under 54:44.7, cities, counties and townships use 48:02.13. Those are the only references that architects that I could at least in the Century code. The amendments you have in .0505 as Mr. Peterson testified do not talk about local jurisdictions. That is something that you could add if you wish and I would suggest you add it under 48:02:13. If you choose not to, that is fine too. From my own perspective, as a city administrator, I have not hired a construction manager for a project yet because I have not been convinced that we have the need for a construction manager. I have had very competent architects whom we've appointed as

general contractors, those contractors who appointed a general contractors, their responsibility includes the coordination of the work. If there is a problem between the general contractor and various other contractors, it is the general contractors responsibility to pull that together and make it happen. Presumably there is some coordination money in their bid that covers their services in that regard. (Example given. Meter # 8.7-9.4) If the city is to go in and hire a construction manager, my recommendation, and I believe my boards requirement would be to hire on the basis of qualifications. We would want to have someone who has demonstrated competence and ability to manage that contract. We do that with our architects, engineers. We select very much in the way that the 54:44:07 suggests, which follows federal law for building professionals, that you take the most qualified person, select them on the basis of qualifications, pull them in and negotiate a contract with them. If you cannot negotiate a contract with the most qualified your number one choice, then you terminate the negotiation and that person is now off the list, you go to number and try to negotiate a contract with them. Its' a little bit different than "bidding", but in requests for proposal that is the accomplished way of providing those professional services. That is the process we would use for hiring a construction manager. That would my process at least in Bismarck, although I cannot speak for all cities, as it is not in the Century Code., but I feel comfortable that local government would be hard pressed to go out here and just select someone off the street and tell them they have a job without going through some competency based selection. That is the intention of Mr. Peterson's bill and I certainly don't have any problem with that intention. I would not however like to have cities bound by the requirements of 54:44.7 as there are quite a few things in that section that would be honourous if not impossible for local government to honor. So I would like you to keep that separate. If you would like to add it to the bill, I can propose some amendments to you' under 48:02.13. However,

I don't know they would be necessary as I think local government would be hard pressed not to follow some sort of competency based selection. SENATOR POLOVITZ: In the new amendments, .0505, applicability policy, architect I understand, engineer I'm not quite understood what the definition would be just because there are so many different types of engineers. BILL WOCKEN: My understanding of the word architect and engineer would be those professionals as defined in the Century Code. There are certification processes in North Dakota for architects and engineers. I am unsure if there is a certification process for construction managers. But land surveyors are also included and I know they do have a certification process. So my understanding of that section, and I could be wrong on this, this would meet any professional who is certified to act as a professional in that discipline in North Dakota. With engineers there is a two step process. I believe there is FE examination and then there is a second examination that brings a engineer into the process which they can call themselves a registered professional engineer within ND. So I believe we would be talking about those who are practiced and licensed to operate in those crafts. SENATOR POLOVITZ: Is the code, state any differences between engineers, that is what I am trying to get? BILL WOCKEN: The engineering examination do require a wide range of the disciplines. Our daughter is a chemical engineer and as a chemical engineer she has to in the process of her professional certification answer questions relative to mechanical engineering, electrical engineering, as well as civil engineering that appear in the certification examinations. Typically a owners' representative or architect will only hire the engineer with these particular vested discipline that they are interested in. A structural engineer should do structural work rather than having a mechanical engineer do structural work. SENATOR POLOVITZ: But in reality, by this definition you can go to a chemical engineer and hire that person for structural engineer? BILL WOCKEN: You could if you choose to provide



that. I think that would be a foolhardy move on the part of local government or state government to accomplish that. Typically, that is why we have the qualification based selection so that we can weed out the individuals who may be weak in the discipline. I think that would come out in the competency based selection process. I think that is one of the reasons why it's in the code.

SENATOR COOK: Senator Polovitz our intern has just listening to questions and putting information out in front of me and one is there a definition of construction management. There is and our intern is printing it for all of us. Your question is about a professional engineer, here is the definition, it means, 'a person who by reason of this special knowledge or use of the mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and engineering experiences qualify to practice engineering and who has been duly registered and met licensed by the State Board of Registration or Professional Engineers and Land Surveyors". SENATOR WATNE: It brings up my question on like you say each of those are registered. Your registered as an architect, your registered as a mechanical engineer or whatever it might be. I want to know, all registered, if there is a process, a license fee in our laws? If we required a requirement of the other entities, it should be required of them to shouldn't it? To determine it? SENATOR MATHERN: The old amendments did address that in 48:01. We put construction manager in the state that they must be a licensed contractor in existing code. SENATOR WATNE: In 48:? SENATOR MATHERN: And it was the old amendments, the .0503 where it was struck out there but you can see in existing code that a construction manager must be allowed to contractor. It doesn't sign a great deal to it. SENATOR COOK: So that is code right now then, we have a definition coming for what a construction manager is and right now in code, and it would stay in code, must be a licensed contractor. Okay. SENATOR WATNE: I have one more question on this amendment.

Maybe Curt can help with this to Every place where it says architects, engineers and land surveyors owned services, construction managers has been put in there. However, the very last sentence on the page "to exceed ten thousand dollars may employ the architects, engineers. I believe construction management needs to be put in there too, right before the "and", for continuity. CURT PETERSON: I think that is an oversight in the draft of the amendment.

SENATOR WATNE: And under "b" I wonder if it needs it also. SENATOR COOK: Darlene, would point that out again here. SENATOR WATNE: All the way through were adding

construction management in a sentence where it says architect, engineer and land surveying services. All the way through until you get to the bottom of the page, the very last line. There you have architects, engineers, no CM in there, and then land surveyors. Also under "b".

SENATOR COOK: Hold it, the bottom of the page, your on .0505? SENATOR LEE: Very last

line. SENATOR WATNE: Right before and; also on the next page you've got in "b", SENATOR

LEE: Under "B". SENATOR WATNE: Two more times. SENATOR COOK: Okay. SENATOR

WATNE: It needs to be put in both those places too? SENATOR LEE: Yes, it does. SENATOR

WATNE: Okay, thank you. BONNIE STAIGER: AIA North Dakota. We got these amendments

five minutes to nine. All I can is were crossing our fingers and saying we think we can live with it. It is simpler. We did receive last week this lengthy copy that was a definition of construction

management services. We like this better, but we understand your need to want it simpler. We

think it is okay. If you are absolutely insisting on acting on it today we're with you, kind of sort

of. SENATOR COOK: Bonnie, maybe to relieve any concern you might have, I don't know,

we've got a few amendments here, the committee is going to decide today which direction they

want go, but I think it is very safe to say that this bill will end up in a conference committee. I

think it , so they'll be some chances here to massage this if it does. BONNIE STAIGER: Okay, I

appreciate it. SENATOR COOK: You never know what they might do with it. It is another option they have too. BONNIE STAIGER: It is not our intention to be obstructionists at all. We want to work with you, but, it looks like we can live with it, but were winging it. SENATOR COOK: Okay. Thank you. SENATOR POLOVITZ: When your, SENATOR COOK: This question is for who, Bonnie? SENATOR POLOVITZ: Yes, to Bonnie, referring to. When you say you can live with it, now my letter from one of the architects in Grand Forks said they could live with it too, but it was the old, the first group of amendments. Now we got a new batch of amendments, today this morning, which they haven't seen. BONNIE STAIGER: That is correct Senator. SENATOR POLOVITZ: That is what really bothers me at this time. Now, I would like to take the letter that I got saying they could live with the old amendments, now we get a new one, and I would like to have them have a chance to at least voice their opinion on this.

SENATOR COOK: It is my belief that the amendments before us today, are a lot less restrictive than the amendments we looked at before. SENATOR LEE: I was just going to point out for Senator Polovitz's benefit as well that Ms. Staiger is here representing the architects, because we often don't have time to call even though it would be great if we could. And so we really rely so heavily on people like the folks in the room to represent their professions or trade associations, so, I am confident that Bonnie has given it review based on what is good for the architects. That she will probably ask the House not to concur if she is not happy. SENATOR POLOVITZ: I can understand her just fine. BONNIE STAIGER: You are correct. In the five minutes that I did have, I spoke with Lonnie Laffene who is the president of our organization. He was the person who most actively testified in the original Senate hearing on this bill. Senator Polovitz, I don't believe that you were in the room that day. But I did speak with him and he was the person who said that we think we can live with it. So if we have the opportunity to intervene in a conference

committee if necessary, that would be great, if not, we'll come back two years from now and straighten this out. SENATOR COOK: Committee, one other piece of information you might want to have. I had the LC just research our neighboring states, Minnesota, South Dakota, Montana. In review of the statutes of Minnesota, South Dakota and Montana does not reveal a similar statutory provision in those states. The statute that they are talking about is, the statute that the original bill was amending, 48:01.0109 which basically says they have to be a licensed contractor. We contacted the Associate General Contractors of Minnesota, the Associated General Contractors of South Dakota and Montana. Minnesota indicated that Minnesota does not have any legislation regarding contraction of project managers and that contractors do not have to be licensed in Minnesota. South Dakota indicated that So. Dakota is not enacted any legislation regarding construction managers, but, the association has considered proposing legislation. Montana indicated that there is no reference to construction of project managers in the Montana laws. Just for your reference. Committee we have three amendments before you, what are your wishes.

**Senator Lee** moved approval of the amendments presented today .0505 with the additions that Senator Watne pointed out, including the appropriate construction manager or construction management phrase on the last line of page 1, and under B and C on page 2.

**Senator Watne- 2nd**

Discussion: SENATOR MATHERN: For clarification then, is the City of Bismarek, they are okay with the amendments or do they prefer to be put into this process at a later time. BILL.

WOCKEN: Yes, the City of Bismarek is all right with the amendments. Mr. Peterson and I did discuss these exact texts of those amendments yesterday and we are okay with that. SENATOR COOK: There has been talk, if you recall the problems, liability insurance. I am assuming that

back page taking into account all of the following: ability to meet project budget requirements, etc., that will include liability insurance. Your going to be required to have it, I would assume.

SENATOR LEE: Should we ask if that's the understanding of Mr. Peterson and Mr. Wocken, if that does cover that confirmly that was expressed in committee before? SENATOR COOK: Yes,

I think we can. Curt, do you feel comfortable that there be liability insurance that would cover the total cost of a project with these amendments? CURT PETERSON: Yes, we do. BILL

WOCKEN: The City of Bismarek is all right with those as well. We do require the liability insurance under any circumstance, so yes I have no problem with Senator Flakoll's amendment.

**Roll Call vote:** 8 Yeas 0 No 0 Ab.

**Senator Watne** moved a Do pass as amended

**Senator Christenson-** 2nd

**Roll Call vote:** 7 Yeas, 1 No, 0 Ab.

**Carrier:** Senator Lee

SENATOR FLAKOLL: I will explain the jest of it. It would seem that throughout their testimony a lot of it was concerned about things more related to liability issues after the fact or during the event, building and such rather than bonding issues or related matters. It may have seem that the bonding had some secondary purposes. So that's what essentially what that is, stripping out the bonding portion of it and requiring them to have liability insurance. That's kind of the jest of the amendments.

SENATOR COOK: We have got a bill as introduced and we've got two sets of amendments, their different amendments.

SENATOR WATNE: How does this compare to the Cook amendments which was in agreement of all the entities? How does this compare?

SENATOR FLAKOLL: This essentially just relates to the liability insurance. I believe in the Cook amendments, one of the things that was, they had to be bonded for something-some portion of it. The contacts they were awarded yet, there were things determined with bid letting controlling that process and how that would work and...

SENATOR WATNE: It put a structure into the entity of the. Where would it put the structure? Into the entity or ignore it, is that correct?

SENATOR COOK: I know the amendments first off with my name on them, but their on behalf of the individuals who's dear to the bill. The biggest difference is, ya the amendments with my name on them put a procedure in place for hiring a construction manager. Its basically the same procedure that in place for hiring an architect right now. It's got a definition there that I think is a little vague, it also leave a question as to whether this, is you look at page one of the amendments, "applicability" this says every state agency. There is a question as to whether or not that includes political subdivisions. I think its, as its written, we can I assume, it doesn't. And it also requires a bond yet up there. In the first section. I do agree that the Flakoll amendments, if we listen to the testimony of what the problems were and why they were justifying this bill. The Flakoll amendments solve that close concerns.

SENATOR FLAKOLL: The Cook amendments, .503. Isn't there still some separation required on a project between the architect and the construction manager. Some restrictions to that?

SENATOR COOK: That's correct!

SENATOR FLAKOLL: Which is somewhat effectual.

SENATOR LEE: Do you see the two sets of amendments as being in conflict with one another or would the issue of the liability insurance as opposed to the bond also would be a part of the larger .503 amendments, but still would call for a policy covering construction management.

SENATOR COOK: I would see it they would be one or the other or you, we could try to put them together.

SENATOR MATHERN: I agree with you completely that Senator Flakoll's amendment addressed testimony from the reasoning we heard behind the legislation. It came in as a protection measure to make that there was a coverage in case of problems like with the roof. Well, when you delve into it a little further, it came out then that a little bit of territorial thing. No! A lot of territorial thing.

SENATOR POLOVITZ: This was referred to us as the Grand Forks bill right? It just kind of irritate me cause everything went very well. The fact that a couple of beams went down was not the problem of who manages the construction manager. I just don't understand why we're even monkeying with this. I heard this morning that this is just a bill to get rid of Mort Mortenson.

SENATOR LEE: I've never heard it called a Grand Forks bill?

SENATOR POLOVITZ: One of the people who gave testimony said that--maybe Mr. LaFeene, somebody here called it a Grand Forks bill. To get Mortenson, frankly, I don't know why this bill is here.

SENATOR WATNE: I think what disturbs me, is that five years ago you never heard of a construction manager. All of a sudden you have the construction managers in the state with excellent power in controlling millions and millions of dollars of construction. I think I like these amendments that Senator Cook had because it does put in there a procedure to follow to select a construction mgr. The same procedure that's used for architects, or land surveyors and engineers. I think that in some cases when we look at these projects, they have architect go in and also be the construction managers. This could be dangerous especially if he has responsibility for parts of it, in that contract part is not covered like other contracts, electrical, plumbing, concrete, all that of that type. If some thing does not go wrong it isn't something to fall back on, so I think we need this thoroughness, this so called Cook Amendments and if we can put the two together that would be even better.

SENATOR MATHERN: I am curious does this address the initial concern that Senator Flakoll asked about. I don't think he really got an answer on, like when NDSU maybe their architectural department works on a project, how will that effect their university? That have those departments.

SENATOR FLAKOLL: When I asked the guy he didn't catch on.

SENATOR COOK: Committee, why don't we hold this, we can deal with this next Thursday. In the meantime, all the parties that have a serious interest in the bill will give them a chance to speak their peace. Find out what the will of the majority is here and kick our last bill out at that time.

SENATOR FLAKOLL: Cause this had been a moving target- this particular bill because of what was originally proposed versus what was testify which versus what was brought in as amendments versus its been kind, a bit of a challenge. One of the things I guess would be a benefit if we can have Mark do some searching to find out what things maybe, is this some redundant in regards to the .502 amendments. What provisions are already in place for construction managers, that they have to-what hoops they already have to go through and maybe the parts we like of the bill are already in place.

SENATOR WATNE: On the school building project in such, who is there to teach- those people, who say their teaching a class, that are hired. They are on state salary to teach, they are not their to be a manager of a construction project on campus, is my thought, which is what evidently happens. Is this type of thing that happens?

SENATOR COOK: Lets finish this bill next week.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 48-02.2 of the North Dakota Century Code, relating to construction management services; and to amend and reenact section 48-01.1-09 of the North Dakota Century Code, relating to construction managers.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century Code is amended and reenacted as follows:

*Refers to bond:*

**48-01.1-09. Use of construction manager.** ~~If a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. A construction manager awarded a contract for construction of a public improvement shall bond the entire cost of the project through a single bond, or through bonds supporting all bid packages and the construction manager's bond for the full amount of the construction manager's services. A construction manager awarded a contract for construction of a public improvement shall bond those contracts held by the construction manager. If a governing body chooses to use a construction manager on a public improvement, the construction manager must be a licensed contractor and must be chosen pursuant to chapter 48-02.2.~~

**SECTION 2.** Chapter 48-02.2 of the North Dakota Century Code is created and enacted as follows:

*Can hold contracts within a project-*

**Definition.** Construction management services are those professional services associated with the practice of construction management pertaining to construction, as defined by the laws of this state, as well as incidental services that a member of this profession and anyone in that person's employ may logically or justifiably perform.

*patterned after existing law, architect-const. mgr. chosen const. mgr. structure to mgr.*

**Applicability - Policy.** Construction management services must be procured as provided in this chapter. Every state agency that negotiates a contract for construction management services shall award the contract on the basis of demonstrated competence and qualification for the particular type of services required.

**Procurement procedures.**

1. Each state agency shall establish its own construction management services selection committee, which must be composed of those individuals whom the governing body of the agency determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The governing body of the using agency or that body's qualified, responsible designee shall sit as a member of the committee for the purpose of coordinating and accounting for the committee's work.
2. The construction management services selection committee is responsible for:
  - a. Developing a description of the proposed project;
  - b. Enumerating all required professional services for the project; and



- c. Preparing a formal invitation to firms for submission of information. The invitation must include the project title, the general scope of the work, a description of all professional services required for the project, and the submission deadline. The invitation must be published. Upon written request, the agency shall mail copies of the invitation to any interested party. The manner in which the invitation must be published, the content of the publication, and the frequency of the publication must be established by rule of the agency.
3. The date for submission of information from interested persons or firms in response to an invitation may not be less than twenty-one days after publication of the invitation. Interested construction managers must respond to the invitation with the submission of the information required in general services administration forms SF 254 and SF 255, construction management-related services questionnaire for specific project, or any similar information as the agency may prescribe by rule.
4. Following receipt of the information from all interested persons, the construction management services selection committee shall hold interviews with at least three persons who have responded to the committee's advertisement and who are deemed most qualified on the basis of information available before the interviews. If fewer than three persons have responded to the advertisement, the committee shall readvertise or hold interviews with those who did respond. The committee's determination as to which persons will be interviewed must be in a written report and must be based upon its review and evaluation of all submitted materials. The report must specifically list the names of all persons that responded to the advertisement and enumerate the reasons of the committee for selecting those to be interviewed. The 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 committee to acquaint itself with the relative qualifications of the several interested persons.
5. The construction management services selection committee shall evaluate each person interviewed on the basis of the following criteria:
  - a. Past performance;
  - b. Ability of professional personnel;
  - c. Willingness to meet time and budget requirements;
  - d. Location;
  - e. Recent, current, and projected workloads of the persons;
  - f. Related experience on similar projects; and
  - g. Recent and current work for the agency.

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

6. The construction management services selection committee shall submit its report ranking the interviewed persons to the head of the using agency for evaluation and approval. When the agency head determines that the

ranking report is final, written notification of the selection and order of preference immediately must be sent to all persons that responded to the 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, at a compensation that is fair and reasonable to the state, after notice of selection and ranking. If the governing body of the using agency or its designee is unable to negotiate a satisfactory contract with this person, negotiations must be 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 in order of their competence and qualifications must be selected after consultation with the construction management services selection committee, and negotiations must be continued in the same manner until agreement is reached.

**Exception.**

1. Every state agency securing construction management services for a project for which the fees are estimated not to exceed ten thousand dollars may employ the construction manager by direct negotiation and selection, taking into account:
  - a. The nature of the project;
  - b. The proximity of the construction management services to the project;
  - c. The capability of the construction manager to produce the required services within a reasonable time;
  - d. Past performance; and
  - e. Ability to meet project budget requirements.

This procedure must follow state policy as described in this chapter.

2. Fees paid pursuant to this section during the twelve-month period immediately preceding negotiation of the contract by a state agency for professional services performed by a construction management firm may not exceed twenty thousand dollars. All persons seeking to render professional services pursuant to this section must 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.

**Splitting projects or services contracts prohibited.** A using agency may not separate service contracts or split or break projects for the purpose of circumventing this chapter."

Renumber accordingly

March 16, 2001

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386

Page 1, line 8, overstrike "shall bond"

Page 1, line 9, overstrike "the entire cost" and insert immediately thereafter "must possess liability insurance in an amount at least equal to the value", overstrike "through a single bond", and overstrike "supporting all bid"

Page 1, line 10, overstrike "packages and the construction manager's"

Page 1, line 11, overstrike "services"

Renumber accordingly

March 28, 2001

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 54-44.7-01 and 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

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

**SECTION 1. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer, construction management, 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, and construction management, 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.

**SECTION 2. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer, construction management, 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.

**SECTION 3. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

1. All state agencies securing architect, engineer, construction management, 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:

- a. The nature of the project.
- b. The proximity of the architect, engineer, or land surveying services to the project.
- c. The capability of the architect, engineer, or land surveyor to produce the required services within a reasonable time.
- d. Past performance.
- e. Ability to meet project budget requirements.

This procedure shall still follow state policy set forth above."

Renumber accordingly

March 29, 2001

703  
3-29-1  
1082

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386

Amendments to ENGR HB 1386 POL. SUBS 3/29/01  
Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 54-44.7-01, 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer, construction management, 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, and construction management, 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.

**SECTION 2. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer, construction management, 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.

**SECTION 3. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

1. All state agencies securing architect, engineer, construction management, or land surveying services for projects for which the fees are estimated not to exceed ten thousand dollars may employ the architects, engineers,

2.12  
construction managers, and land surveyors by direct negotiation and selection, taking into account all of the following:

- a. The nature of the project.
- b. The proximity of the architect, engineer, construction management, or land surveying services to the project.
- c. The capability of the architect, engineer, construction manager, or land surveyor to produce the required services within a reasonable time.
- d. Past performance.
- e. Ability to meet project budget requirements.

This procedure shall still follow state policy set forth above."

Renumber accordingly

Date: 11/29, 2001  
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. H. B. 1386

Senate Political Subdivisions Committee

☐ Subcommittee on \_\_\_\_\_

or

☐ Conference Committee

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

Action Taken Move Approval of Amendments 0505 including appropriate terminology of "Construction Manager or Construction Management"

Motion Made By Sen. Lee Seconded By Sen. Watne

Senators	Yes	No	Senators	Yes	No
Senator Cook	✓		Senator Christenson	✓	
Senator Lyson	✓		Senator Mathern	✓	
Senator Flakoll	✓		Senator Polovitz	✓	
Senator Lee	✓				
Senator Watne	✓				

Total (Yes) 8 No 0

Absent 0

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

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



Date: March 29, 2001  
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1386

Senate Political Subdivisions Committee

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

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

Action Taken No Pass as amended H.B. 1386

Motion Made By Sen. Watne Seconded By Sen. Christenson

Senators	Yes	No	Senators	Yes	No
Senator Cook	✓		Senator Christenson	✓	
Senator Lyson	✓		Senator Mathern	✓	
Senator Flakoll		✓	Senator Polovitz	✓	
Senator Lee	✓				
Senator Watne	✓				

Total (Yes) 7 No 1

Absent 0

Floor Assignment Sen. Lee

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

**REPORT OF STANDING COMMITTEE**

HB 1386, as engrossed: Political Subdivisions Committee (Sen. Cook, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1386 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 amend and reenact sections 54-44.7-01, 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

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

**SECTION 1. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer, construction management, 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, and construction management, 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.

**SECTION 2. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer, construction management, 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.

**SECTION 3. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

1. All state agencies securing architect, engineer, construction management, or land surveying services for projects for which the fees are estimated not to exceed ten thousand dollars may employ the architects,

engineers, construction managers, and land surveyors by direct negotiation and selection, taking into account all of the following:

- a. The nature of the project.
- b. The proximity of the architect, engineer, construction management, or land surveying services to the project.
- c. The capability of the architect, engineer, construction manager, or land surveyor to produce the required services within a reasonable time.
- d. Past performance.
- e. Ability to meet project budget requirements.

This procedure shall still follow state policy set forth above."

Renumber accordingly

2001 HOUSE POLITICAL SUBDIVISIONS

CONFERENCE COMMITTEE

HB 1386

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386 conf

House Political Subdivisions Committee

☒ Conference Committee

Hearing Date 4-10-01

Tape Number	Side A	Side B	Meter #
1	xx		1--2500
Committee Clerk Signature <i>Patricia A. Quinn</i>			

Minutes: Rep. Disrud called the conference committee to order with others present: Rep.

Froseth, Rep. Ekstrom, Sen. Cook, Sen. Flakoll, and Sen. D. Mathern.

Rep. Froseth : I don't have a problem with the senate amendment. I read all the testimony from the senate side and the discussion following the hearing. It seemed like there was a lot of confusion as to what this amendment actually does. What responsibilities does it put on a construction managers firm in regard to serving as the project coordinator. There were comments made in regard to bonding and comments regarding liability insurance. In this amendment, it doesn't spell out anything. Can the senate explain what the amendments really do?

Sen. Cook : The amendments to require liability insurance were overlooked. We had some discussion as to if liability language was needed. I think we thought the language was in here, and it is not. If there is an improvement that could be put on this bill, it would be liability. We

feel that the problems that were out there, that this bill is to address, would have been avoided with liability insurance, not bonding.

Sen. D. Mathern : We did have an amendment in committee that did not get voted on. It stated that who ever would carry liability insurance. That amendment would have been in stead of this one.

Rep. Froseth : Is 504 Sen. Flakoll's amendment.

Sen. Flakoll : Yes, that is the one we discussed, but did not act on.

Rep. Ekstrom : I have no grief with putting liability in, but this is generally the case in the industry anyway. I own a small architectural firm and do construction management for 20 years now. The primary concern among subs and everyone, is that the project needs to be completed. If there is a problem and someone goes belly up, we want something to kick in. Liability insurance is already in place in most cases. Most firms have liability insurance. There are other forms of insurance like Errors and Omissions, where if someone is doing something in your stead and does something wrong, then errors and omissions will kick in. The first and primary duty of the construction manager is to keep the cost of the project in check. Most have liability insurance already, or they should, so why mandate this.

Sen. D. Mathern : I liked the Flakoll amendment because it said that the liability insurance should be in the amount equal to the value of the project. If there is a large project, there would be enough liability coverage.

Rep. Froseth : I had a problem with the Flakoll amendment because it removes the bonding that is present statute now.

Sen. Flakoll : At the time, it would have done just that. Our committee felt the problems were with the liability not with bonding.

Rep. Froseth : I don't know that there has been a problem with present language in the law. I offer a motion that the house accede to the senate amendments and further amend section 48-01.01.09, which is the use of the construction managers bonding bill. That was the only thing left in our bill when it came over. I further amend the original language - if the construction manager does not bond for the entire cost of the project through a single bond, the construction manager must possess liability insurance in an amount equal to the value of the project. I visited with people in the industry, and they said liability insurance isn't very expensive. **I move that.**

Rep. Disrud : **I second.**

Sen. D. Mathern : Rep. Ekstrom, can a construction manager or architect have a single bond if they don't own the contracts.

Rep. Ekstrom : What you would be doing is providing a completion bond for the project. If there is a problem then the bond would kick in. As a construction manager or architect you can not bond someone else's work. It is not available. You can bond yourself or bond what portion of the work is yours. Your responsibility really falls back on your liability insurance, if something goes wrong.

Rep. Froseth : My further amendment does not change what is already in present law.

Rep. Ekstrom : When you are dealing with a public entity. The public entity has the right to say each one of the folks need to have bonds. I don't see that this will do anything. The construction manager can't bond for other people. You can certainly say to the individual subcontractor that you must be bonded. It does tend to limit for some projects, whether smaller companies can get in. I don't think that was the intent of the bill, either. I think that holds back on the universities, public entities, and townships. Professional liability is enough protection for the state, I feel.

Sen. Cook : Is it important that this existing language requiring a single bond for what the construction manager is doing, in there?

Rep. Ekstrom : Not necessary. I can see the reasoning for putting in the liability. The bonding requirement does not achieve what we intend. Sen. Flakoll's amendment removes the bonding and just puts it into liability.

Sen. Cook : I have information from L.C. on what surrounding states do. Basically, there is nothing out there in code in the other states. What we have in code already, is more than our neighbors. I would be willing to put the Flakoll amendments on the original engrossed house bill and add that to the senate engrossed bill.

Rep. Ekstrom : Do I understand then, we would be taking your engrossment from the senate and adding the Flakoll amendment and that would be it?

Sen. Cook : Yes. We would be adding another section to the bill.

Rep. Froseth : I would not support that amendment because it removes all the bonding requirements. I think we are going a step backwards then.

Sen. Cook : The way I understand it, if you have a construction manager, all the various contractors are hired. Those contractors provide bonds for their part of the contract. If the contract is a \$1M contract, and the construction managers fee out of this is \$100,000, then the bonds that all the contractors have must total \$900,000. The construction manager would have to a bond for \$100,000, under existing law.

Rep. Froseth : But under Sen. Flakoll's amendment, that would be removed.

Sen. Cook : That's why I asked that question earlier, if that bond is needed.

Rep. Ekstrom : I am leaning back on they way it is done elsewhere. When I as construction manager do large public projects, my primary concern is getting the walls up, the physical stuff



done. The primary concern of the public entity is that their project will get completed and that is also part of my contract. It would be highly unusual for a construction manager or architect to go belly up. You could get fired from a project. The point of completion bond must say that the work must get done. I feel that the liability insurance covers the problem if someone walks away before the project is completed. This seems redundant to me.

Sen. Cook : MN does not have any of this language in their code. What's different in how you conduct business in MN. Do you buy a bond for your job?

Rep. Ekstrom : No. I have professional liability insurance and Errors and Omissions. My part of the project is covered. The liability to the public entity is whether or not I perform my job right, not whether the job gets done. The responsibility of getting the job done is mine. I don't buy a bond.

Sen. Cook : I'm comfortable with the bill just the way it is. The question is do we want to replace the bonding language with liability insurance. To have liability insurance is part of the bid process, so that is covered.

Rep. Froseth : I worry about the state projects. I feel we need to make sure that those projects are being covered by bonding and liability both. I agree that we should leave this language in present law the way it is. I just think we should add something about liability must be carried also.

**VOTE: 2 YES and 4 NO. MOTION FAILED.**

Rep. Froseth : **I move that the house accede to the senate amendments.**

Rep. Ekstrom : **I second.**

**VOTE: 6 YES and 0 NO. PASSED. Rep. Disrud/Sen. Cook will carry the bill.**

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386 conf-2

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date 4-17-01

Tape Number	Side A	Side B	Meter #
1	xx		1--2300
Committee Clerk Signature <i>Sam Allen</i>			

Minutes: Chair Froseth opened the conference committee with others present: Rep. Carlson, Rep. Delmore, Sen. Cook, Sen. Flakoll, and Sen. D. Mathern. We are here to once again discuss HB1386. The house rejected our last conference report.

Rep. Carlson : I was one of the sponsors of the bill. I hardly recognize the bill from it's original form. Some of the corrections were good. Defining what a construction manager does is good. I still have concerns about the bonding side of the bill. I did not hear all of the senate arguments for or against the bonding. This is just for public improvement projects, not just the general public. This is something that has to be bid or bonded by state dollars. I personally don't bid jobs like this. I just have an interest and have had various phone calls asking me to bid on parts of jobs, where there has been a construction manager. I don't think there is anything wrong with that process of construction. What I still think is missing from this bill, is that there is a gap in coverage when there is no bonding required by the general contractor or the construction manager. The general contractor, in most cases, has the net worth to be able to buy a bond, and

then the jobs he bids on, he bonds those projects. Construction manager does not, and this is why the bill is here. Liability insurance doesn't cover it. Any other type of insurance, that I am aware of, would not cover it. If I'm a construction manager and there are 7 major subs on the job, everything from concrete and footings, structural, roof, brick, windows, mechanical and electrical, and plumbing are required to supply bonds in the amount of the work they do. If something is wrong, each of those contracts or bonds are responsible. If I was there bond agent, I wouldn't pay a nickel more than my portion of what I was bonding, if I had any responsibility for it. When you don't have that umbrella over the top, the tax payers in the end have to pay. The Fargo Dome is a perfect example. Law suits had to be filed. Had there been a general contractor on that job, his bond would have been responsible for taking care of some of those items in the Dome that were wrong. Maybe we went too far in the original process of requiring a bond for the entire cost of the project. In order to get a bond, you need a certain amount of net worth. I think there is still a gap and the logical solution would be to require a bond for the construction manager on public improvement projects for 20% of the cost of the project through a single bond. I don't have a problem with the definitions that are in the other part of the bill that you fixed. To address the bond issue, we need to have some amount of coverage over the top. Not many architects are in that business. If they are going to be in that area, and their major selling tool is coordination, efficiency, and cost savings, then they should have some responsibility. I think the 20% should work as they put their projects together. I did not have an amendment drafted.

Sen. Cook : Did you say that construction managers are not required to have a bond now?

Rep. Carlson : I think that original law said for the cost of their fee. It would be 6% or 7%.

They have two fees though. One for the architectural design part and then a separate fee for the

construction management side. We are not asking for a tremendous amount more, but we are trying to put an umbrella over the top of these projects.

Sen. Cook : Doesn't existing law require that the total cost of the project be bonded by the construction manager, or if all the bonds that are issued total the entire cost of the project? The plumber would have to have a bond to cover his cost, the mechanical engineer would, the electrical contractor, etc?

Rep. Carlson : There in lies the problem. If the electrical contractor did not have anything wrong with his work, but his work was effected by faulty work from one of the other bonds parts; his bond people are not going to want to pay, because he did not do anything wrong in his project. Therefore you limit the amount you will be able to collect, because someone who wasn't directly at fault is not going to want his bond pulled and pay on a project were he had everything signed off as being correct.

Sen. D.Mathern : I gather that this is double bonding.

Rep. Carlson : Not really. What it is, is that the general contractor will be required to cover his work. This could be half the project or a third of the project, or more if he subcontracts. There is a huge difference between a construction manager and a general contractor, and how he is going to put the project together, and the way he does his bonds. The general contractor is going to be there in place to cover the entire project. I don't believe the way the law is written, that construction manager does cover the entire. I don't believe you can prove that he does. That's why the big jobs are for the very big companies who can afford to do the bonding requirements that are out there.

Rep. Froseth : There was a lot of discussion that those types of bonds are not available for construction managers. I don't know if a bond for 20% is available or not.

Rep. Carlson : By law you can require them to carry a bond for his amount of the fee already. That has already cleared statute. This would take it one step further and to match up with what that general contractor would have to do if he's running the job.

Sen. Flakoll : Seems to me we are getting done crossover between liability and bonding: performance bonding vs payment bonding.

Rep. Froseth : If a construction manager serves as a contractor, they have to be licensed. On the license application form, it requires that they have secured liability insurance. They have to have liability to be considered a construction manager as such.

Sen. Flakoll : That's for the state. Does that also include counties and municipalities? Do the townships and counties have the same requirements as the state does in terms of liability?

Rep. Froseth : I would think on public improvements they would.

Rep. Delmore : We're looking at this, and that 20% comes to double bonding. Will there not be an increased cost either to the customer or to the taxpayer?

Rep. Carlson : I don't know that you can call it double bonding when you add up the total of the entire project. The most it would be is 10% additional bonding on the project. The purpose of the bond is protect the project and the taxpayer who's paying for the project. To make sure when the overall project is done, if there is a problem, someone is responsible for the project. If you are trying to chase 8 different people who all say it wasn't their fault, you are going to go to the general contractor. You don't have that leverage when dealing with a construction manager.

Rep. Delmore : How is that extra 5% going to make the difference in cost to either the customer or taxpayer, if something goes wrong. Will this 5 % really make a difference?

Rep. Carlson : Ideal was the way we sent the bill out of here. Someone is responsible for making sure there is overall coverage. Now they are going to rely on the bonds of the other

individuals to the point that they're liable. This isn't meant to keep them out of the business. It makes them more responsible. I can go back to the Fargo Dome as a prime example. There wouldn't have been the lawsuits that were filed had there been a general contractor. There was no general. There was a construction manager and all kinds of subs. They were all saying the other guy did it.

Sen. D. Mathern : I also agree that 5 % additional won't do a lot.

Rep. Carlson : On a \$10M project and that bond was required at 20%, that would be \$1M. If that was the overall umbrella and it cost \$1.4M to fix the roof, it took \$400,000 left unpaid, and the rest was covered, not by taxpayers. Should it be 25% or 30%? Will there be a problem on every project? We certainly hope not. If the general contractor had done that, and it was required for him to bond the entire project, we could go back and get him to pay for everything. So there is a difference in how we would be treated.

Sen. Flakoll : I think there is some burden of proof in determining who may be the responsible party. I think we will always have certain problems whether there is a general contractor or not. Even the general contractor would go after the individual subs and say you created the problem, so pay up.

Rep. Froseth : There always will be a portion hanging out there with something like a no fault.

Rep. Delmore : If there already is the liability language, why isn't this enough?

Rep. Carlson : Liability insurance doesn't pay for work that is incorrectly done. I can't go back to my liability insurance and collect if I frame a house wrong. Liability protects me from accidents on the job or defective materials delivered to the job site. Trying to cover this with liability insurance doesn't work. Liability doesn't cover any operations and completions of a project.

Rep. Delmore : If there is a problem in getting the bond, adding this extra 5% would put construction management people in a position where they could not contract for some of these bids, right?

Rep. Carlson : I don't believe that. We already require them to get a contractor's license. When it comes to bonding, we treat them differently than general contractor. We say if you're going to be one, you must be a contractor. If they want to be in the game, fine. This is not intended to keep them out.

Sen. Cook : Do you know for a fact whether a construction manager could buy a bond for 20% if he was only doing 6% of the project?

Rep. Carlson : Bonds are based upon your ability to make them good. If you have the net worth to buy them. We'd have to get bond counsel to tell us that. You only get a bond if you can afford to pay for that much or have that much net worth. 5% may be too much for some of them.

Sen. Cook : Are the different types of bonds?

Rep. Carlson : Yes, there are. Performance bonds and payment bonds are the two I am familiar with.

Sen. Cook : If I walk away from the job, is there money there to hire somebody else to continue and finish my work. Is that a performance bond?

Rep. Carlson : I believe it is. You sign a contract and agree to complete a project by a certain time for a certain price. Those bonds can be drawn out if those are not met.

Sen. Cook : Do you know for a fact whether performance bonds cover defective workmanship?

Rep. Carlson : No. I'd have to get that information for you. from bond counsel.

Sen. Cook : My last question. The amendments that we put on this bill were to solve the concern that you raise here again, today, about a construction manager being an architect that

puts on the construction manager hat. We tried to get some separation between the two. Do you feel that's has been accomplished? Do you want these amendments removed?

Rep. Carlson : I feel there are merits in those amendments. We have always wondered who is he and what does he do. This isn't fence building. This is making sure that everyone is following the same rules as we do for bonding. If we can better define what they are, then that is fine with me. If you check deeper, you will find that liability doesn't cover what we're looking for here. When you have multiple prime bids, there are many different options that can happen out there. There can be one bid overall, be multiple prime, or all these bonds added together. In most cases, if the general contractor does it, he's covering the entire project. When a construction manager is, he's relying on everybody else, and he's not covering for anything that could happen along the way.

Rep. Froseth : In most projects, the general contractor bonds the entire project, then the multiple bonds from each sub isn't necessary.

Rep. Carlson : Yes, but there's lots of multiple prime bids required. Depends on how your city does it. We are talking about public money. We should be concerned that those are all properly taken care of in the end, and everything is covered.

Sen. Cook : We have heard all kinds of testimony. We are getting different answers. We need to get all questions answered, reliable, before we make an important decision.

Rep. Froseth : We are adjourned and will meet another day.



2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386 conf-3

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date 4-18-01

Tape Number	Side A	Side B	Meter #
I	xx		1-1755
Committee Clerk Signature <i>Phyllis Quinn</i>			

Minutes: Chair Froseth opened the conference committee hearing with others present: Rep. Carlson, Rep. Delmore, Sen. Cook, Sen. Flakoll, and Sen. D. Mathern. Rep. Carlson has some amendments to present.

Rep. Carlson : In the amendments, we wanted to incorporate everything that was on the yellow copy from the senate. Section 1 became 2, and so on so everything had to be renumbered. (Rep. Carlson read the changes)

Rep. Delmore : I take it that this explanation you handed out was from a local law firm to explain the bonding.

Rep. Carlson : Yes. I asked Curt Peterson with the Association of General Contractors if he could give us a history of bonding, and also, to explain the difference in bonding between a general contractor and construction manager. I wanted to answer some concerns asked yesterday.

Rep. Delmore : I still don't think the bonds are available.

Sen. Cook : Does that extra language say something different than what is already in existing law? What is not being bonded under existing language?

Rep. Carlson : If you look at a package. Normally they will have a 7% or 8% fee in for construction management. The existing language requires he would only be required to have a bond for his services of construction manager, 7%. That is specifically what it is. If you look at a project where the architectural fees, construction manager fees, and profit built into it, that's fine at their end, but that 7% may well be short of the 20% total or whatever the total would be. My attempt was to get the entire project covered, not just the fees.

Rep. Delmore : How often does the general contractor carry a bond that covers the electrical and the mechanical contractor?

Rep. Carlson : If he covers them, he will require a bond back from his sub contractors to cover their portion of the job, or he will build the charge into their fee and deduct it from them what their cost would be to bond their work.

Rep. Delmore : Is that same bond available for a construction manager?

Rep. Carlson : A construction manager is going to require multiple bond bids. He will require bonds from the subs. That is what the law says. The only difference in this is he not only has to cover the fee but also the difference. Can he get bond? Anybody can go buy a bond if they have the net worth to get the bond. If he doesn't have the net worth to get the bond, he can't. The public project is at risk if he does not have the bond.

Sen. Cook : Say you have \$1M project. You have the three prime contractors and an architect. The architect fee is 6%. That is \$60,000. The three prime contracts will have to total \$940,000. Correct?

Rep. Carlson : No, they don't have to. They could.

Sen. Cook : Does the architect have to a bond for his \$60,000 architectural services?

Rep. Carlson : Can't answer that. Our law says for construction management services. I believe the architect does carry insurance and liability protection for errors in design and structural things that he has done in his design.

Sen. Cook : Let's say you have another \$1M project. You have an architect with a 6% fee, which is \$60,000. You have a construction manager with a 7% fee, which is another \$70,000. Then all of your contractors, which comes up with \$870,000 with prime bids. You now have \$870,000 worth of bonds. Existing law would require the construction manager to bond for his \$70,000. With your amendment you are saying the construction manager must also bond for the architect fees, if the architect is not bonded for himself.

Rep. Carlson : That would be one of the fees covered. There are generally miscellaneous costs, charges, and profits put into this system. It will never work out \$60,000 or \$70,000 exactly. There is going to be some gap. They will be building some profit into this project as well.

Sen. Cook : Who is collecting these profits? It must be in a fee or something.

Rep. Carlson : When something is competitively bid, you and I agreed on a price. You won't sort through all of my lines and say that this one is too inflated, etc. We just want to make sure that the entire project is covered for the full amount. That is what we will require from a general contractor. I don't think it should be any different if someone else is doing the project. I don't care if he makes money over here or over here. They should both cover the same amount. That is the basis for the bill.

Sen. Flakoll : How would change orders work then? Is each sub responsible for the change order?

Rep. Froseth : I think each individual contractor is responsible for the change order in their area.

Rep. Carlson : This is all contractual. I don't know how to answer that. I don't know if another bond is required for a change order. I have never seen that.

Sen. D.Mathern : The amendments are just talking about the multiple prime bid, which is the three entities. If the construction manager is doing the job and have all of these different entities working with them, don't they all carry their own bonds? Why is this referring to just the multiple prime bids, and that they have to make up the difference? I still contend that this is double bonding. I feel there is some fence building involved here, and I don't like it.

Rep. Carlson : I disagree. I feel this is leveling the playing field. If you want to play in the construction field, you have to be able to follow the rules that have been established the rules the general contractors have to follow.

Sen. Cook : Is it possible for a construction manager to agree with a political subdivisions to complete say a \$1M project, and start before all of the primes are determined?

Rep. Carlson : That would be extremely scary. You are talking about competitive bids here. If he's coming in bidding the project as well as three or four other general contractors are bidding the project, most everybody is bidding the same mechanical, electrical, heating, etc. If that construction manager went in and gave a number without doing his homework about what it's going to cost, he would be crazy. I sure wouldn't do it.

Rep. Delmore : How often do your general contractors do a single prime bid for the whole project rather than dividing it into the three parts?

Rep. Carlson : I can't give you a percentage on that. I know this is not an open hearing, or I'd ask Curt Peterson to give you that answer. I can just tell you what their requirements are by law.

Sen. D. Mathern : I have a question about the multiple prime bids in the first section. What does total of the bonds in the multiple prime bids include? Is it the three entities, mechanical, electrical, and general or is it more then that, and they have to make up the difference?

Rep. Carlson : I assume it would have to be all the bidding contractors would be required to have a bond. We have required those three for sure, but generally all the others are bonded, too.

Sen. D. Mathern : My point then if those three entities are the prime bids, and you don't have a general contractor, that leaves the construction manager responsible for bonding everything the general normally would.

Rep. Carlson : Or requiring bonds of the other subs involved. This is all contractual. This is one step farther then we take it by law. Bonds were established years ago for the purpose of protecting the governing body from failure of the contractors to pay their respective subcontractors and failure to complete the work. This just furthers that.

Sen. Cook : All you want is the total of all the bonds to equal the total of the project.

Rep. Carlson : That's right.

Sen. Cook : That's what I thought we had in existing law. Can I suggest that we sleep on this and make sure we're not adding anything in here that is more then what we think. Can we come back and work this out in maybe 5 minutes, after we sleep on it.

Rep. Carlson : If the language is not such that we are not getting to the intended purpose, we'll change. Double bonding is not intended here at all.

Sen. Flakoll : There are a number of public improvements done by the national guard. How do these interface with this? They do a portion of the work. I was just curious.

Rep. Froseth : We'll adjourn and come back tomorrow.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386 conf-4

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date 4-19-01

Tape Number	Side A	Side B	Meter #
1	xx		1-2400
Committee Clerk Signature <i>Pam Dever</i>			

Minutes: Chair Froseth called the conference committee to order with others present: Rep.

Carlson, Rep. Delmore, Sen. Cook, Sen. Flakoll, and Sen. D.Mathern.

Chair Froseth : Does everyone have amendment .0509? I'll have Rep. Carlson explain it.

Rep. Carlson : Yesterday, the more we discussed it, the more confused we got. There are more parts to a normal project then the three that are called out in code. I tried to simplify the language. (Read the amendment) **SEE ATTACHED**

Sen. Cook : I still don't see what part can be missed by existing language. Does cost of the project include cost of the land?

Rep. Carlson : It would be the bid they signed. The contract price on the project. In most public improvements projects it would not be, because the public owns the land. There are very seldom building off site.

Sen. Cook : I was thinking of Workmens Comp. If they wanted to buy land and build a new facility. Is there anything in a public project that is not bid?

Rep. Carlson : To the best of my knowledge, no. Somehow when the bonds are let, they have to fund a completed project. No one leaves anything unfinished when they are bidding the project out.

Sen. Cook : (269) That's my thought. Everything in a public project is bid. I have difficulty seeing where this last sentence says anything different than is already in existing law.

Rep. Carlson : In many cases those bid packages would not total the contract price. That is the point of this bill.

Sen. Cook : My previous question was is there anything in the project that is not bid. The answer was, no. I'm trying to figure out what is missed in the total cost of the project.

Rep. Carlson : You bid everything on the project. You add on an architectural fee, a construction management fee, and profit. Previous law says you have to have a bond that covers the entire project or the amount to the construction management fee. I believe those numbers will not total the whole cost of the project. That's why the language. If the general contractor takes that bid, he gets the bid for \$1,212,000, his bonds or all his bonds plus his, equal \$1.2M. In this case it probably would not. He's bidding everything; his profit, his overhead, and his construction management fees. He has to have a bond for that. A construction manager only has to bond for either the whole thing, if he chooses a single bond; or his fee of 7% or 8%. That's it. They don't total up the same amount.

Sen. Cook : The profit he's going to have is his fee.

Rep. Carlson : Yes or no. Maybe. They don't total up to the same number.

Rep. Delmore : Would part of the bid with the fees have to be bonded, like attorney fees, building permits, and equipment. Would that have to be bonded for, too?

Rep. Carlson : If that is part of the package that he is required to supply. If the general gets very specific lists of what he has to supply. If he supplies everything from the digging to the landscaping, then that's the total price of the project. This would not include all of the bonding fees because that's not in his bid project. He has nothing to do with those sides of the issue in public improvement projects. He is given a list. This is what we want your price to include. He bids those items and the rest make no difference to him.

Rep. Delmore : It would still make out the difference between the total of the bonds for the bids and total cost of the project, that would have to be bonded for by the construction manager, correct.

Rep. Carlson : He would not have to bond for anything other than what was on that bidding sheet of his. In most cases, they're not going to require him to get involved in anything but what is called for in the spec sheet. They are very detailed plans. He's doing two sides of the same issue. He not only is the designer, but he is also the builder. The other person is just the builder. There in lies the difference between the things that he does and where you will find the gap in the total number. This is not meant to keep them out of the business. This is meant to make sure that the total cost of the project.

Rep. Delmore : How often do general contractors bid a single bid, when they do everything that is included in that project?

Rep. Carlson : More times than not, it's the general contractor that does that. They are securing all the subs and making sure they have bonds to backup theirs. They are required by law to put a bond over the total project or have the total equal to the total cost of the project. Now we have just added a new entity, namely the construction manager.



Sen. D.Mathern. : If a construction manager can't get bonds for a contract they don't hold, we are keeping them out of it. Why would we have a construction bond for their profit to pay themselves? I don't get it.

Rep. Carlson : The general contractor gives the bid for the total project. No one asks him what his profit is in their or how must he paid for a construction manager to sit on site. He got the bid because he met all the specifications, and he had the low bid. A construction manager is required by present law to make sure that the subs below him have a bond, and he has to bond for his fee. I believe there is a gap between the two.

Sen. D.Mathern : My question was why would we require a construction manager to bond for their profit. They are the ones who would loose.

Rep. Carlson : You have to remember that a bond is for two things. One, failure of sub contractors or contractors to pay their respective subs or suppliers; or two, the contractors failure to complete the work. It should have nothing to do whether he is bonding his profit or not. The bond is to protect the buyer who agreed to \$1.2M to have the project completed. If we did not do diligence and cover that, the loser is the person who signed the contract. If he wants to be a contractor, he should be responsible to the same rules as the general would have to be.

Sen. Cook : One concern since the beginning has been that an architect can be a construction manager. We dealt with some language in the senate that put some separation there. Talking to people in the industry, they feel comfortable that it does. I'm curious if the house members if this language does solve some of the concern with the architects. Do you feel this language will keep this alive.

Rep. Carlson : I believe it does. I believe there are two separate issues. We are defining what he is, and what he does. Then we are also talking about bonding, and the purposes of a bond upfront. I felt the senate amendment fell short with the bonding issue.

Sen. Cook : As cloudy as this other gets, I have concerns that we have a bill that came through the senate and stayed alive. I know you want more to it, but maybe we should discuss whether we should settle for this and get it into code. See how it works out. **I move the house accede to the senate amendments.**

Sen. Flakoll : **I second.**

**VOTE: 4 YES and 2 NO MOTION FAILS.**

Rep. Froseth : I think that this proposed amendment .0509 a just a good safe guard for the general public as far as public improvement projects.

Rep. Carlson : I can't help but think that some think we are trying to price someone out of the market. That is not the case. It has been in code a long time that bonding has been required. Construction manager is a new breed of builder. We have treated him different than general contractors. If we don't want to pass this because we're afraid someone can't get a bond and participate, then we've missed the point of what a bond really is. A bond is meant to protect the failure to complete the work. **I move that the senate recede from it's amendments and further amend .0509.**

Rep. Froseth : **I second.**

Sen. Cook : I am going to have to vote against these the first time anyway. If it's a reality that this flexes some out of the business, that is very unfortunate. I don't want my fingerprint on legislation that would result in that. I look at existing law, and I don't see the gap. If there is a

gap, I don't think you need a bond to fill that gap. If we pass the senate version, we have taken a giant step forward. Anything but that, we risk taking a step backward.

Rep. Carlson : I couldn't disagree more then with the comments just made. The purpose of a bond is not to protect the person in business. It's to protect the public whose buying the project. I can't get a bond because I'm not big enough. I don't feel any way slighted. I do smaller projects that are not in that level. The loser is not the construction manager. The loser is the public. We have gotten bogged down with the issue of the fee and the poor guy not being able to afford it. We have failed to realize the purpose of a bond in the first place.

**VOTE: 2 YES and 4 NO      MOTION FAILS**

Rep. Delmore : I feel there are still unanswered question. I want to know where it's going before we mandate something. There's questions about the bonding that still have not been answered for this committee. The availability of the bonds has not been answered.

Sen. D. Mathern : I did a little research on what this gap may be. It was not clear to me. You can't have a performance bond for something like change orders, attorney fees, and building permits. That is a major problem. There is no performance bond for a building permit or attorney fee.

Rep. Carlson : Who ends up paying the price then?

Sen. D. Mathern : I don't believe that situation has reared it's ugly head. So what are we doing, Mr. Chairman.

Rep. Carlson : I find it amazing that the general contractor must have a bond for the total price of the contract, but we don't think anybody else should, because there is a gap or he can't afford it. I can try one more amendment to see if I can clear it up.

Rep. Froseth : We'll adjourn and meet tomorrow.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386 conf-5

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date 4-20-01

Tape Number	Side A	Side B	Meter #
1	xx		1--1400
Committee Clerk Signature <i>Ann Deane</i>			

Minutes: Chair Froseth opened the conference committee with others present: Rep. Carlson, Rep. Delmore, Sen. Cook, Sen. Flakoll, and Sen. D. Mathern.

Rep. Carlson : I passed out the part of code dealing with bonding and general contractors, and how they work on public improvement projects. The 5th line down is the main part here. **SEE ATTACHED** Yesterday we were worried about profit and things being in a bond. The point is they deal from the contract level and the completion level of that bond. That's the rule that the general follows when he bonds that project.

Sen. Cook : When you want to confuse all of us, talk about profit. It's something that sits out by itself.

Rep. Carlson : Profit has nothing to do with the issue. The contract is the contract.

Rep. Froseth : I passed out a new amendment, .0512. The changes from yesterday were why did we remove "public improvement". We now put it back in. We also put the wording back in that "construction manager shall bond the entire project through a single bond or through bonds

supporting all bid packages and the construction managers bond in the full amount of the construction managers services". Bonds must total the entire project bid.

Rep. Carlson : I move the amendments .0512.

Sen. Cook : I second.

Sen. D. Mathern : I still have not gotten an explanation of the gap, and what those items entail. From what I can see they may be the cost of building permits, cost of the bonds, etc. How in the world can you get a performance bond for the price of the bonds. I can't agree with this. We can't even get a real answer on what those items may be in the gap. If we could take a look at them, and say, yes, those are realistic. We can't force somebody to bond for something they can't get a bond for. I just don't think this is good practice.

Rep. Froseth : With this amendment there should be no gap.

Sen. Cook : I will vote for the amendment. The gap is between the old language and this language. I have to be able to explain this on the floor, and I don't really know the gap. It's a very important question, because the answer that I get here will be the answer I will have to give on the floor.

Rep. Froseth : The way I see it now, is that it will put the responsibility on the construction manager to see that the entire project is bonded through the sub contractors for the full project bid, including their services.

Sen. Cook : That's what I understood the old language to say.

Rep. Froseth : I don't know how they deal with cost overruns.

Sen. D. Mathern : I believe if we did any research, we'd find that the construction managers already have bonded theirs.

Rep. Carlson : It's very specific in code. The bond must be for an amount equal at least to the price stated in the contract. This language says the same thing. We can argue over a gap or no gap. Before, the language only said "his fee". (Read from code) Is the language redundant? I guess we could argue that. The point is to treat it as they treat a general contractor, which is very specific. If they add them all up and it happens to be a 7% fee that makes it total, that's perfect. If it was 5% short, I would hope that we would protect that other 5%, like we do with the general contractor.

Sen. Flakoll : Would a change order be deemed a bid? Would this change the responsibility of whose to bond these change orders?

Rep. Froseth : If anyone in the audience would like to speak to this, do so.

Rep. Delmore : I'd like to take this home this weekend and talk to my people that this directly effects. I won't vote for this until I know it is workable. I need more information.

Curt Peterson, Association of Contractors : I don't know that change orders are going to be a big deal unless they are substantial. Some change order lower the price as well. Some go up, of course. If I was a construction manager, and there was a big change, say to put in a sprinkler system, I would go to Mr. Sprinkler contractor and ask him for a bond. The law says he has to bond himself or see to it that he has bond from several contractors on the project. The committee should be aware that the construction management business is not a huge business in ND. There are probably 5 or 6 construction managers in ND. I have not gotten lots of complaints from them now, because the bill has changed from its original form. This new language clarifies better than the old language.

Rep. Froseth : In regard to cost over runs, how are they handled?

Curt Peterson : If it's substantial, I would think the construction manager would want to have a bond from the contractor.

Rep. Froseth : Aren't change orders usually negotiated with the owner of the project?

Curt Peterson : Sure. Our law says that the construction manager will be the bond man himself, or he will see to it that the contractor does.

Rep. Froseth : Would anyone else in the audience care to comment on cost over runs and change orders?

Sen. Cook : I don't have a problem with Rep. Delmore's request. I called an architect this morning. I'm confident in my discussion with him on this. He just asked that the overstrike be taken off of "construction of a public improvement". I still have to answer a question about the gap. I still believe that the only thing different between existing law and what we are creating with this new sentence, is that if you have a construction manager and you have an architect, and if the architect fees are part of the bid project, then the construction manager will have to have a bond for his services and also the architect. I believe it's redundant, except for the architect fee. I'm willing to come back Monday.

Rep. Froseth : We have a motion and a second on the floor. We have a motion by Rep. Carlson and a second by Sen. Cook. Call the role.

**VOTE: 3 YES and 3 NO. MOTION FAILS.**

Rep. Froseth : Any other wishes by the committee?

Sen. Flakoll : I may vote, yes, on Monday, but I would like to talk to some people at home this weekend.

Rep. Delmore : I agree.

Rep. Froseth : We'll adjourn and see you on Monday.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1386 conf-6

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date 4-23-01

Tape Number	Side A	Side B	Meter #
I	xx		1-259
Committee Clerk Signature <i>Patricia Delmore</i>			

Minutes: Rep. Froseth called the meeting to order with others present: Rep. Delmore, Rep. Carlson, Sen. Cook, Sen D.Mathern, and Sen. Flakoll.

Rep. Delmore : I have one little change. Can we change "supporting" to "provided by" to all bid packages.

Rep. Froseth : He reads the corrected amendment.

Sen. Cook : I move that the senate recede from it's amendments and further amend.

Rep. Carlson : I second.

VOTE: 6 YES and 0 NO MOTION PASSED. Rep. Froseth will carry.



Date: 3-10-01  
Roll Call Vote # 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. *HB 1386*

House Political Subdivisions Committee

☐ Subcommittee on \_\_\_\_\_  
or \_\_\_\_\_

☒ Conference Committee

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

Action Taken Do Pass Rep. Franchise Amendment

Motion Made By Rep. Froese Seconded By Rep. Diemel

[illegible]

Total (Yes) 2 No 4

**Absent**

Floor Assignment Motion Failed

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

Date: 4-10-01  
Roll Call Vote # 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1386

House Political Subs. Committee

☐ Subcommittee on \_\_\_\_\_  
or \_\_\_\_\_

☒ Conference Committee

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

Action Taken Do Pass

Motion Made By Rep. Froese Seconded By Rep. Ekstrom

[illegible]

Total (Yes) 6 No 0

Absent                     

Floor Assignment Diary / Cook

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

Insert LC: .

**REPORT OF CONFERENCE COMMITTEE**

**HB 1386, as engrossed:** Your conference committee (Sens. Cook, Flakoll, D. Mathern and Reps. Disrud, Froseth, Ekstrom) recommends that the **HOUSE ACCEDE** to the Senate amendments on HJ pages 1227-1228 and place HB 1386 on the Seventh order.

Engrossed HB 1386 was placed on the Seventh order of business on the calendar.

REPORT OF CONFERENCE COMMITTEE  
(ACCEDE/RECEDE) - 420

07398

(Bill Number) HB 1386 (, as (re)engrossed):

Your Conference Committee Pol. Subs

For the Senate:

Sen. Cook  
Sen. Flakoll  
Sen. D. Mathern

For the House:

Rep. Disrud  
Rep. Frosuth  
Rep. Ekstrom

☒ recommends that the (SENATE HOUSE) (ACCEDE to) (RECEDE from)  
the (Senate/House) amendments on (S/J HJ) page(s) 1227 - 1228

☒ and place 1386 on the Seventh order.

☐ , adopt (further) amendments as follows, and place  
\_\_\_\_\_ on the Seventh order:

☐ having been unable to agree, recommends that the committee be discharged  
and a new committee be appointed.

((Re)Engrossed) 1386 was placed on the Seventh order of business on the  
calendar.

DATE: 4 / 10 / 01

CARRIER: Disrud / Cook

LC NO. \_\_\_\_\_ of amendment

LC NO. \_\_\_\_\_ of engrossment

Emergency clause added or deleted \_\_\_\_\_

Statement of purpose of amendment \_\_\_\_\_

(1) LC (2) LC (3) DESK (4) COMM.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386

That the Senate recede from its amendments as printed on pages 1227 and 1228 of the House Journal and pages 1037 and 1038 of the Senate Journal and that Engrossed House Bill No. 1386 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 48-01.1-09, 54-44.7-01, and 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

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

**SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century Code is amended and reenacted as follows:

**48-01.1-09. Use of construction manager.** If a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. A If multiple prime bids are used on the public improvement, the construction manager awarded a the contract for construction of a public improvement shall bond the entire cost of the project through a single bond, or through bonds supporting all bid packages and the construction manager's bond for the full amount of the construction manager's services. If the total of the bonds for the multiple prime bids is less than the total cost of the project, the construction manager must bond the difference between the total of the bonds for the multiple prime bids and the total cost of the project.

**SECTION 2. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer, construction management, 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, and construction management, 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.

**SECTION 3. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer, construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 5. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

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

This procedure shall still follow state policy set forth above."

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386

That the Senate recede from its amendments as printed on pages 1227 and 1228 of the House Journal and pages 1037 and 1038 of the Senate Journal and that Engrossed House Bill No. 1386 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 48-01.1-09, 54-44.7-01, and 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

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

**SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century Code is amended and reenacted as follows:

**48-01.1-09. Use of construction manager.** If a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. A The construction manager awarded a the contract for construction of a public improvement shall bond the entire cost of the project through a single bond, or through bonds supporting all bid packages and the construction manager's bond for the full amount of the construction manager's services. If the total of the bonds is less than the total cost of the project, the construction manager must bond the difference between the total of the bonds for the bids and the total cost of the project.

**SECTION 2. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer, construction management, 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, and construction management, 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.

**SECTION 3. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer, construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 5. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

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

This procedure shall still follow state policy set forth above."

Renumber accordingly



Date: 4-19-01

Roll Call Vote # /

## 2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES

**BILL/RESOLUTION NO.** 1356

House

Committee



Subcommittee on

or

**X**

Conference Committee H 4

Legislative Council Amendment Number

### Action Taken

**Motion Made By**

Seconded By

[illegible]

Total

(Yes)

No

**Absent**

### Floor Assignment

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

Date: 11-16-01  
Roll Call Vote # 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1386

House Pol. Sec. Committee

☐ Subcommittee on \_\_\_\_\_  
or \_\_\_\_\_

☒ Conference Committee *WLC*

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

Action Taken Create record of on-site environmental assessment

Motion Made By Rep. Carlson Seconded By Rep. Farwell

[illegible]

Total (Yes) 2 No 2

**Absent**

Floor Assignment 1st

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

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386

That the Senate recode from its amendments as printed on pages 1227 and 1228 of the House Journal and pages 1037 and 1038 of the Senate Journal and that Engrossed House Bill No. 1386 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 48-01.1-09, 54-44.7-01, and 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

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

**SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century Code is amended and reenacted as follows:

**48-01.1-09. Use of construction manager.** If a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. A The construction manager awarded a the contract for construction of a public improvement shall bond the entire cost of the project through a single bond, or through bonds supporting all bid packages and the construction manager's bond for the full amount of the construction manager's services. If the total of the bonds is less than the total project bid, the construction manager shall bond the difference between the total of the bonds and the total project bid.

**SECTION 2. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer, construction management, 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, and construction management, 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.

**SECTION 3. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer, construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 5. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

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

This procedure shall still follow state policy set forth above."

Renumber accordingly

Date: 4-1-00  
Roll Call Vote #

**2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 1356**

House Sub. C. Committee

☐ Subcommittee on \_\_\_\_\_  
or \_\_\_\_\_

☒ Conference Committee

Legislative Council Amendment Number 104/32-05/20

Action Taken As per

Motion Made By Rep. Landon Seconded By Sen. C. C.

[illegible]

Total (Yes) 3 No 2

Absent

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

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

CONFERENCE AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1386 HOUSE POL. SUBS 4/23

That the Senate recode from its amendments as printed on pages 1227 and 1228 of the House Journal and pages 1037 and 1038 of the Senate Journal and that Engrossed House Bill No. 1386 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 48-01.1-09, 54-44.7-01, and 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

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

**SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century Code is amended and reenacted as follows:

**48-01.1-09. Use of construction manager.** If a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. A The construction manager awarded a the contract for construction of a public improvement shall bond the entire cost of the project through a single bond, or through bonds supporting provided by all bid packages and the construction manager's bond for the full amount of the construction manager's services. If the total of the bonds is less than the total project bid, the construction manager shall bond the difference between the total of the bonds and the total project bid.

**SECTION 2. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer, construction management, 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, and construction management, 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.

**SECTION 3. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer, construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

242  
pg. 2

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 5. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

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

This procedure shall still follow state policy set forth above."

Renumber accordingly

Date: 4-2  
Roll Call Vote # 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1781

House Pol. Sci. Committee

Subcommittee on \_\_\_\_\_

or

☒ Conference Committee #6...

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

Action Taken Senate Recede from Senate Amendments + further Agenda

Motion Made By Sen. Cook Seconded By Rep. Carlson

[illegible]

Total (Yes) 6 No 0

Absent

Floor Assignment (Rev. 1/1/10)

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



**REPORT OF CONFERENCE COMMITTEE**

**HB 1386, as engrossed:** Your conference committee (Sens. Cook, Flakoll, D. Mathorn and Reps. Froseth, Carlson, Delmore) recommends that the **SENATE RECEDE** from the Senate amendments on HJ pages 1227-1228, adopt further amendments as follows, and place HB 1386 on the Seventh order:

That the Senate recede from its amendments as printed on pages 1227 and 1228 of the House Journal and pages 1037 and 1038 of the Senate Journal and that Engrossed House Bill No. 1386 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 48-01.1-09, 54-44.7-01, and 54-44.7-02, subsection 1 of section 54-44.7-03, and subsection 1 of section 54-44.7-04 of the North Dakota Century Code, relating to construction management.

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

**SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century Code is amended and reenacted as follows:

**48-01.1-09. Use of construction manager.** If a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. AThe construction manager awarded a the contract for construction of a public improvement shall bond the entire cost of the project through a single bond, or through bonds supporting provided by all bid packages and the construction manager's bond for the full amount of the construction manager's services. If the total of the bonds is less than the total project bid, the construction manager shall bond the difference between the total of the bonds and the total project bid.

**SECTION 2. AMENDMENT.** Section 54-44.7-01 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-01. Definition.** "Architect, engineer,construction management, 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, and construction management, 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.

**SECTION 3. AMENDMENT.** Section 54-44.7-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.7-02. Applicability - Policy.** Architect, engineer,construction management, 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.

**SECTION 4. AMENDMENT.** Subsection 1 of section 54-44.7-03 of the North Dakota Century Code is amended and reenacted as follows:

1. Each using agency shall establish its own architect, engineer, construction management, 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.

**SECTION 5. AMENDMENT.** Subsection 1 of section 54-44.7-04 of the North Dakota Century Code is amended and reenacted as follows:

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

This procedure shall still follow state policy set forth above."

Renumber accordingly

Engrossed HB 1386 was placed on the Seventh order of business on the calendar.

REPORT OF CONFERENCE COMMITTEE  
(ACCEDE/RECEDE) - 420

07398

(Bill Number) 1384 (, as (re)engrossed):

Your Conference Committee

Pol. Sub.

For the Senate:

Sen Cook  
Sen Flakoll  
Sen D. Matheson

For the House:

Rep Froese  
Rep Carlson  
Rep. Helmore

☒ recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)  
the (Senate/House) amendments on (SJ/HJ) page(s) \_\_\_\_\_

☐ and place \_\_\_\_\_ on the Seventh order.

☒ , adopt (further) amendments as follows, and place  
HP 1324 on the Seventh order:

☐ having been unable to agree, recommends that the committee be discharged  
and a new committee be appointed.

((Re)Engrossed) \_\_\_\_\_ was placed on the Seventh order of business on the  
calendar.

DATE: 4/23/01

CARRIER: Rep Froese

LC NO. \_\_\_\_\_ of amendment

LC NO. \_\_\_\_\_ of engrossment

Emergency clause added or deleted \_\_\_\_\_

Statement of purpose of amendment \_\_\_\_\_

(1) LC (2) LC (3) DESK (4) COMM.

2001 TESTIMONY

HB 1386

GARY J. NELSON  
State Senator  
Chairman

JOHN D. OLSEN  
Director

JAY E. BURINORUD  
Assistant Director

JIM W. SMITH  
Legislative Budget  
Analyst & Auditor

JOHN WALSTAD  
Code Revisor

# North Dakota Legislative Council

STATE CAPITOL, 600 EAST BOULEVARD, BISMARCK, ND 58505-0360 (701) 328-2916 TTY 1-800-366-6888

January 11, 2001

Honorable Francis J. Wald  
State Representative  
433 Seventh Street East  
Dickinson, ND 58601-4525

Dear Representative Wald:

This letter is in response to your inquiry concerning bids for the construction of public buildings.

North Dakota Century Code (NDCC) Section 48-01.1-02 requires governing bodies to award contracts for the construction of public improvements to the lowest responsible bidders. As used in the section, public improvement means any improvement the cost of which is payable from taxes or other funds under the control of a governing body including improvements for which special assessments are levied. The term does not include any county road construction and maintenance, state highway, or Public Service Commission project governed by Titles 11, 24, or 38.

Under NDCC Section 48-01.1-03, if the contract for the construction of a public improvement is estimated to cost in excess of \$100,000, the governing body is required to advertise for bids. The governing body may reject any bid and readvertise for proposals if no bid is satisfactory, or if it believes any agreement has been entered into by the bidders or others to prevent competition. If the governing body determines that an emergency situation exists, a contract may be made without seeking bids.

We hope the foregoing discussion is helpful. Please contact our office if you require any additional information.

Sincerely,

Jeffrey N. Nelson  
Counsel

JNN/PG  
cc: Mr. Curt Peterson

**TESTIMONY ON HB 1386  
PROVIDED BY CURT PETERSON, EXECUTIVE VICE PRESIDENT  
ASSOCIATED GENERAL CONTRACTORS OF NORTH DAKOTA  
2-7-01**

**Chairman Froseth, members of the Committee, House Bill 1386 was introduced to clarify three issues relative to public construction projects.**

**Section 1 of the bill addresses Subsection 6 of Section 48-01.1-01 of the North Dakota Statute relative to the requirement of the need to publicly bid on those that are funded in part by economic development funds and sales tax revenues. Attached is a copy of a January 11, 2001 letter addressed to Rep. Francis J. Wald from Mr. Jeffrey Nelson, Counsel for the North Dakota Legislative Council, which addresses that matter.**

**Section 2 of this bill addresses multiple prime bids for public construction projects. This section establishes the requirements for multiple prime bids and will give the public entities the prerogative to decide how the project will be bid relative to prime or multiple bids.**

**The Section 3 amendment simply requires that a construction manager must provide a bond for the entire project when ever this method of construction is utilized. Please note the attached legal opinion relative to the reasons this should be included in the statute.**



502 First Avenue North  
Fargo, ND 58102-4804

Reply to: P.O. Box 1389  
Fargo, ND 58107-1389

Tel: 701-237-6983

Fax: 701-237-0847

E-mail: [vogellaw@vogellaw.com](mailto:vogellaw@vogellaw.com)

Offices in Fargo & Bismarck

Il. Patrick Weir\*  
Kermit Edward Bye\*  
Carlton J. Hunke\*  
C. Nicholas Vogel  
Maurice O. McCormick  
M. Daniel Vogel\*  
John C. Kapsner  
William A. Schlossman, Jr.\*  
Jane C. Voglewede\*

Jon R. Brakke\*  
W. Todd Haggart\*  
Frank G. Gokey\*  
Steven A. Johnson\*  
Bruce D. Quick\*  
Wayne W. Carlson\*  
Leslie Bakken Oliver  
Jertlynn B. Adams  
Lisa Edison-Smith\*

Daniel A. Bueide\*  
Monte L. Rognaby\*  
Angie Elspenger Lord\*  
Sidney J. Spaeth\*  
Tami L. Norgard\*  
Retired  
Mart R. Vogel  
Jerry O. Branmer

\*Also licensed in MN

March 20, 2000

Curt Peterson, Executive Vice President  
Associated General Contractors of North Dakota  
422 North 2nd Street  
Box 1624  
Bismarck, ND 58502

VIA FACSIMILE AND U.S. MAIL  
(701) 223-6719

RE: Bonding of Projects With Construction Manager

Dear Mr. Peterson:

I am writing in response to your request for a discussion of the risks faced by North Dakota governmental entities which bond projects through a construction manager under N.D.C.C. § 48-01.1-09.

### DISCUSSION

1. Background. In order to protect governmental bodies from the significant losses which can result from contractor defaults, North Dakota law requires contractors working on all public building projects in excess of \$100,000 to provide a bond. [NDCC § 48-02-06.2]. Contractor's bonds must be at least equal to the price stated in the contract. Id. The bond protects the governing body from two risks: (a) the failure of contractors and subcontractors to pay their respective subcontractors and suppliers; and (b) the contractor's failure to complete work, construction defects, and other breaches of contract. Id.

In the past, where general contractors were hired to construct a project, the general contractor was required to provide a bond for the entire cost of the project. This gave the governing body full protection under a single bond for the entire cost of the project, regardless of whether the general contractor or any subcontractor or supplier was at fault. If the workmanship or materials provided by any contractor, subcontractor or supplier were defective, the bond covered the governing body for loss up to the full cost of the project.

Vogel, Weir, Bye, Hunke & McCormick, LTD.

Recent North Dakota legislation allows governing bodies to employ construction managers to manage construction projects [NDCC § 48-01.1-09]. The construction manager is obligated to manage and supervise the construction [NDCC § 48-01.1-01(3)], but not contractually obligated to complete the work nor be responsible for defects in work supplied by contractors, subcontractors, and suppliers. Where a construction manager is awarded a contract, the construction manager need not provide a bond covering the entire cost of the project. [NDCC § 48-01.1-09]. Rather, the construction manager may elect to either (a) bond the entire cost of the project through a single bond or (b) obtain separate bonds supporting all of the bid packages in addition to a separate construction manager bond for the full amount of the construction manager's services. Understandably, construction managers typically elect to bond projects through separate bonds supporting each bid package. When such an election is made, the construction manager only needs to bond and be responsible for the amount payable to the construction manager for its services, often a small fraction of the overall cost of the project.

2. Risks. Use of multiple bonds in projects managed by construction managers substantially reduces the security available to a governing body from that available where a general contractor provides a single bond for the entire cost of a project. As discussed above, where the general contractor provides a single bond covering the entire cost of a project, the bonding company is responsible for losses up to the cost of the project regardless of whether the claim results from defective workmanship or materials supplied by the general contractor, or any subcontractor or supplier. On the other hand, when a construction manager is used and the project is bonded with multiple bonds as authorized under NDCC § 48-01.1-09, each separate bond covers only breaches by the contractor supplying the bond, up to the amount payable under the contractor's contract. If the contractor is responsible for 5% of the cost of the project, the governing body would be bonded for losses and claims resulting from breach by that contractor for only 5% of the cost of the project, regardless of the extent of the loss. The remaining 95% of project costs are uninsured for losses sustained as a result of the offending contractor's breach.

Because defective construction methods or materials often necessitate reconstruction of other parts of a project, the costs to remedy the breach frequently exceed the incremental costs paid to the offending construction manager, contractor or supplier providing the work. Where a construction manager is used and separate bonds are provided by each contractor, the risk to the governing body of sustaining a loss in excess of the bond provided by the offending contractor is significant. If, for example, a foundation subcontractor with a \$400,000 contract in a \$10,000,000 building project managed by a construction manager negligently pours the foundation necessitating the demolition and reconstruction of the completed structure, only the subcontractor's bond in the amount of \$400,000 would be available to cover a loss of \$10,000,000, leaving the governing body exposed to nearly a \$9,600,000 loss. Likewise, if a construction manager was hired to manage the construction of a \$5,000,000 building for a fee of \$250,000, and the construction manager's improper sequencing of work resulted in substantial delays and corresponding overruns in claims



Curt Peterson  
May 20, 2000

by contractors and subcontractors of \$1,000,000, only the construction manager's bond of \$250,000 would be available to cover the \$1,000,000 loss.

### CONCLUSION

Changes in North Dakota law authorizing bond coverage to be provided only for the amount of each separate contract where a construction manager is involved substantially reduce the protection available to governing bodies from loss resulting from defective construction. It will only be a matter of time before some governing body will face a significant unbonded loss resulting from defects in construction on a project where performance is secured under separate bonds capped at the amount of the individual contracts.

Very truly yours,

  
William A. Schlossman, Jr.

WAS:ldt

## PUBLIC IMPROVEMENTS BIDDING ISSUES

1. Problems with Laws Relating to Use of Construction Manager
  - a. Construction Managers are required to bond only their fee. This is entirely inadequate to address potential loss to governing body resulting from misfeasance of the construction manager which may require rebuilding substantial portions of the project.
  - b. Although a contractors license is required, licensing laws are weak allowing insubstantial operators with little experience to manage major projects. This problem is exacerbated by limited bonding requirements which fail to weed out marginal operators.
  - c. There is no statutory bidding or selection process for construction managers. Selection of a construction manager need not follow any formal criteria.
  - d. There is no prohibition of any company related to architect for a project from being the construction manager. This creates a substantial conflict of interest between the architect whose responsibility it is to oversee all aspects of construction, including those under the control of the construction manager.
  - e. There is no requirement that an entire project be bid before construction proceeds. This results in the governing body is at risk for construction costs exceeding estimates, with no ability to ask for new bids, or resize or redesign those portions of the project completed or contracted for prior to receipt of final bids.
2. Multiple Prime Bids: There is no limitation on the number of prime bids obtained for any project. Bonds cover only the amount of each contractor's contract. As a result, there is inadequate bonding coverage where a contractor's non-performance results in damages greater than the amount of the contractor's contract.
3. Development Agreements: Regardless of the amount of the project, NDCC Section 48-02.1-12 allows governing bodies to contract with private entities for construction of fee based facilities. If there is private ownership (sale-leaseback) governing body need not comply with the public bidding statutes.
4. General Abuses:
  - a. Purchase of building materials by the governing body. Contractor becomes the installer only.
  - b. Liberal use of emergency exemption to avoid bidding public improvements.

# HOUSE POLITICAL SUBDIVISIONS COMMITTEE

February 8, 2001

North Dakota Department of Transportation  
Jerome L. Horner, Maintenance Engineer)

HB 1386

---

This bill enables the department to administer one contract, instead of three, for department buildings under \$250,000 in value.

The department has a number of highway maintenance equipment and materials storage facilities throughout the state. These facilities include section maintenance buildings at 66 rural sites, and equipment and material storage buildings at the department's eight district headquarters in the larger cities. In general, these facilities are similar to buildings erected by farmers and small businesses throughout the state. Their replacement value ranges from \$150,000 to \$400,000, depending upon the size.

NDDOT buildings constructed during the current biennium had three prime contractors: general, mechanical, and electrical. This caused some coordination problems because the scope of the electrical and mechanical contractors is such a small part of the contract. The department feels that we would receive better bids with one prime contractor—the general contractor—on these smaller projects. The bids would improve because the general contractor would no longer have down-time caused by waiting for an electrical or mechanical contractor that the general contractor had no control over.

The bill would not eliminate work from any of the general, mechanical, or electrical contractors. The department will still require the work to be completed by licensed general, mechanical, and electrical contractors. In fact, the bill would enable the contracting industry to use smaller subcontractors who may not have the bonding capacity to bid as a prime contractor to the department. The bill would also reduce the number of contracts the department has to administer.

We are not aware of any problems this would cause with the construction or operation of our facilities. We feel that eliminating some potential down-time for the general contractor will result in better bids for the department, and ask the committee to favorably consider HB 1386—with one change. We ask that you increase the limit as proposed by the bill from \$250,000 to \$400,000. This amount will better accommodate the department's facility upgrade program.

2-9-01

## **HOUSE BILL 1386 TESTIMONY**

**I am Representative Elliot Glassheim. Dave McFarlane of McFarlane Sheet Metal, Grand Forks has asked me to read the following testimony on his behalf against this bill. He has written the following**

### **Representatives**

**I would have liked to have been able to testify in person as I have in the past but business issues this week will not allow this to happen. Elliot Glassheim has graciously agreed to read this for me.**

**House Bill 1386 is a subtle attempt to eliminate the provisions of current state law that require the submission of multiple General, Mechanical and Electrical bids on state work. The current law has saved the state hundreds of millions of dollars in construction costs by requiring multiple bids to be submitted. Dividing the construction process among these prime construction entities allows more companies to participate in the bidding process by lowering bonding dollar requirements. Increased competition equates to lower project costs. The state saves money.**

**The following language is particularly troubling:**

**Line 16 Changing the wording to "is allowed but not required" would mean the end of the requirement to solicit multiple bids. Architects find it easier to write single contracts. They will specify single bid contracts in the bid documents. Single contracts reduce the amount of work architects have to perform when writing specifications. Multiple contracts require exact specifications to avoid conflicts. Exact specifications require extra work from architects.**

**Conflicts will still occur under single contracts. However the general contractor will become the arbitrator and typically subcontractors suffer, as the general contractor will most likely resolve disputes in his favor. The state architectural association has typically promoted these proposed changes because it is easier for architects to write inclusive specifications. The state will pay the price for this change in higher construction costs.**

**When single bids are submitted, mechanical and electrical subcontractors raise prices to cover these ambiguities and conflicts. As these ambiguities are corrected through internal change orders, the general contractor will pocket**

the change order dollars. These price increases by mechanical and electrical contractors cost the state money.

Mechanical and electrical costs are typically 50% of standard building projects. When these cost are included under one contract, the general contractor will mark up these subbids for overhead and profit. This markup can add 10-15% to the mechanical and electrical costs. The state pays these extra costs of single contracts.

Line 17 & 19 attempts to raise the limit when the current law is implemented to \$250,000 . This is another attempt to circumvent existing law and reduce competition.

Line 21 states "Independent of the amount of the contract"

This language would allow governmental agencies to arbitrarily use single bids on any size project. This language opens the door to sweetheart deals between governmental agencies and larger contractors.

There are only a handful of contractors in the entire state that have the bonding capacity to bid large million dollar projects. The wording "Independent of the amount of the contract" significantly reduces construction competition.

The current law allows general contractors to submit single combined bids. When contractors submit combined bids and have to compete against multiple bids, they seldom are the low bidder. It is this loss of work by the general contractors and the extra work required of the design profession that has prompted the request for changes in the existing law in the past. I have been unable to hear todays testimony in favor of the changes but suspect that it is similar to prior years.

Very simply **Project costs are higher under single bids.**

We are unsure how the provisions of the bill on page two that modify the construction management process would affect construction costs but are concerned that these changes may also limit competition.

Our company is opposed to any legislation that reduces competition.

**These proposed changes on page one definitely reduce competition and will cost taxpayers money.**

**We urge you to vote NO on House Bill 1386**

**Thank you for your consideration**

**Dave McFarlane**

**President of McFarlane Sheet Metal**

## North Dakota House Bill # 1386

When originally drafted and put into law, it was determined that in using multiple prime bids the savings were up to 7%.

The University of North Dakota has used this system of bidding for as long as I have been bidding work starting in the year 1964. The reason being that they were and still are saving money using this system.

With that in mind the multiple prime bid system should be used in all bidding for public building on any project over \$100,000.00 (\$7,000.00 saved) total project costs, saving tax payers money. Please at least let it be allowed and accept bid for both single prime and multiple prime bids on all projects over \$100,000.00 without exceptions. This doesn't change the quality of the final project. It will accelerate the project, as communication can be direct with engineer or owners. Payments are then paid directly to the multiple prime contractors not through single prime, which will delay payments. Project coordination would not change.

Please review the above, do not pass this Senate Bill #1386. Save the tax payer money or tax reductions.

Leon Comeau  
1015 11th Street  
Thompson, ND 58278  
(701)775-7055

Paul Comeau  
1603 S. 17th Street  
Grand Forks, ND 58201  
(701)746-0862

Dennis D'Heilly  
1334 S. 19th Street  
Grand Forks, ND 58201  
(701)775-7407

Edward Scherpinsky  
2569 23rd Street NE  
Mekinock, ND 58258  
(701)696-8208

Jim Melicher  
4811 6th Avenue North  
Grand Forks, ND 58203  
(701)746-5936

Kurt Comeau  
617 10th Avenue South  
Grand Forks, ND 58201  
(701)772-4651

Denyse Bindon  
1804 Continental Drive #305  
Grand Forks, ND 58201  
(701)780-8838

Dennis Schroeder  
1544 10th Avenue NE  
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Jerry Brokke  
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Donald Bleth  
1802 6th Avenue North  
Grand Forks, ND 58203  
(701)772-9441

Donald Timian  
P.O. Box 56  
Manvel, ND 58256  
(Cell)701-741-4049

**Dakota Electric Construction Co., Inc.***Fargo's Oldest Electrical Contractor*Box 1006 — 1650 First Avenue North  
Fargo, North Dakota 58107Phone: 701-235-7581  
Fax: 701-235-6032  
e-mail: dakotaelectricco@uswest.netEstablished  
1898

February 5, 2001

The Honorable Matthew M. Klein of the North Dakota House  
1815 Seventh Street NW  
Minot, ND 58703

Dear Honorable Matthew M. Klein:

Re: House Bill No. 1386

As a small business electrical contractor in the State of North Dakota, I wish to express my concern on proposed legislation House Bill No. 1386, Section 2, Amendment, Section 48-001.1-06.

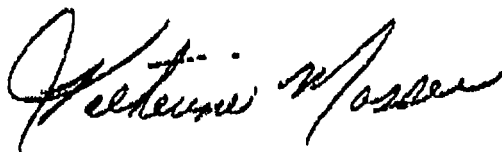
It is my understanding this amendment is raising the multiple prime bid limit from \$100,000 to \$250,000. Our experience has been when State of North Dakota work is under a single prime contract, we wait additional time for payment of work completed to filter down to us. This obviously puts a strain on small business cash flow. We have also experienced longer close out time of the project because of work still needing to be completed by the general. This in turn, through no fault of our own, delays payment of the retainage on the project.

There is a lot of electrical work that falls below the \$250,000 mark, the majority of our jobs are below this amount. We prefer bidding directly to the State as it assures the contract will be awarded fairly and not be left to the general contractor's discretion.

This amendment does indeed reduce small business competitiveness, limiting the ability of small electrical contractors to bid as a prime contractor on state jobs, thereby decreasing individual contracts awarded to small firms.

Respectfully submitted,

Dakota Electric Construction Co., Inc.

Katherine Massee  
President





DAKOTAS CHAPTER

www.smart-wire.com

February 8, 2001

Honorable Glen Froseth, Chairman  
Political Subdivisions Committee  
600 E. Boulevard Avenue  
Bismarck, ND 58505

Dear Representative Froseth:

My name is Francis E. Mazza and I am Executive Director of the Dakotas Chapter of the National Electrical Contractors Association.

On behalf of our entire membership I wish to state our opposition to House Bill No. 1386.

This proposed legislation strikes at the heart of a contractor's opportunity to be competitive, and the State of North Dakota's responsibility, to all our citizens, to act in a fiscally responsible manner.

Therefore, I respectfully request you and your Political Subdivisions Committee vote against the proposed amendments in House Bill No. 1386.

This proposed legislation should receive a **no** vote for the following reasons:

- **Multiple Primes** insure fair competition with each prime component of a project going to the lowest responsible bidder; and,
- **Multiple Primes** insure prompt payment by the State for work completed, thereby eliminating the cash flow strain on small businesses caused by slow payment inherent in single prime contracts; and,
- **Multiple Primes** save the State and the citizens of North Dakota approximately seven per cent (7%) on construction project costs; and,
- **Raising the multiple prime bid limit** to \$250,000 greatly reduces the number of projects where the benefits of multiple prime bids can be realized.

Thank you and I respectfully request a "**do not support**" vote from you and your Committee so that the State can continue providing a fiscally responsible and competitive bidding environment for all State construction projects. Thereby insuring continued opportunities for our States small businesses / contractors.

Respectfully,  
for the Dakotas Chapter NECA

*Francis E. Mazza*  
Francis E. Mazza  
Executive Director

# **MOWBRAY & SON**

## **PLUMBING & HEATING, INC.**

### **SHEET METAL, INC.**

P.O. Box 878  
328 20th Ave SE  
Minot, ND 58702-0878  
Phone 701-852-1491  
Fax 701-839-5869

Feb. 6, 2001

57<sup>th</sup> Legislative Assembly of North Dakota  
Attn: North Dakota House Representatives

Re: Opposition to House Bill 1386 Section 48-01, 1-06 of the North Dakota Century Code

In reference to House Bill 1386, I wish to express strong opposition toward the proposed amendment of Section 48-01, 1-06 of the North Dakota Century Code, which pushes the idea of single prime bids for construction of public building contracts. Our tax money would pay for this mistake.

There would be no benefit to the construction industry, the public, nor the government if this amendment were to go through. It would unnecessarily drive the end result of construction costs up at the taxpayers' expense.

The idea of a single prime bid is appealing only to those people at the top-end of the "bid chain" who could reap the benefits of undue mark-ups on construction costs. A single prime bid allows the general contractor to add a percentage of mark-up to each of the subcontract bids, thereby increasing the price of the contract. Architects and the AGC are attracted to this idea because they, as a result, receive a greater dollar amount for their percentage. Even if the mark-up percentages were small, the dollars would add up quickly--paid for with taxpayers' dollars.

I hope you take the time to research this matter further, and I am sure you will see that there is no benefit in amending this portion of the bill. It will only hurt subcontractors and taxpayers alike.

Sincerely,

*[Handwritten signature]*

*Derrick Orban*  
*Dan Orban*

*[Handwritten signature]*  
*Diane Melvin*  
*Cynthia Barnes*

*Warren K. Gordon*  
*Bill Waller*

**Proposed Amendments to HB #1386**

**Page 1, Delete Section 1, Lines 5-12.**

**Page 1, Line 13, after Section, delete 2 and insert in lieu thereof 1.**

**Page 2, Line 1, after Section, delete 3 and insert in lieu thereof 2.**



February 8, 2001

Honorable Glenn Froseth, Chairman  
Political Subdivision Committee  
600 East Boulevard Ave  
Bismarck, ND 58501

ND Government and Veterans  
Affairs Committee  
House Bill No. 1386

Dear Representative Froseth

I appear before you in opposition to House Bill No. 1386.

The intent for multiple prime bids when it was introduced was of course to save taxpayers money.

The law was introduced after a study done in the state of Wisconsin showed that multiple prime bids cost less than single prime bids. Raising the limits on when multiple prime bids must be used does not change the fact that when compared to a single prime bid, multiple prime bids are lower.

I have attached the results of three recent projects that show the savings when a project is bid in both manners.

**Bench Welcome & Visitors Center:**

Single Prime Bid Total:	\$ 1,506,000.00
Multiple Prime Bid Total:	<u>\$ 1,491,221.20</u>
Savings To Taxpayers:	\$ 14,778.80

**Bismarck Water treatment Plant PH-1 Optimization:**

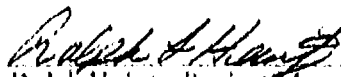
Single Prime Bid Total:	\$ 172,100.00
Multiple Prime Bid Total:	<u>\$ 162,085.00</u>
Savings To Taxpayers:	\$ 10,015.00

**Bismarck Water treatment Plant Misc. Improvements:**

Single Prime Bid Total:	\$ 297,000.00
Multiple Prime Bid Total:	<u>\$ 196,700.00</u>
Savings To Taxpayers:	\$ 100,300.00

Note that the engineer's estimate for the last two projects are below the proposed \$250,000.00 threshold. Due to their estimates, had the engineer or owner not allowed the submission of multiple primes for these two projects it would have cost the owner an additional \$110,315.00, a premium of 30% more than it actually cost by using the multiple bid requirement.

Respectfully submitted,

  
Ralph Heintz, Project Manager



1300 Basin Avenue • PO Box 1451 • Bismarck, ND 58502

Telephone: (701) 255-2831 • Fax: (701) 255-2835

E-mail: edling@btigate.com

*We are an Equal Opportunity Employer M/F/V/H*

MASTER  
LICENSE  
#1541



# BEACH WELCOME & VISITOR CENTER

## NDDOT PROJECT #TEI-5-094(020)001

### BID RESULTS

ZUMBRUNNEN, ARCHITECT, PC

BID OPENING: Tuesday, January 23, 2001

GENERAL CONTRACTOR	BID BOND	ACKN ADD	BASE BID	UNIT COSTS	
				Deleted Excavation	Added Excavation
CAPITAL CITY CONST.*	✓	✓	\$ 622,000.00	\$10.00/C.Y.	\$20.00/C.Y.
BIG K INDUSTRIES	✓	✓	645,100.00	14.50/C.Y.	14.50/C.Y.
ASSOCIATED BUILDERS	✓	✓	655,000.00	16.00/C.Y.	21.00/C.Y.
KOLLING & KOLLING	✓	✓	669,000.00	3.00/C.Y.	17.00/C.Y.
TOOZ CONSTRUCTION	✓	✓	936,000.00	5.00/C.Y.	22.00/C.Y.

MECHANICAL CONTRACTOR	BID BOND	ACKN ADD	TOTAL BID		
SELID PLUMBING*	✓	✓	\$ 103,700.00		
CENTRAL MECHANICAL	✓	✓	112,400.00		
KRAMER SHEET METAL	✓	✓	118,766.00		
BELFIELD PLUMBING	✓	✓	129,093.00		
CITY AIR MECHANICAL	✓	✓	129,470.00		
ADVANCED	✓	✓	133,650.00		
WALSH'S	✓	✓	160,350.00		

ELECTRICAL CONTRACTOR	BID BOND	ACKN ADD	TOTAL BID		
BERGER ELECTRIC*	✓	✓	\$ 122,750.00		
SKEELS ELECTRIC	✓	✓	128,480.00		
EDLING ELECTRIC	✓	✓	138,000.00		
ELECTRIC SLS & SV	✓	✓	142,000.00		

**BEACH WELCOME & VISITOR CENTER**  
**NDDOT PROJECT #TEI-5-094(020)001**  
**BID RESULTS CONTINUED**

CIVIL CONTRACTOR	BID BOND	ACKN ADD	TOTAL BID		
NORTHERN IMPROV.*	✓	✓	\$ 642,771.20		
FRANZ CONSTRUCTION	✓	✓	681,608.35		
CENTURY COMPANIES	✓	✓	697,993.50		

# TABULATION OF BIDS

BISMARCK WATER TREATMENT FACILITY  
PH-1 OPTIMIZATION INTERIM IMPROVEMENTS

CITY OF BISMARCK  
BISMARCK, NORTH DAKOTA

Bid Letting: Tuesday, June 27, 2000  
Checked by: Russ Sorenson

Page 1 of 1

ITEM	DESCRIPTION	Cofell's Bismarck, ND TOTAL SUM	Edling Electric Bismarck, ND TOTAL SUM	H.A. Thompson Bismarck, ND TOTAL SUM	Swanberg Const. Valley City, ND TOTAL SUM	Engineer's Estimate TOTAL SUM
CONTRACT NO. 1 - GENERAL CONSTRUCTION						
1.	Mobilization and Bonding	\$1,500.00		\$1,537.00	\$9,000.00	\$8,300.00
2.	F&I Chlorine System Improvements	\$96,000.00		\$68,743.00	\$65,000.00	\$81,500.00
3.	F&I New Low Lift Pump Priming System	\$35,000.00		\$29,707.00	\$35,000.00	\$28,600.00
4.	F&I New Backwash Supply Flow Meter	\$11,000.00		\$9,687.00	\$10,000.00	\$16,300.00
5.	Install New Filter Instrumentation and Control Monitoring Equipment	\$5,000.00		\$6,911.00	\$3,000.00	\$10,900.00
6.	Contract Allowance	\$500.00		\$500.00	\$500.00	\$500.00
	TOTAL BID CONTRACT NO. 1 - GENERAL CONSTRUCTION	\$149,000.00	No Bid	\$117,085.00	\$122,500.00	\$146,100.00
CONTRACT NO. 2 - ELECTRICAL CONSTRUCTION						
1.	Mobilization and Bonding					\$6,600.00
2.	F&I New Chlorine System Electrical Power and Control Wiring		\$2,000.00			\$35,600.00
3.	F&I New Low Lift Pump Priming System Electrical Power and Control Wiring		\$26,600.00			\$6,700.00
4.	F&I New Backwash Supply Flow Meter Electrical Power and Control Wiring		\$2,400.00			\$6,200.00
5.	F&I New Filter Instrumentation and Control Monitoring Electrical Power and Control Wiring		\$3,750.00			
6.	F&I Transformer 7 Power Feed Relocation		\$9,050.00			\$12,500.00
	TOTAL BID CONTRACT NO. 2 - ELECTRICAL CONSTRUCTION	No Bid	\$45,000.00	No Bid	No Bid	\$5,000.00
CONTRACT NO. 3 - COMBINED GENERAL AND ELECTRICAL CONSTRUCTION						
1.	Mobilization and Bonding	\$6,000.00			\$9,600.00	\$14,500.00
2.	General Construction	\$147,000.00			\$113,000.00	\$137,300.00
3.	Electrical Construction	\$113,300.00			\$49,000.00	\$66,000.00
4.	Contract Allowance	\$500.00			\$500.00	\$500.00
	TOTAL BID CONTRACT NO. 3 - COMBINED CONSTRUCTION	\$266,800.00	No Bid	No Bid	\$172,100.00	\$278,700.00

TRUE TABULATION OF BIDS  
Advanced Engineering and Environmental Services, Inc.



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OCT 7 '99

EDLING  
ELECTRIC INC.

Page 1 of 1

**TABULATION OF BIDS**  
**BISMARCK WATER TREATMENT FACILITY**  
**MISCELLANEOUS IMPROVEMENTS**  
**CITY OF BISMARCK**  
**BISMARCK, ND 58501**

Bid Letting: Tuesday, September 28, 1999  
Checked by: Kami Emineth

ITEM	DESCRIPTION	Becker Electric Bismarck, ND TOTAL SUM	Edling Electric Bismarck, ND TOTAL SUM	H.A. Thompson Bismarck, ND TOTAL SUM	Swanberg Const. Valley City, ND TOTAL SUM	Wiesz & Sons Bismarck, ND TOTAL SUM	Engineer's Estimate TOTAL SUM
<b>CONTRACT NO. 1 - GENERAL CONSTRUCTION</b>							
1.	Install Sluice Gates					\$5,600.00	\$5,600.00
2.	Furnish and Install Inspection Hatches					\$11,600.00	\$11,600.00
3.	8" Concrete Core					\$2,000.00	\$2,000.00
4.	Furnish and Install Vacuum Chamber Drain Pipes and Valves					\$7,400.00	\$7,400.00
5.	10" Concrete Core					\$1,200.00	\$1,200.00
6.	Furnish and Install 4" D.I. Pipe Spools and Blind Flanges in Basins					\$2,800.00	\$2,800.00
7.	Furnish and Install New Access Hatch and Rail Modifications					\$6,200.00	\$6,200.00
8.	Furnish and Install New Access Hatches					\$16,000.00	\$16,000.00
9.	Concrete Patching					\$3,800.00	\$3,800.00
10.	Cutting and Removal of Abandoned High Lift Pump Suction Pipe					\$2,300.00	\$2,300.00
11.	Contract Allowance					\$300.00	\$300.00
	<b>TOTAL BID CONTRACT NO. 1 - GENERAL CONSTRUCTION</b>	No Bid	No Bid	No Bid	No Bid	\$59,200.00	\$59,200.00
<b>CONTRACT NO. 2 - MECHANICAL CONSTRUCTION</b>							
1.	High Lift Pump Header Backwash Supply Interconnect Piping			\$1,800.00		\$11,250.00	\$13,050.00
2.	Install 16" Isolation Valve on Filter Backwash Supply Piping			\$2,000.00		\$3,800.00	\$5,800.00
3.	Replace Filter Valves			\$5,800.00		\$7,500.00	\$13,300.00
4.	Install New Rate of Flow Control Piping, Meters, and Valves			\$4,200.00		\$5,500.00	\$9,700.00
5.	Replace New Filter to Wastewater Piping and Appurtenances			\$5,000.00		\$11,000.00	\$16,000.00
6.	Replace Filter Valves			\$2,800.00		\$4,000.00	\$6,800.00
7.	Install New Rate of Flow Control Piping, Meters, and Valves			\$2,200.00		\$3,000.00	\$5,200.00
8.	Install New Filter to Wastewater Piping and Appurtenances			\$5,600.00		\$3,000.00	\$8,600.00
9.	Replace Filter Valves			\$6,600.00		\$16,500.00	\$23,100.00
10.	Install New Rate of Flow Control Piping, Meters, and Valves			\$1,600.00		\$7,200.00	\$8,800.00
11.	Install New Filter to Wastewater Piping and Appurtenances			\$5,900.00		\$6,500.00	\$12,400.00
12.	Furnish and Install New Combustion Air Ductwork and Related Appurtenances			\$4,200.00		\$8,800.00	\$13,000.00
13.	Replace 36" Isolation Valve			\$2,300.00		\$4,500.00	\$6,800.00
14.	Furnish and Install Influent Turbidimeter Sample Pump System			\$2,300.00		\$13,500.00	\$15,800.00
15.	Contract Allowance			\$15,700.00		\$15,700.00	\$31,400.00
	<b>TOTAL BID CONTRACT NO. 2 - MECHANICAL CONSTRUCTION</b>	No Bid	No Bid	\$72,000.00	No Bid	\$125,750.00	\$197,750.00
<b>CONTRACT NO. 3 - ELECTRICAL CONSTRUCTION</b>							
1.	Furnish and Install Filter Electrical Power and Control Wiring	\$39,100.00	\$20,500.00				\$59,600.00
2.	Furnish and Install New Filter Controls and Consoles	\$13,500.00	\$17,500.00				\$31,000.00
3.	Furnish and Install New Filter Monitoring Equipment	\$3,800.00	\$14,000.00				\$17,800.00
4.	Furnish and Install Process Monitoring Equipment	\$3,500.00	\$13,670.00				\$17,170.00
5.	Furnish and Install New Clearwell Level Sensor	\$1,600.00	\$2,500.00				\$4,100.00
6.	Contract Allowance	\$4,000.00	\$4,000.00				\$8,000.00
	<b>TOTAL BID CONTRACT NO. 3 - ELECTRICAL CONSTRUCTION</b>	\$65,500.00	\$72,170.00	No Bid	No Bid	No Bid	\$137,670.00
<b>CONTRACT NO. 4 - COMBINED GENERAL, MECHANICAL, AND ELECTRICAL CONSTRUCTION</b>							
1.	General Construction						
2.	Mechanical Construction						
3.	Electrical Construction						
4.	Contract Allowance						
	<b>TOTAL BID CONTRACT NO. 4 - COMBINED CONSTRUCTION</b>	No Bid	No Bid	No Bid	No Bid	No Bid	No Bid
<b>TRUE TABULATION OF BIDS</b>							
Advanced Engineering and Environmental Services, Inc.							
							\$53,000.00
							\$27,000.00
							\$40,000.00
							\$20,000.00
							\$297,000.00

# LUNSETH

Plumbing and Heating Co.

1710 North Washington St. • PO Box 5909  
Grand Forks, North Dakota 58206-5909  
Phone (701) 772-6631 • Fax (701) 772-7932  
E-Mail: lunseth@lunseth.com

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Mr. Glen Froseth, Chairman  
Political Subdivisions Committee  
ND State Legislature  
Bismarck, ND 58501

RE: House Bill 1386

Dear Mr. Froseth;

I'm writing to you to express my concerns about HB-1386 and the proposed amendments to the present state law. The present law is working well, saving the taxpayers of North Dakota many thousands of dollars since it was enacted.

Raising the contract dollar limit for separate prime bids from \$100,000 to \$250,000 will negatively affect many mechanical and electrical contractors throughout the state, both large and small. *The small contractors will be hurt the most* because the delays in cash flow is more critical to their operations.

As the law now stands, the Owner (in many cases the State) benefits from the direct competitive bidding process, getting the best price offered by a host of mechanical and electrical contractors. With the single prime bid method, *the Owner ends up paying more* because they also have to pay the general contractor's 'mark up' on the mechanical and electrical sub-contractors.

Furthermore, the Owner will have the uncertainty of who their subs will be and the financial pressure under which they will be forced to perform their work. When the mechanical and electrical contractors aren't identified on bid day through their separate prime bids, *the 'real' bid process takes place after the fact*, as the general contractor leverages the subcontractors against each other to lower their prices. *The Owner obtains none of these cost savings; the general contractor 'takes' it.* This squeezing puts the subs in a financial pinch and directly affects the quality of their performance on the job. The subcontractor's financial stress provides no benefit to the Owner.

To summarize, it is our belief that **the multiple prime bid system has benefited the State in both cost of work done and in the quality of work performed.** We respectfully ask that HB-1386 be killed in Committee. Thank you for your time.

Sincerely,



James C. Fristad, P.E.  
Lunseth Plumbing & Heating Co.

- 
- Est. 1935 • 24 Hour Service • Mechanical Contractors • Plumbing • Heating • Boilers • Geothermal • Residential • Remodeling
  - Industrial • Commercial • Military • Government • Process Piping • Utilities • ASME and NBIC Code Repair • Design/Build
  - Professional Engineering • Prefabrication Shop • Industrial Controls and Automation



## BISMARCK-MANDAN DEVELOPMENT ASSOCIATION

701-222-5530 • fax 701-222-3843 • 1-888-222-5497    [Info@bmda.org](mailto:Info@bmda.org) • [www.bmda.org](http://www.bmda.org)

February 7, 2001

TO:            Mr. Glen Froseth, Chairman  
                House Political Subdivisions Committee  
                Prairie Room  
                State Capitol

FROM:        Mr. Russell Staiger, President  
                Bismarck-Mandan Development Association

RE:            Recommendation for a "DO NOT PASS" for HB 1386

Mr. Chairman and Members of the House Political Subdivisions Committee, on behalf of the Bismarck-Mandan Development Association I wish to encourage this committee to recommend a "DO NOT PASS" on House Bill 1386.

I apologize for not being able to personally appear before this committee, however, a prior commitment to meet with an out-of-state business client prevents me from being with you at this hearing.

The primary objections to this piece of proposed legislation is that it creates yet another difficulty in the process of attempting to recruit positive new business and industry to our communities and the State of North Dakota.

The level of financial incentives offered both existing businesses wanting to expand, and new business considering a North Dakota location is completely varied from project to project. Some projects warrant substantial tax and financial incentives because they hold promise of high quality and good paying employment for North Dakotan's. In some cases the incentives are limited and may only include a property tax exemption, or a PACE Interest Rate Buy Down. Yet that company is going to invest millions of its own capital in building and owning its own building.

My understanding is that this legislation is focused at the "Big Box" operations that come in with their own contractors, and quite often source their building materials from some large out of state supplier. These are generally retail operations and in most cases, certainly in Bismarck-Mandan, they probably would not get any kind of incentive other than possibly a property tax exemption. As distasteful as this may seem to some, these

HIGH PLAINS • HIGH STANDARDS

400 East Broadway Avenue    PO Box 2615    Bismarck, ND 58502

large operators do provide a source of employment for our work force. They also produce new retail sales tax revenue for the community and the state.

These may not be the highest paying jobs in the market place, but for those lacking the necessary education or training for more technical and higher paying positions, they do offer employment until those people can work their way up the skill level chain and better jobs.

I can think of several major projects which we have brought to Bismarck-Mandan which would not have come had HB 1386 been law at the time we brought those companies to Bismarck. These are companies that have helped create positive employment for thousands of people. Employment that has helped keep thousands of people in North Dakota.

Mr. Chairman, please vote a "DO NOT PASS" HB 1386.

*Attn: Tom*

Feb. 8, 2001

57<sup>th</sup> Legislative Assembly of North Dakota  
Attn: North Dakota House Representatives

Re: Opposition to House Bill 1386 Section 48-01.1-06 of the North Dakota Century  
Code

In reference to House Bill 1386, I wish to express strong opposition toward the proposed amendment of Section 48-01.1-06 of the North Dakota Century Code, which pushes the idea of single prime bids for construction of public building contracts. Our tax money would pay for this mistake.

There would be no benefit to the construction industry, the public, nor the government if this amendment were to go through. It would unnecessarily drive the end result of construction costs up at the taxpayers' expense.

The idea of a single prime bid is appealing only to those people at the top-end of the "bid chain" who could reap the benefits of undue mark-ups on construction costs. A single prime bid allows the general contractor to add a percentage of mark-up to each of the subcontract bids, thereby increasing the price of the contract. Architects and the AGC are attracted to this idea because they, as a result, receive a greater dollar amount for their percentage. Even if the mark-up percentages were small, the dollars would add up quickly--paid for with taxpayers' dollars.

I hope you take the time to research this matter further, and I am sure you will see that there is no benefit in amending this portion of the bill. It will only hurt subcontractors and taxpayers alike.

Sincerely,

*Heather Jones*

Heather Jones  
Mowbray & Son Plumbing & Heating

*David Weigel*

David Weigel  
City Air Mechanical, Inc.

**48-02-06.1. Public contract to contain a fuel cost line item and a fuel cost adjustment clause.** Repealed by S.L. 1995, ch. 443, § 29.

**48-02-06.2. Bonds from contractors for public improvements.** A governing body, as defined in section 48-01.1-01, authorized to enter into a contract for construction of a public improvement in excess of one hundred thousand dollars shall take from the contractor a bond before permitting any work to be done on that contract. The bond must be for an amount equal at least to the price stated in the contract. The bond must be conditioned to be void if the contractor and all subcontractors fully perform all terms, conditions, and provisions of the contract and pay all bills or claims on account of labor and materials including supplies used for machinery and equipment, performed, furnished, and used in the performance of the contract, including all demands of subcontractors. The requirement that bills and claims be paid must include the requirement that interest of the amount authorized under section 13-01-14 be paid on bills and claims not paid within ninety days. The bond is security for all bills, claims, and demands until fully paid, with preference to labor and material suppliers as to payment. The bond must run to the governing body, but any person having a lawful claim against the contractor, or any subcontractor, as provided in this chapter, may sue on the bond.

Source: S.L. 1995, ch. 443, § 17; 1997, ch. 398, § 1.

**Note.**

In light of the similarity of the subject matter, decisions under former 48-01-01 and 48-01-04 are included in the annotations for this section. The term "this section," as used in annotations of decisions before 1999, refers to former sections 48-01-01 or 48-01-04.

**Cross-References.**

Bids for construction of public project must show license issued, see § 43-07-12.

Bridge construction projects let by county commissioners, contractor's bond, see § 24-08-01.

Claim and suit on contractor's bond by laborer or materialman, see § 48-02-13.

License of public contractor required, see § 43-07-02.

Payment of all delinquent income, sales and use taxes prerequisite to eligibility to enter into public contract, see § 43-07-11.1.

**Bond Requirement.**

A general contractor is required to furnish a bond as security for all bills and claims of subcontractors under this section. *Kuchenski v. Kramer Sheet Metal, Inc.*, 377 N.W.2d 133 (N.D. 1985).

Oil company suppliers failed to show that they had a good faith belief that their asphaltic product was to be used in particular

bonded projects where they entered into open seasonal contracts to supply asphaltic product to the contractor, they were aware that the contractor intended to use the asphalt oil for both bonded and unbonded projects and that there were at least three suppliers of asphalt oil to the contractor during this period, and there was no evidence that any asphalt oil was designated by the oil company suppliers solely for use in a given bonded project. *Farmer's Union Cent. Exch., Inc. v. Reliance Ins. Co.*, 675 F. Supp. 1534 (D.N.D. 1987).

**Extension of Time.**

The obligation which the statute imposes upon sureties on contractors' bonds or, in the absence of such bonds, upon the officers failing to take them is one that is not discharged by an extension of time given to the principal debtor where such extension is not prejudicial to the sureties. *Thompson Yards, Inc. v. Kingsley*, 54 N.D. 49, 208 N.W. 949 (1926).

**Labor Incidental to Contract.**

Mechanic's claim against construction contract surety upheld for daily labor performed upon subcontractor's equipment to keep it operative during the off season and for small parts purchased by the mechanic for use on such equipment, since the repairs made and parts purchased were of such a nature that they were incidental to the performance of the

FIFTY SEVENTH LEGISLATION ASSOCIATION

NORTH DAKOTA HOUSE BILL NO. 1386

INTRODUCED BY:

REPRESENTATIVES WALD, CARLSON, SWANSON

- SENATOR TOLLEFSON

---

TESTIMONY AGAINST HOUSE BILL No. 1386

BY HOWARD W. WRIGLEY, PRESIDENT  
WRIGLEY MECHANICAL, INC.

4102 15TH AVENUE NW

POST OFFICE BOX 1516

FARGO, NORTH DAKOTA 58107

POLITICAL SUBDIVISION COMMITTEE:

Glen Froseth, Chairman

Dale Severson, Vice Chairman

Lois Delmore

Rachael Disrud

Bruce Eckre

Mary Ekstrom

April Fairfield

Michael Grosz

G. Jane Gunter

Gil Herbel

Nancy Johnson

William E. Kretschmar

Andrew G. Maragos

Carol A. Niemeier

Wayne Tieman



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Page 2 .....	Comments on Economic Development
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Page 7 .....	Construction Management
Page 8 .....	Closing Comments

## LIST OF APPENDICES

- Appendix A: Specification and Bid Forms
- Appendix B: Project Manual



Wrigley Mechanical, Inc. was founded in 1978 by Howard W. Wrigley. He has a degree in Mechanical Engineering from the University of North Dakota. We are holders of North Dakota contractors license number 2222, Class A.

Wrigley Mechanical, Inc. has a volume of approximately 8 million dollars per year. We are, therefore, considered a medium sized company.

The state of North Dakota is in need of economic development and, if this bill is passed as proposed on line 15 through 24, small companies will not have the opportunity to grow on their own behalf but will be at the mercy of another construction firm.

A great deal of small to medium sized companies would have to depend on other companies for project they should have if they are low bidders. This would be particularly true in many of the small communities in our state.

To pass this bill in the form that is proposed is a setback for economic development.

All figures are based on the following bond rates: First \$100,000.00 (\$10.00/1,000), next \$400,000.00 (\$8.00/1,000), next \$2,000,000.00 (\$7.00/1,000). The figures are also based on a project being 60% general, 25% mechanical and 15% electrical.

Example of a \$240,000.00± project under multiple prime bids:

General contractor	\$144,000.00
Bond	\$1,352.00
Mechanical contract	\$60,000.00
Bond	\$600.00
Electrical contracts	\$36,000.00
Bond	<u>\$360.00</u>
Total cost of project:	<u>\$242,312.00</u>

Example of a \$250,000 project under a prime bid just due to increased bonding cost:

General contract	\$144,000.00
Bond	-0-
Mechanical contract	\$60,000.00
Bond	\$600.00
Electrical Contract	\$36,000.00
Bond	<u>\$360.00</u>
Sub Total	\$240,960.00
Bond	<u>\$2,128.00</u>
Total cost of project:	<u>\$243,088.00</u>

Under multiple prime bids, this project would have a savings of approximately .32% just due to the bonding.

Under prime bid, actual cost of this project is as follows:

General contract	\$144,000.00 - \$144,000.00	
Mechanical contract	\$60,000.00	
Bond	<u>\$600.00</u>	
	\$60,600.00	
10% commission	<u>\$6,060.00</u>	
	\$66,660.00 - \$66,660.00	
Electrical contract	\$36,000.00	
Bond	<u>\$360.00</u>	
	\$36,360.00	
10% commission	<u>\$3,636.00</u>	
	\$39,996.00 - <u>\$39,996.00</u>	
		\$250,656.00
Bond		<u>\$2,205.00</u>
Total Cost of Project		<u>\$252,861.00</u>

Under multiple prime bids, this project would have a savings of approximately 4% due to commission and bonding.

Another part of the project that would have a savings is if there should be a change in the work.

Example of a \$15,000.00± change in the work under multiple prime bids:

General contract	\$9,000.00
Bond	\$72.00
Mechanical contract	\$3,750.00
Bond	\$37.00
Electrical contract	\$2,250.00
Bond	<u>\$22.00</u>
Total cost of change:	<u>\$15,131.00</u>

Under prime bid the actual cost of change is just due to bonding.

General contract	\$9,000.00
Mechanical contract	\$3,750.00
Bond	\$37.00
Electrical contract	\$2,250.00
Bond	<u>\$22.00</u>
	\$15,059.00
	<u>\$120.00</u>
Total cost of change:	<u>\$15,179.00</u>

Under multiple prime bids, this project would have a savings of approximately .32% just because of bonding.

Under prime bid actual cost of the \$15,000.00± change in work would be as follows:

General contract	\$9,000.00 - \$9,000.00
------------------	-------------------------

Mechanical contract	\$3,750.00
Bond	<u>\$37.00</u>

	\$3,787.00
10% commission	<u>\$378.00</u>

\$4,165.00 - \$4,165.00

Electrical contract	\$2,250.00
---------------------	------------

Bond	<u>\$22.00</u>
------	----------------

\$2,272.00

10% commission	<u>\$227.00</u>
----------------	-----------------

\$2,499.00 - \$2,499.00

	\$15,664.00
Bond	<u>\$125.00</u>

Total cost of change:	\$15,789.00
-----------------------	-------------

Under multiple prime bids, this project on a change in work would have a savings of approximately 4%.

To back up commission rates, please refer to Appendix A and B.

The changes proposed for construction management will help the State and the small contractors.

This change in the bill will protect the public plus the contractors to guarantee project completion plus payment to the contractor.

Closing comment for this House Bill 1386, Section 48-01.1-06, bid requirements for public buildings:

**IF IT AIN'T BROKE, DON'T FIX IT!!**

Thank you all for your time and consideration.



Howard W. Wrigley



DRAWINGS ARE BEING MAILED UNDER SEPARATE COVER

# SPECIFICATION AND BID FORMS

PROJECT

REPLACE BOILER/CHILLER  
FEDERAL BUILDING/POST OFFICE/COURTHOUSE  
BISMARCK, NORTH DAKOTA

PROJECT NO.

R-ND-93-012

VOLUME

VOL 1 OF 111 GENERAL REQUIREMENTS  
DIVISIONS 1 - 3

BID OPENING  
TIME AND DATE

APRIL 22, 1993  
1:30 P.M.

BUSINESS SERVICE CENTER  
BUILDING 41, ROOM 145  
DENVER FEDERAL CENTER  
LAKEWOOD, COLORADO

CONTRACT NO.

GS 08P-93-JXC-0075

GENERAL SERVICES ADMINISTRATION

GSA FORM 1118 (REV. 1-79)

Appendix A

(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 90 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 90 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract. (End of Clause)

#### 81. GSAR 552.243-71--EQUITABLE ADJUSTMENTS (APR 1984)

(a) The provisions of the "Changes" clause prescribed by FAR 52.243-4 are supplemented as follows:

(1) Upon written request, the Contractor shall submit a proposal, in accordance with the requirements and limitations set forth in the "Equitable Adjustments" clause, for work involving contemplated changes covered by the request. The proposal shall be submitted within the time limit indicated in the request or any extension of such time limit as may be subsequently granted. The Contractor's written statement of the monetary extent of a claim for equitable adjustment shall be submitted in the following form:

(i) Proposals totaling \$5,000 or less shall be submitted in the form of a lump sum proposal with supporting information to clearly relate elements of cost with specific items of work involved to the satisfaction of the Contracting Officer, or his/her authorized representative.

(ii) For proposals in excess of \$5,000, the claim for equitable adjustment shall be submitted in the form of a lump sum proposal supported with an itemized

breakdown of all increases and decreases in the contract in at least the following detail:

##### Direct Costs

Material quantities by trades and unit costs (Manufacturing burden associated with material fabrication performed will be considered to be part of the material costs of the fabricated item delivered to the job site).

Labor breakdown by trades and unit costs (Identified with specific items of material to be placed or operation to be performed).

Construction equipment or fixtures necessary for the change.

Costs of preparation and/or revision of drawings resulting from the change.

Workmen's Compensation and Third Party Liability Insurance.

Employment taxes under FICA and FUTA.

Bond Costs when size of change warrants revision.

##### Overhead, Profit and Commission

(2) The allowable overhead shall be determined in accordance with the contract cost principles and procedures in Part 31 of the Federal Acquisition Regulation (48 CFR Part 31) in effect on the date of this contract. The percentages for profit and commission shall be negotiated and may vary according to the nature, extent, and complexity of the work involved, but in no case shall exceed the following unless the contractor demonstrates entitlement to a higher percentage:

##### Overhead Profit Commission

To Contractor on work performed by other than his own forces --- --	10%
---	-----

To first tier subcontractor on work performed by his subcontractors ---	
---	--

To Contractor and/or the subcontractors for that portion of the work performed with their respective forces-----	To be Negotiated 10%
--	----------------------

Not more than four percentages will be allowed regardless of the number of tier subcontractors. The Contractor shall not be allowed a commission on the commission received by a first tier subcontractor. Equitable adjustments for deleted work shall include credits for overhead, profit and commission. On proposals covering both increases and decreases in the amount of the contract, the application of overhead and profit shall be on the net change in direct costs for the Contractor or subcontractor performing the work.

(3) The Contractor shall submit with the proposal his request for time extension (if any) and shall include sufficient information and data to demonstrate why a

and to what extent the change will delay the contract in its entirety

(4) In considering a proposal, the Contracting Officer shall make check estimates in detail, utilizing unit prices where specified or agreed upon, with a view to arriving at an equitable adjustment

(5) After receipt of a proposal the Contracting Officer shall act thereon, within 30 days, provided however, that when the necessity to proceed with a change does not allow time properly to check a proposal or in the event of failure to reach an agreement on a proposal, the Government may under the Contract to proceed on the basis of price to be determined at the earliest practicable date. Such price shall not be more than the increase or less than the decrease proposed

(6) If a mutually acceptable agreement cannot be reached, the Contracting Officer may determine the price unilaterally

(b) The provisions of the "Differing Site Conditions" clause prescribed by FAR 52.236.2 are supplemented as follows: The Contractor shall submit all claims for equitable adjustment in accordance with and subject to the requirements and limitations set out in paragraph (a) of this "Equitable Adjustment" clause. (End of Clause)

#### 82. GSAK 552.243-70 PRICING OF ADJUSTMENTS (APR 1989)

When costs are a factor in any determination of a contract price adjustment, such costs shall be in accordance with the contract cost principles and procedures in Part 31 of the Federal Acquisition Regulation (48 CFR Part 31) in effect on the date of this contract. (End of Clause)

### AUDITS

#### 83. FAR 52.214-26--AUDIT-SEALED BIDDING (APR 1985)

(a) Cost or pricing data. If the Contractor has submitted cost or pricing data in connection with the pricing of any modification to this contract, unless the pricing was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or price set by law or regulation, the Contracting Officer or a representative who is an employee of the Government shall have the right to examine and audit all books, records, documents, and other data of the Contractor (including computations and projections) related to negotiating, pricing or performing the modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. In the case of pricing any modification, the Comptroller General of the United States or a representative who is an employee of the Government shall have the same rights

(b) Availability. The Contractor shall make available at its office at all reasonable times the materials described in paragraph (a) above, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any other period specified in Subpart 4.7 of the Federal Acquisition Regulation (FAR) FAR Subpart 4.7, Contractor Records Retention, in effect on the date of this contract, is incorporated by reference in its entirety and made a part of this contract

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement

(2) Records pertaining to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to the performance of this contract shall be made available until disposition of such appeals, litigation, or claims

(c) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph, (c), in all subcontracts over \$10,000 under this contract, altering the clause only as necessary to identify properly the contracting parties and the contracting officer under the Government prime contract. (End of Clause)

#### 84. FAR 52.214-27 PRICE REDUCTIONS FOR DEFECTIVE COST OR PRICING DATA MODIFICATIONS-SEALED BIDDING (APR 1985) (DEC 1993)

(a) This clause shall become operative only for any modification to this contract involving a significant increase and/or decreases in costs, plus applicable profit, of more than \$100,000 except that this clause does not apply to any modification for which the price is

(1) Based on adequate price competition

(2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public, or

(3) Set by law or regulation

(b) If any price, including profit, negotiated in connection with any modification under this clause, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) above

(c) Any reduction in the contract price under paragraph (b) above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data

(d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted

(ii) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer

\* SEE MOD 3506

# Foss Associates

Architecture &  
Interiors

PROJECT MANUAL

FOR

ALL WORK

FOR

BOILER REPLACEMENT  
FARGO NORTH HIGH SCHOOL  
FARGO, NORTH DAKOTA

PROJECT NO. 0104

606 1st Avenue North,  
Fargo, North Dakota 58102 - 701 282-5505

Appendix B

37

4.2.3 Add: The Architect will not be responsible for the acts or omissions of the Owner

4.2.4 Add: If there are any direct communications between Owner and Contractor that affect the performance or administration of the Contract, a summary of such communication shall be reduced in writing by the Owner, with a copy sent to the Architect.

#### ARTICLE 5.

##### SUBCONTRACTORS

No Supplement

#### ARTICLE 6.

##### CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

No Supplement

#### ARTICLE 7.

##### CHANGES IN THE WORK

7.3.6 In the sixth line, change the words "a reasonable" to "the specified" in tenth line, delete remainder of subparagraph starting with the words "Unless otherwise..." Insert instead "The lump sum method listed under clause 7.3.3.1 above shall be determined in accordance with the provisions of the following subparagraph 7.3.10. The same costs as allowances for overhead, profit and commission shall be used in determining the costs under the method of the clause 7.3.3.4 above

7.3.10 Add subparagraph: For proposed changes in the Work on the lump sum or time and material methods under Clauses 7.3.3.1 and 7.3.3.4 above, the costs shall be determined as provided under this subparagraph 7.3.10. The Contractor shall submit an itemized list of quantities with the applicable unit costs and extended price for each, in such form and detail as required by the Architect

- 1 As a minimum the detailed breakdown shall include and indicate the items enumerated below. Items (a) and (b) constitute the cost of labor, and items (a), (b), (c) and (d) constitute the basic costs referred to under this Article 7

(a) Labor costs, itemized by each trade involved, showing the hourly rates for each, and the hours required for the change. Labor rates shall be the same for extra and credit computations and shall be the actual rate paid the workman in accordance with established management labor agreements.

(b) Burden on labor, which shall be only the actual costs of mandatory fringe benefits required by established agreements, taxes on labor, worker's or workmen's compensation, insurance on labor as affected by payroll, unemployment taxes and insurance, including FICA and FUTA.

(c) Quantities of materials, equipment and supplies, at their actual cost, with unit costs indicated, plus applicable sales tax.

(d) The cost of subcontracted work, computed in the same way as provided for under this Subparagraph 7.3.10.

(e) Overhead, profit or commission added after the above computations are complete

- 2 The maximum that will be allowed for overhead and profit, or commission, shall be as follows, expressed as a percentage of the basic cost of the change. The maximum allowable percentages for profit, overhead and commission may be less, depending on the nature, extent or complexity of the change, where the percentage is not commensurate with the responsibility and administration involved (such as the Contractor merely processing a substantial Change Order to a Subcontractor) but in no event shall they exceed the following:

	*Overhead	*Profit	**Commission
(a) To the Contractor and/or its Subcontractors for work performed with their own forces	9%	6%	---
(b) To the Contractor for work performed by other than its own forces	---	---	9%

\* (a) To the Contractor and/or its Subcontractors for work performed with their own forces

\*\* (b) To the Contractor for work performed by other than its own forces

- 3 Not more than three percentages for overhead, profit and commission will be allowed. The mark-up on any part of the Work a Subcontractor subcontracts will be limited to one overhead figure and one profit figure, in addition to the Contractor's commission. The Subcontractor and Sub-subcontractor may divide the overhead and profit amount as they agree upon.
- 4 The burden on labor may be indicated as a dollar/cents addition to the hourly rate or may be expressed as a percentage of the extended hourly rate costs. If required by the Owner or the Architect, the Contractor shall provide a detailed breakdown to justify the labor burden. The Owner and Architect reserve the right to reject any labor burden which is inconsistent with other similar contractors or where the cost of fringe benefits are in excess of established labor agreements. The burden on labor shall not include any costs noted as general overhead.
- 5 Material, equipment and supply costs shall be quoted at the actual cost to the Contractor, or Subcontractor. Upon request, the Contractor (or Subcontractor) shall submit evidence to substantiate the costs. Sales costs shall be quoted at trade discount prices, with quantity discounts also applied where the quantities warrant. Cash or prompt payment discounts need not be credited. In any proposal with material, equipment and supply credits, the credit shall be based on the actual Contract cost of the material (including trade and quantity discounts) less any charges actually incurred for handling or returning a material which has been delivered. No cancellation, restocking or similar charge will be allowed unless actually incurred by the purchaser and generally will not be allowed when the product has not been shipped. The sales tax burden shall be indicated as a dollar/cents addition with the percentage also listed.
- 6 The percentages allowed for overhead, profit or commission under clause 7.3.10.2 shall be deemed to include, and no further addition allowed for: (1) field and office supervision

and administration, including the field superintendent and foremen; (2) general insurance, except that listed as the labor burden, (3) use or replacement of tools, (4) shop burden, (5) equipment rental (other than specifically required additional hoisting equipment required excavating equipment or similar equipment necessary solely as a result of the Change); (6) engineering and estimating costs; (7) performance (guaranty) bond, (8) cost of safety measures (including those imposed by OSHA), (9) shipping, drayage and demurrage; (10) parking charges, (11) clean up and debris removal, (12) testing, (13) permits, unless a new permit type is required, (14) or any other costs except those enumerated under clause 7.3.10.1

- 7 Cost changes shall be computed by determining the basic costs enumerated under clause 7.3.10.1 (as further specified under this subparagraph), to which the overhead may be added, then the profit figure may be added
- 8 Subcontractors (or Sub-subcontractors) shall compute their costs in the same way and are subject to the same conditions of what may be included in the cost and the same maximum percentages for overhead and profit. To the Subcontractor's price, the Contractor may add up to 10% commission
- 9 For Changes involving work of the Contractor with its own forces and work by a Subcontractor (or Sub-subcontractor), the commission shall be applied directly to the Subcontractor's price, with the overhead and profit figure applied only to the Work the Contractor performs with its own forces
- 10 For Changes involving both extra and credit amount, the overhead and profit or commission, shall be applied only to net difference where the extra exceeds the credit
- 11 For Changes resulting in a credit in the basic costs, a reasonable allowance for overhead, profit or commission may be required to be credited the Owner, as approved by the Architect. In general no credit for overhead, profit or commission will be required where the net change credit is minor or where the Change in Work indicates it is reasonable that no credit be allowed to the Owner due to the effort, cost or responsibility of the Contractor. In the event of substantial subcontract credits, or for Work not performed by the Contractor, a reasonable overhead, profit or commission credit shall be allowed to the Owner

## ARTICLE 8.

### TIME

8.1.3 Add: Minor corrective Work and the replacement of defective Work or materials, and the adjustment of control apparatus will not delay the determination that the Contract is Substantially Complete. See 12.2.2.

8.3.1 Add: The following will not be considered justifications for extension of time unless due to one of the causes stated within this Article 8

a) Delay caused by Subcontractors or Supplier except if the Supplier goes out of business and another Supplier cannot be found in time to meet schedule

b) Shortage of workmen

## ARTICLE 9.

# Foss Associates

Architecture &  
Interiors

## Addendum No. 1

Work: All Work

Project: **Boiler Replacement**  
**Fargo North High School**  
Fargo, North Dakota

Project No.: 0104

Date Issued: February 6, 2001

Bid Opening: February 13, 2001 at 2:00 P.M.

To: All Planholders of Record

Acknowledge receipt of this Addendum by inserting its number in space provided on Bid Form. Failure to do so may subject Bidder to disqualification. This Addendum forms part of Bidding Documents and modifies them as follows:

### PROJECT MANUAL:

**Note to Bidders:** Since this project exceeds \$100,000, according to State law we are now requesting that "Multiple Prime Bids - Mechanical (Lead Prime), Electrical and General" be received. An option to bid the project Single Prime will also be considered. Thus, Electrical and General Contractors are required to furnish bonds, etc., where bidding Multiple Prime. The following changed items reflect the Multiple Prime Bid requirement.

**Invitation to Bid:** Replace with attached "Invitation to Bid"

**Instructions to Bidders:** Delete Pages ITB-3, ITB-4 and ITB-5 and replace with revised attached Sheets ITB-3, ITB-4 and ITB-5

**Bid Form:** Delete and substitute the "Revised Bid Form"

**Supplementary Conditions:** Delete SC-1 through SC-9 and replace with attached Supplementary Conditions Sheets SC-1 through SC-9

### Section 01500:

Page 1 - Delete Line 10

Page 2, Line 5, change to read: "Mechanical Prime Contractor to provide the neatly constructed fence, which will..."



#### ARTICLE 4.

##### ADMINISTRATION OF THE CONTRACT

4.2.3 Add: The Architect will not be responsible for the acts or omissions of the Owner

4.2.4 Add: If there are any direct communications between Owner and Contractor that affect the performance or administration of the Contract, a summary of such communication shall be reduced in writing by the Owner, with a copy sent to the Architect.

#### ARTICLE 5.

##### SUBCONTRACTORS

No Supplement

#### ARTICLE 6.

##### CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

No Supplement

#### ARTICLE 7.

##### CHANGES IN THE WORK

7.3.6 In the sixth line, change the words "a reasonable" to "the specified". In tenth line, delete remainder of subparagraph starting with the words "Unless otherwise..." Insert instead: The lump sum method listed under clause 7.3.3.1 above shall be determined in accordance with the provisions of the following subparagraph 7.3.10. The same costs as allowances for overhead, profit and commission shall be used in determining the costs under the method of the clause 7.3.3.4 above

7.3.10 Add subparagraph: For proposed changes in the Work on the lump sum or time and material methods under Clauses 7.3.3.1 and 7.3.3.4 above, the costs shall be determined as provided under this subparagraph 7.3.10. The Contractor shall submit an itemized list of quantities with the applicable unit costs and extended price for each, in such form and detail as required by the Architect

- 1 As a minimum the detailed breakdown shall include and indicate the items enumerated below. Items (a) and (b) constitute the cost of labor, and items (a), (b), (c) and (d) constitute the basic costs referred to under this Article 7.

(a) Labor costs, itemized by each trade involved, showing the hourly rates for each, and the hours required for the change. Labor rates shall be the same for extra and credit computations and shall be the actual rate paid the workman in accordance with established management labor agreements

(b) Burden on labor, which shall be only the actual costs of mandatory fringe benefits required by established agreements. taxes on labor, worker's or workmen's compensation, insurance on labor as affected by payroll, unemployment taxes and insurance, including FICA and FUTA.

(c) Quantities of materials, equipment and supplies, at their actual cost, with unit costs indicated, plus applicable sales tax

(d) The cost of subcontracted work, computed in the same way as provided for under this Subparagraph 7.3.10.

(e) Overhead, profit or commission added after the above computations are complete

2. The maximum that will be allowed for overhead and profit, or commission, shall be as follows, expressed as a percentage of the basic cost of the change. The maximum allowable percentages for profit, overhead and commission may be less, depending on the nature, extent or complexity of the change, where the percentage is not commensurate with the responsibility and administration involved (such as the Contractor merely processing a substantial Change Order to a Subcontractor) but in no event shall they exceed the following:

	Overhead	Profit	Commission
(a) To the Contractor and/or its Subcontractors for work performed with their own forces	10%	8%	---
(b) To the Contractor for work performed by other than its own forces.	---	---	10%

3. Not more than three percentages for overhead, profit and commission will be allowed. The mark-up on any part of the Work a Subcontractor subcontracts will be limited to one overhead figure and one profit figure, in addition to the Contractor's commission. The Subcontractor and Sub-subcontractor may divide the overhead and profit amount as they agree upon.
4. The burden on labor may be indicated as a dollar/cents addition to the hourly rate or may be expressed as a percentage of the extended hourly rate costs. If required by the Owner or the Architect, the Contractor shall provide a detailed breakdown to justify the labor burden. The Owner and Architect reserve the right to reject any labor burden which is inconsistent with other similar contractors or where the cost of fringe benefits are in excess of established labor agreements. The burden on labor shall not include any costs noted as general overhead.
5. Material, equipment and supply costs shall be quoted at the actual cost to the Contractor, or Subcontractor. Upon request, the Contractor (or Subcontractor) shall submit evidence to substantiate the costs. Said costs shall be quoted at trade discount prices, with quantity discounts also applied where the quantities warrant. Cash or prompt payment discounts need not be credited. In any proposal with material, equipment and supply credits, the credit shall be based on the actual Contract cost of the material (including trade and quantity discounts) less any charges actually incurred for handling or returning a material which has been delivered. No cancellation, restocking or similar charge will be allowed unless actually incurred by the purchaser and generally will not be allowed when the product has not been shipped. The sales tax burden shall be indicated as a dollar/cents addition with the percentage also listed.
6. The percentages allowed for overhead, profit or commission under clause 7.3.10.2 shall be deemed to include, and no further addition allowed for: (1) field and office supervision and administration, including the field superintendent and foremen, (2) general insurance, except that listed as the labor burden, (3) use or replacement of tools, (4) shop burden.

(5) equipment rental (other than specifically required additional hoisting equipment required excavating equipment or similar equipment necessary solely as a result of the Change), (6) engineering and estimating costs, (7) performance (guaranty) bond, (8) cost of safety measures (including those imposed by OSHA), (9) shipping, drayage and demurrage, (10) parking charges, (11) clean up and debris removal, (12) testing, (13) permits, unless a new permit type is required, (14) or any other costs except those enumerated under clause 7.3.10.1

7. Cost changes shall be computed by determining the basic costs enumerated under clause 7.3.10.1 (as further specified under this subparagraph), to which the overhead may be added, then the profit figure may be added.
8. Subcontractors (or Sub-subcontractors) shall compute their costs in the same way and are subject to the same conditions of what may be included in the cost and the same maximum percentages for overhead and profit. To the Subcontractor's price, the Contractor may add up to 10% commission.
9. For Changes involving work of the Contractor with its own forces and work by a Subcontractor (or Sub-subcontractor), the commission shall be applied directly to the Subcontractor's price, with the overhead and profit figure applied only to the Work the Contractor performs with its own forces.
10. For Changes involving both extra and credit amount, the overhead and profit, or commission, shall be applied only to net difference where the extra exceeds the credit.
11. For Changes resulting in a credit in the basic costs, a reasonable allowance for overhead, profit or commission may be required to be credited the Owner, as approved by the Architect. In general no credit for overhead, profit or commission will be required where the net change credit is minor or where the Change in Work indicates it is reasonable that no credit be allowed to the Owner due to the effort, cost or responsibility of the Contractor. In the event of substantial subcontract credits, or for Work not performed by the Contractor, a reasonable overhead, profit or commission credit shall be allowed to the Owner.

## ARTICLE 8.

### TIME

8.1.3 Add: Minor corrective Work and the replacement of defective Work or materials, and the adjustment of control apparatus will not delay the determination that the Contract is Substantially Complete. See 12.2.2

8.3.1 Add: The following will not be considered justifications for extension of time unless due to one of the causes stated within this Article 8

a) Delay caused by Subcontractors or Supplier except if the Supplier goes out of business and another Supplier cannot be found in time to meet schedule

b) Shortage of workmen.

## ARTICLE 9.

### PAYMENTS AND COMPLETION

## **CHAPTER 48-01.1 PUBLIC IMPROVEMENT CONTRACT BIDS**

**48-01.1-01. Definitions.** In this chapter, unless the context otherwise requires:

1. "Construction" includes repair and alteration.
2. "Construction administration" means administrative services provided on behalf of the governing body, either by the governing body or a registered design professional, and includes providing clarifications, submittal review, recommendations for payment, preparation of change orders, and other administrative services included in the agreement with the registered design professional. The term does not include supervision of the construction activities for the construction contracts.
3. "Construction management" means the management and supervision of the construction of a public improvement, including the management and supervision of multiple prime contracts. The term does not include construction administration performed by a design professional under the terms of a professional services agreement with the governing body.
4. "Contractor" means any person, duly licensed, that undertakes or enters a contract with a governing body for the construction or construction management of any public improvement, including multiple prime contracts.
5. "Governing body" means the governing officer or board of any state entity or of any political subdivision.
6. "Public Improvement" means any improvement the cost of which is payable from taxes or other funds under the control of a governing body including improvements for which special assessments are levied. The term does not include any county road construction and maintenance, state highway, or public service commission project governed by titles 11, 24, or 38.
7. "Surety" means a bond or undertaking executed by a surety company authorized to do business in this state which is countersigned by an agent of that company.

**48-01.1-02. Contracts let to lowest bidder - Emergency waiver.** A governing body shall award a contract for the construction of a public improvement under this chapter to the lowest responsible bidder. The governing body may reject any bid and readvertise for proposals if no bid is satisfactory, or if it believes any agreement has been entered into by the bidders or others to prevent competition. If the governing body determines that an emergency situation exists, a contract may be made without seeking bids.

**48-01.1-03. Publication of advertisement for bids.** If a contract of a governing body for the construction of a public improvement is estimated to cost in excess of one hundred thousand dollars, the governing body shall advertise for bids by publishing for three consecutive weeks, the first publication to be at least twenty-one days before the date of the opening of bids. The advertisement must be published in the official newspaper of the political subdivision in which the public improvement is or will be located, and in a trade publication of general circulation among the contractors, building manufacturers, and dealers in this state, except the advertisement for a public improvement financed by special assessments need only be published once each week for two weeks in the official newspaper with the first publication being at least fourteen days before bid opening.

Testimony before the Senate Political Subdivisions Committee  
Engrossed Senate Bill 1386  
March 8, 2001

Good morning Mr. Chairman and committee members. My name is Bill Wocken. I am City Administrator for the City of Bismarck. I am appearing in opposition to Engrossed HB 1386.

In its original form this bill sought to require government-supported economic development projects to be bid and to raise the ceiling for multiple prime bids in addition to the present construction manager bonding requirements. We opposed the remainder of the bill but did not testify in the House on the construction manager section of the bill due to a lack of time for proper research. I have now had a chance to review the bill as it is presently constructed and I must oppose it at this time.

The engrossed bill seeks to require a construction manager to bid the entire cost of a construction project, without benefit of the use of the contractors' bonds. North Dakota Century Code Section 48-02-06.2 requires each contractor to bond his or her own work. That contractor bond requirement is not changed by this bill. If HB 1386 were to be passed in its present form it would effectively double bond any project utilizing a construction manager.

It will be very difficult, if not impossible, for a construction manager to get a bond for any moderate to large project, effectively prohibiting the use of a manager.

But even if the bond could be obtained this bill will double bond the project and the political subdivision building the project will pay for both bonds while being able to collect on only one.

It is important to note that the bond we are talking about here is only a performance bond which guarantees completion of the work bid. If the issue is the correction of damage to a project under construction the bonding requirements should be replaced with a requirement for professional liability insurance coverage. This insurance coverage would provide a resource for payment of expenses if a project was damaged by the acts of others.

Members of the Political Subdivisions Committee, this bill is unworkable in its present form. It would effectively prohibit the use of construction managers on large projects. My city has not chosen to use this resource extensively in the past but I would not want to have the option to do so in the future taken away. I would urge you to recommend a Do Not Pass on this bill. Thank you for allowing me to speak to you this morning.

Mr. Chairman & Members of the Political Subdivisions Committee:

I have come here today to testify in favor of House Bill#1386. My Name is Kim Cady, I am a Partner in C&C Plumbing & Heating, of Minot. My Partner & I have been in the Mechanical Contracting Business in Minot for 21 Yrs. We have performed work as a Prime Contractor, & Subcontractor on Federal, State, & Local Government Projects.

We have been involved in Mechanical Construction Contracts W/ Construction Management firms. In most cases the CM Firm fragments the Contract in to Bid Packages. One example of a Contract for a Multi level facility is as follows. Each floor or group of floors were broken down into the various systems in the building, i.e.( Plumbing, Heating Piping, Cooling Piping, Sheet Metal etc.) Each of these systems would then be broken down into Bid packages.

Example: Plumbing System

Bid Package #1 -- Plumbing System Rough-in ----- Contractor "A"

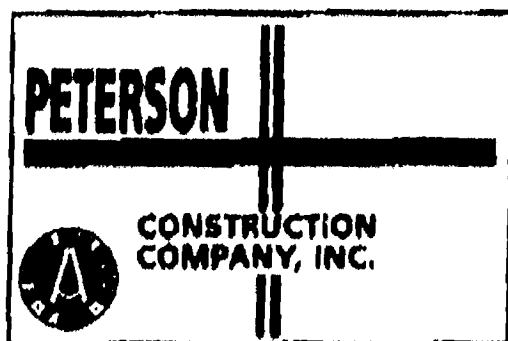
Bid Package #2 -- Furnish Plumbing Fixtures & Trim ---- Contractor "B"

Bid Package #3 -- Plumbing System Set Fixtures and trim ---- Contractor "C"

This opens up a multitude of possible problems having several Contractor's working on various parts of the same system. Where does one contractors liability end and the others begin when there is a problem. The owner would end up with several different bonding company's and trying to sort out who's responsibility the problem is.

We feel that Construction Contracts with CM firms that have multiple Contracts and Bid packages endanger the Payment & Performance Bond protection for the owner. It would be difficult if not impossible to protect the owner in the event of a large problem in the Mechanical System with multiple Mechanical Contractor's working on the same system furnishing individual Payment & Performance Bonds.

If a CM type Construction project is preferred by the Owner then we request that the CM furnish one Payment & Performance Bond for the entire project in order to protect the interests of the Owner as stated in 48-01.1-09.



Highway 81 North  
P.O. Box 14239  
GRAND FORKS, ND 58208-4239

TELEPHONE AREA CODE 701 746-6446  
FAX # AREA CODE 701 772-1763

March 7, 2001

To the Members of the Senate Political Sub-Committee:

We are writing to ask you to support HB 1386 Political Subdivisions Bill, Use of Construction Manager for the following reasons:

1. Protection of Public Funds: At the present time, a construction manager has no financial obligation to an owner. If damage to a structure occurs or a defect appears, the owner must look to other parties involved in the construction project who have bonded only their portion of the work, which is most likely inadequate to cover actual damages.
2. Fairness in the public bidding system should require construction managers to be bonded in a like manner as general contractors, who essentially provide the same services.
3. Bonding of construction managers would eliminate unqualified firms and protect the public from financial loss.
4. The City of Grand Forks would have had no financial loss from the collapse of the roof of the Alerus Center if the construction manager had furnished a performance and payment bond.

We hope you will vote for HB 1386. If you have any questions on this matter please call me at (701) 746-6446.

Sincerely,

PETERSON CONSTRUCTION COMPANY, INC.

Mark Peterson  
Vice President





# JLA

## JOHNSON LAFFEN

ARCHITECTS

Chairman Cook & Members of the Senate Political Subdivision Committee:

My name is Lonnie J. Laffen. I am a registered Architect in the State of North Dakota, a partner with Johnson Laffen Architects of Grand Forks and currently serve as President of the North Dakota Chapter of the American Institute of Architects. I am also a partner with Melby Construction Services (MCS) - a firm specializing in both Construction and Construction Management. MCS holds a North Dakota Contractor License.

I am opposed to HB 1386 and ask that you give this bill a do-not-pass recommendation to the Senate floor. I am grateful for the opportunity to testify as I did not have enough notice when this went through the House side.

Please recognize this bill for what it actually is - this session's version of the AGC's attempt to eliminate Construction Management (CM) as an option for public projects - thus eliminating their competition. We have fought some form of this bill the past three sessions. Two sessions ago the bill simply stated that CM should not be allowed in ND. Last session the bill stated that only Architects should not be allowed to practice Construction Management. This session the restraint of trade attempt is hidden in the technical understanding of bonding. The contractors would like you to believe that Construction Managed projects lack bonding (not true) and that the CM should bond the entire project. I would like to address these two issues:

1. All public projects in the state of North Dakota are required by law to be bid as multiple prime contracts meaning every project has multiple contractors. It does not matter if the project is managed by a CM or not. The General Contractors (GC) are using a scare tactic to make you believe that because there are multiple contractors on a CM project that there may be a problem of bond coverage. I do not believe this perceived problem has ever happened in the State (although I have no research to prove this). I have never heard of a public institution take a bond on a contractor. I have checked with the State Bd. of Higher Ed. - they tell me that they never have needed to take a bond. I would suggest this is not a very large problem and if it is - it exists exactly the same on non CM managed projects - they also have multiple contracts by law.

2. Construction bonds can only be obtained by the contractor performing their own work or a subcontractor for whom they hold the contract (Ex. A contractor who hires a painter can get a bond for both his work and the painters work). Construction Managers do not provide material or labor for construction and therefore cannot bond the entire project. They are consultants similar the architect (who also cannot get a bond). The CM is representing the owner (unlike a GC who is representing himself) helping coordinate the effort of doing a construction project by helping with scheduling, contracts, coordination of contracts etc. HE DOES NOT PERFORM CONSTRUCTION. If he is required to provide a bond for more than his consulting fee he will be forced out of business because the bond is not available. This is the primary purpose of this bill - to eliminate CM as an option for public projects by asking for a bond that the CM cannot acquire. The same would hold true for the GC method. The GC cannot get a bond for the other contractors he does not have contracts with (see #1 above). Not surprising however - this bill does not try to solve the problem (if it is one) for this 80%-90% of the states public projects.

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The federal government is moving heavily into design-build contracts and construction management as its procurement choice. The reason is that it saves time and money and provides the owner with better management during construction. This is a growing industry nationwide because people who build buildings like it. You will hear testimony from people who build buildings using both methods. They will be in opposition to this bill. The only support will come from the self interest group who has written it

This bill is strictly an effort to restrain trade made obvious by the amendment which states that only Architects CANNOT perform CM. There has never been any law that prohibits architects from performing construction or construction management nor should there be. In fact an Architect receives a post graduate degree from an accredited school, undertakes a three year internship and a national registration exam before he can practice Architecture. We are intensely involved in every aspect of the construction trades and are the only ones trained in Health, Life & Safety issues as they relate to public buildings. I would argue that no one is more qualified than the Architect to be associated with the practice of Construction Management. In reverse there is no law that prohibits Contractors from providing Architecture and is done so every day in the state of ND.

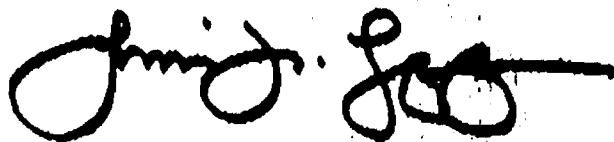
My two firms provided both Architecture and Construction Management services for UND's new Barnes & Noble Bookstore. It was completed remarkably in one year from beginning of design to end of construction. This was only possible by the combined efforts of a team working together - just as you car is designed and built by the same company. All contracts were bonded including the CM. Barnes & Noble states it is the best building they operate out of and is one of their top 5 stores nationwide.

Following the flood of 1997, the city of Grand Forks was virtually rebuilt by construction management companies from all over the United States. The country has never seen such a quick turnaround in its history. While the communities along the Mississippi are still rebuilding from their 1993 flood while GF work is complete - thanks mostly to excellent help from our friends, legislators and the process of Construction Management.

Lastly it was stated in testimony that the Alerus Center in Grand Forks is suffering from a lack of bonding on its roof collapse. This is simply not true. I am the project architect for the Alerus Center. Bonds have not been called on this issue as it was a construction accident. All projects carry Builders Risk Insurance to cover such accidents and this project was no exception. The Builders Risk Insurance company has paid out to the city of GF and is now collecting from the contractors individual insurance companies

Please see this bill for what it truly is - one more attempt to eliminate Construction Management as competition by the Associated General Contractors. Please defeat this bill.

Thank-you for your efforts.



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*Kevin Mattson*

I have come to testify in favor of House Bill 1386. I am the Vice President of the ND AGC Builders Chapter and President of Mattson Construction Co, a Minot General Contracting firm. Currently our firm does not perform as a Construction Manager, depending on the project, it prefers to work either as the General Contractor and or as a sub-contractor.

I previously e-mailed each member of this committee on this bill regarding the bonding. I would like to add to my previous communication, after discussing it with an insurance agent, it is possible, depending on how the policy is written, that my example may be covered under builders risk. But as the City of Grand Forks is learning, owner's liability with separate bonds remains a huge problem.

I would like to address the amendment regarding cleaning up the problem with the entangled financial interests.

There is a large body of the Century Code devoted to regulating the conventional Design-Bid-Build contracts while Construction Management, (CM), contracts are largely ignored. We find it alarming that CM construction is more or less unregulated and ignored in the Century Code. CM is gaining market share and we believe it is time that this issue be addressed by the legislature. The Design Firm is first to the table and has the ear of the owner long before the contractor enters the picture, unchecked, the CM trend will accelerate.

We are asking that CM be put on a level playing field with conventional forms of contracting. We are not here to outlaw CM, but we are opposed to the governing bodies

using the current lack of laws that don't properly regulate CM to avoid their responsibilities in administering the contract. The owners responsibilities that are placed on them for conventional Design-Bid-Build construction should be similar in CM work.

When it comes to CM, it is not uncommon for the Design Firm to have a "captive" CM firm that is chosen by the Design Firm, not the owner, to administer the contract. Not surprisingly, it brings the question of who is loyal to whom. When problems occur on the job, under Design-Bid-Build, the Designer and Prime Contractors have an official communication channel to the owner. Those problems are addressed in an environment where the financial impact of a solution is independent of each party. Not so the case of a captive CM. While it's not beyond the possibility that a CM, owned by the Designer, will call the Design Firm on the carpet for design errors and force them to correct the errors at their own expense, it is just not likely.

If a CM contract is preferred, we feel that the owner is best served when the CM's loyalty is to the owner, having no financial interest to the Designer. It used to be that architectural firms couldn't have a financial relationship to the contractor, we feel that rule was wise then and is needed now regarding CM work.

One final point. Construction industry in North Dakota is at risk of losing its expertise if it is not given the chance to use it. Splitting projects up into many smaller pieces and hiring an elite management firm to administer them is a good way of killing it. Yesterday I heard that the developers of UND's Bronson Property, are soliciting CMs on a project and are restricting the list to two out of state firms. Nothing in this bill will address that issue, but it should be noted that currently there are construction firms located in ND capable of doing the work. I am enclosing an economic impact study commissioned by the AGC which shows on page 18, paragraph 3, that the construction industry supplies at least \$90 million more to the legislature than it consumes. That number is not guaranteed, outsourcing the value-added management and construction expertise to out of state firms and/or non-contractors, would make that number a lot less.

# **Economic Impact of Aggregate Expenditure by Associated General Contractors of North Dakota**

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**Bureau Occasional Paper Number 501**

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## Highlights

1. Construction industry employment has increased 5.1% per year since 1989.
2. The North Dakota construction industry averaged 4.82% of total North Dakota employment during the 1990s.
3. Construction industry gross state product increased twice as that for the North Dakota economy since 1989.
4. The real rate of growth in North Dakota construction industry gross state product since 1989 has been 11.8% per year compared to 5.9% per year for North Dakota.
5. Employee compensation increased 124% since 1989 compared to 63% for the State.
6. Construction industry personal income increased 129% since 1989, an amazing 11.7% per year compared to 5.4% for North Dakota.
7. The total economic impact of the North Dakota construction industry is \$1,634,427,749, 9% of North Dakota gross state product. One of every 11 dollars spent in North Dakota result from the economic impact of this industry.
8. The construction industry generates \$1,291,135,273 of personal income, or 8.7% of North Dakota total personal income. One of every 11 dollars earned in North Dakota results from the economic impact of this industry.
9. One of every nine dollars of North Dakota employee compensation results from the economic impact of this industry.
10. The construction industry is responsible for 24,494 directly and for a total of 48,512 North Dakota jobs, or 10.9% of total North Dakota employment.
11. The construction industry generates a total of \$317 million in revenues for the Federal government.
12. The construction industry generates \$125 million in revenues for State and local government.



**Highlights cont. —**

13. Employers in the North Dakota construction industry pay Unemployment Insurance Fund tax rates of 8.5% for road construction and 7% for others. This compares to an average employer tax rate of 2.2 percent.
14. According to North Dakota ED&F funded report "Our Competitive Landscape: A Report on the Composition and Performance of the North Dakota Economy" the construction industry is a dynamic industry.

## Introduction

Economists divide industries into three groups. The first group, called primary industries includes agriculture, forestry, fisheries, and mining. The second group, called secondary industries includes construction, manufacture. The third part, the tertiary includes transportation, communications, utilities, and finance-insurance and real estate, business services, professional services, and government. This report examines the North Dakota construction industry.

The purpose of this report is to provide information regarding the economic impact of the North Dakota construction industry. This includes two parts. The first part is the direct impact, which is described in the next or second section. The second part is the impact on the remainder on the State's economy, oftentimes called the indirect and induced effects. That is described in the third part. The fourth part evaluates the impact of the industry on the North Dakota unemployment insurance system.

The standard of measurement used throughout this report is the relative impact, or the construction industry impact compared to total economic activity in North Dakota. The types of economic impact emphasized include employment, income, and gross state product.

## Direct Impact

The first column of Table 1 gives total full and part-time employment in North Dakota from 1970 through 1999. Total employment increased steadily, although at different rates from 1970 through 1983. Employment did decrease from 1984 through 1986. The construction industry increased through 1979, after which it fell to 1981 and then increased to 1983, then decreased until 1989. Total employment increased much sooner than construction industry employment. It took until 1989 before construction industry employment increased again. There was no recovery for the "general building" segment of the industry after 1981. This portion was more strongly influenced by the 50,000 decline in the resident population during the 1980s.

Construction industry employment increased 56% since 1989, a 5.1% annual rate of increase. General building construction employment increased by

**Table 1**  
**North Dakota & Construction Industry Employment**  
**1970-1999**

Year	Total Employ- ment	Construct Industry Employ	Wage & Salary Employ	General Building Employ	Heavy Construct Employ	Special Trade Employ
1970	281,459	13,697	10,585	3,706	4,004	5,987
1971	283,812	14,342	11,251	3,612	4,751	5,979
1972	288,139	15,727	12,239	4,300	4,912	6,515
1973	300,252	15,585	11,677	4,844	3,499	7,242
1974	308,012	16,688	12,654	5,212	3,237	8,239
1975	313,716	18,560	14,260	5,702	4,189	8,669
1976	326,115	21,020	16,178	6,956	4,051	10,013
1977	331,139	21,927	16,890	7,183	4,030	10,714
1978	345,549	24,493	19,062	7,495	4,678	12,320
1979	354,285	24,678	19,247	7,303	5,075	12,300
1980	355,960	22,241	17,086	6,014	4,621	11,606
1981	360,298	21,141	15,605	5,448	4,745	10,948
1982	361,072	22,122	16,243	5,212	6,175	10,753
1983	366,691	24,285	17,991	5,404	7,649	11,232
1984	368,285	21,095	14,196	5,563	4,848	10,684
1985	365,660	18,630	12,267	4,827	3,761	10,042
1986	359,555	17,865	11,385	4,804	3,327	9,734
1987	365,083	16,948	11,301	4,020	3,223	9,705
1988	369,057	15,971	10,440	3,968	2,787	9,216
1989	372,929	15,731	10,267	3,836	2,639	9,256
1990	376,339	15,865	10,644	3,607	2,862	9,396
1991	384,649	16,298	10,860	3,585	2,886	9,727
1992	390,405	17,122	11,674	3,825	2,759	10,538
1993	399,753	18,131	12,416	4,351	3,102	10,678
1994	414,740	19,783	13,476	4,487	3,226	12,070
1995	421,447	20,547	14,319	4,458	3,577	12,512
1996	429,572	21,793	15,683	4,592	3,833	13,368
1997	434,048	22,487	15,780	4,895	3,628	13,964
1998	439,676	23,311	16,444	5,204	3,596	14,511
1999	444,224	24,556	17,573	5,121	4,215	15,220

Source: U. S. Department of Commerce, Regional Economics Information System, "State Personal Income, 1929-99", November 2000.

thirty-four percent. Heavy construction employment increased 61% and special trade construction employment increased 64 percent.

Seventy-two percent of 1999 construction industry employment was "wage and salary" full and part-time employment. The balance of 28% of industry employment is due to proprietors.

**Table 2**  
**North Dakota & Construction Industry Gross State Product**  
**1977-1998 (millions)**

Year	GSP Current Dollars		Em- ployee Comp- ensation		Indirect Busi- ness Taxes		Real GSP 1996 Dollars	
	State	Industry	State	Industry	State	Industry	State	Industry
1998	17,214	865	9,264	556	1,534	21	17,205	794
1997	16,193	803	8,850	511	1,531	18	16,188	771
1996	16,089	772	8,422	496	1,474	18	16,089	772
1995	14,747	663	7,984	432	1,390	15	15,229	685
1994	14,140	617	7,583	382	1,367	14	14,902	666
1993	13,103	551	7,180	345	1,250	12	14,066	618
1992	12,939	490	6,793	314	1,100	12	14,239	568
1991	11,855	440	6,384	283	1,110	10	13,355	509
1990	11,675	423	6,056	273	1,028	10	13,380	494
1989	10,826	396	5,692	248	1,003	9	12,899	478
1988	9,929	397	5,485	250	943	10	12,290	492
1987	10,372	413	5,264	264	902	11	13,210	525
1986	9,975	430	5,086	254	890	10	13,096	569
1985	10,919	451	5,072	273	1,021	10	NA	NA
1984	10,960	536	4,963	338	1,104	12	NA	NA
1983	10,187	678	4,769	469	1,047	15	NA	NA
1982	10,088	589	4,572	381	1,036	11	NA	NA
1981	10,058	524	4,284	337	1,053	10	NA	NA
1980	7,743	536	3,778	337	692	10	NA	NA
1979	7,341	555	3,435	352	507	11	NA	NA
1978	6,545	518	3,027	329	446	11	NA	NA
1977	5,330	410	2,638	259	418	11	NA	NA

Source: [www.bea.gov](http://www.bea.gov)

The North Dakota construction industry averaged 4.82% of total employment during the 1990s. That percentage increased over the decade from the low 4% level to the 5.5% level by 1999. The construction industry increased its share of total employment from the low to middle 4 percent level to the middle 5% level by the end of the 1990s, nearly a 25% increase. This means that construction industry employment increased faster than employment in other industries.

Table 2 presents data on North Dakota and construction industry gross state product. Gross state product is similar to gross domestic product in that it measures total spending, depreciation, and indirect business taxes. It is available from the U. S. Department of Commerce for the years 1997-1998.

Real gross state product is measured in 1996 dollars. Constant dollar measurements are preferred by economists because they more accurately measure the quantity rather than the value of construction activity. A similar pattern as was found in employment emerges. Construction industry real gross state product bottomed in 1989, the same year as employment. It then increased robustly throughout the 1990s.

Whereas North Dakota gross state product increased 33% between 1989 and 1998 (3.3% per year) construction industry real gross state product increased 66 percent (6.6% per year), or twice the rate of real gross state product. This implies that North Dakota is becoming relatively more dependent on the construction industry as a source of economic activity.

Current dollar gross state product increased 59% (5.9% per year) over the same interval of time compared to 118% (11.8% per year) for the construction industry. Employee compensation increased 124% in the construction industry compared to 63% for the state. Indirect business taxes increased 133% in the construction industry compared to 63% for the state. Since the construction industry totals for employee compensation and indirect business taxes are increasing much faster than comparable State totals it follows that the construction industry is relatively more important as a source of spending on government services and workers.

Spending produces income for economic agents. Table 3 produces statistics on total personal income in North Dakota and the construction industry. *Personal income in the construction industry grew faster than North Dakota personal income, which increased 129% from 1989 to 1999, an amazing 11.73% per year. North Dakota total personal income only increased 59%, or 5.4% per year.*

Personal income increased faster than the State average for the decade as well. General construction personal income increased 104%, or 9.45% per year. Heavy construction personal income increased 154% or 14% per year. Special trade construction income increased 130% or 11.8% per year. The last column gives construction industry income as a percent of total personal income. This has been increasing since 1991.

**Table 3**  
**North Dakota and Construction Industry Total Personal Income**  
**1970-1999 (000)**

Year	Personal Income	Construc Income	General Building	Heavy Construc	Special Trade	Ratio of C to PI
1970	1,988,968	118,506	28,227	41,020	49,259	5.96%
1971	2,299,381	135,530	29,385	52,319	53,826	5.89%
1972	2,761,347	163,779	35,724	61,071	66,984	5.93%
1973	3,903,321	163,202	44,935	40,085	78,182	4.18%
1974	3,881,283	194,422	54,171	38,855	101,396	5.01%
1975	4,044,269	238,937	62,855	64,665	111,417	5.91%
1976	3,990,249	300,747	88,635	67,004	145,108	7.54%
1977	4,172,119	328,082	99,600	67,666	160,816	7.86%
1978	5,293,941	406,968	114,895	90,362	201,711	7.69%
1979	5,477,036	427,084	119,252	101,383	206,449	7.80%
1980	5,296,893	405,135	104,167	94,169	206,799	7.65%
1981	6,820,275	390,696	87,763	112,119	190,814	5.73%
1982	7,351,871	432,932	83,843	160,651	188,438	5.89%
1983	7,704,431	521,549	93,679	226,012	201,858	6.77%
1984	8,375,006	426,869	98,024	131,150	197,695	5.10%
1985	8,672,948	369,402	87,970	92,242	189,190	4.26%
1986	8,788,163	362,836	95,970	80,217	186,649	4.13%
1987	8,968,475	358,350	85,000	81,816	191,534	4.00%
1988	8,352,113	336,729	81,802	72,715	182,212	4.03%
1989	9,279,703	332,517	74,523	70,685	187,309	3.58%
1990	10,121,249	351,675	72,535	84,347	194,793	3.47%
1991	10,318,486	362,750	69,437	83,551	209,762	3.52%
1992	11,241,941	400,858	82,244	81,973	236,641	3.57%
1993	11,361,715	448,092	94,307	91,285	262,500	3.94%
1994	12,176,830	498,875	105,964	99,731	293,180	4.10%
1995	12,243,384	527,504	108,229	116,886	302,319	4.31%
1996	13,606,650	610,663	118,613	140,209	351,841	4.49%
1997	13,330,457	611,473	127,100	130,108	354,265	4.59%
1998	14,520,817	667,983	146,045	130,230	391,708	4.60%
1999	14,772,589	761,935	152,145	179,736	430,054	5.16%

Source: U. S. Department of Commerce, Bureau of Economic Analysis, "State Personal Income 1929-1999", November 2000.

Because construction industry income has increased faster than North Dakota total personal income its share of the latter has increased from 3.47% in 1990 to 5.16 percent in 1999, a 49% increase. The last time this happened was from 1973 to 1979.

Since inflation has averaged approximately 2% per year annually, North Dakotans have experienced real income growth rates of 3% or more per year for the 1990s. Members of the construction industry have witnessed real income growth rates near 9% per year. The per capita income in the construction industry has probably doubled in the 1990s. The same would be true for gross state product per capita.

Construction industry income increased 25% since 1997 compared to an 11% increase in State total personal income. Total personal income, gross state product and employment have increased faster than North Dakota total personal income. Much of this growth is due to the substantial damage inflicted on the State by the winter of 1996-1997 and the resultant flooding. This additional employment, income, and spending has no doubt offset the decreases in these amounts caused by this disaster.

### **Indirect and Induced Economic Impacts**

The next part of this study looks at the impact of the construction industry on employment, income, and gross state product in other North Dakota industries. Road construction requires that asphalt and concrete be produced. This is an example of the indirect economic impact. Industries that supply production inputs to the construction industry are included in the indirect impact. The induced economic impact results when income earned in the direct and indirect impacts is re-spent.

There is a variety of methods that can be used to calculate an economic impact. This study uses IMPLAN, a product developed and sold by the Minnesota IMPLAN Group. IMPLAN is an input-output model. The various coefficients that make up the model are calculated from 1997 U. S. Department of Commerce, Bureau of Economic Analysis data. The fact that the model coefficients are calculated from recent data probably increases the accuracy of the model's predictions. The construction industry probably utilizes more capital per unit of output than 40 years ago. The induced impact of expenditures by North Dakotans is probably smaller than it was 40 years ago because the number of proprietors has declined. Transactions that were conducted in State are now probably conducted out-of-state.<sup>1</sup> Readers that are interested in all that has been done with the IMPLAN model can consult [www.implan.com](http://www.implan.com) for more information.

This economic impact analysis calculates the impact of the aggregate expenditures of the North Dakota Association of General Contractors on North

Dakota personal income, gross state product, and employment. The majority of this economic impact results because the contractors bring dollars from Out-of-State, like highway construction, for instance. The construction industry is subdivided into three groups by the U. S. Department of Commerce, Bureau of Economic Analysis. These include General Building, Heavy Construction, and Special Trade segments. Heavy construction primarily is road construction. General building refers to construction of buildings and special construction is a category created to capture the many other things our society builds, like transmission towers, and other infrastructure.

A survey was mailed to all association members to acquire various data, especially total revenue. A reasonable response permitted the estimation of the total revenue of the membership—\$2,533,000,000 1999 dollars. The reader should bear in mind that the best approach would be to calculate a range of economic impacts for different possible levels of expenditure. However, this would add many more tables to a report designed primarily to inform the public and government of the economic impact of the industry. Because a point estimate is used, the reader is cautioned to add an error term to the numbers that follow. The actual economic impact probably is within plus or minus four percent of the following calculations. This approach acknowledges that this study relies on a sample and not a census to calculate total aggregate expenditures received by the Associated General Contractors of North Dakota.

IMPLAN calculates economic impact for a number of important economic magnitudes including total value added (gross state product), total personal income and its components—employee compensation (wages and salaries), proprietors income (profits), and other property income (dividends, rents, and interest). IMPLAN calculates the employment impact and the output impact. IMPLAN also calculates indirect business taxes and both the Federal and North Dakota tax collections resulting from the expenditure by the Contractors.

Moreover, IMPLAN calculates these for each industrial subdivision of the economy—1) Agriculture, forestry, and fisheries; 2) Mining; 3) Construction; 4) Manufacturing; 5) Transportation, communication and public utilities; 6) Trade (both wholesale and retail); 7) Finance, insurance and real estate; 8) Services (both business and professional); 9) Government (Federal, State and local); and 10) Other. These industries are reported in the subsequent tables as follows: 1) Agriculture; 2) Mining; 3) Construction; 4) Manufacturing; 5) Transportation CPU; 6) Trade; 7) FIRE; 8) Services; 9) Government; and 10) Other. The Government impacts incorporate all levels of government into this title.

An economic impact is comprised of three parts: 1) the direct impact; 2) the indirect impact; and 3) the induced impact. The sum of the parts is the total economic impact. The direct impact calculation calculates the economic impact in North Dakota of the total revenue received by the Association. The national economic impact is obviously larger. The revenue received by the Association is



used to buy equipment, nearly all of which is manufactured outside the State. Part of the revenue goes for taxes (income and Social Security), which also leaks out-of-state. One of the great virtues of the IMPLAN model is that it permits the calculation of the Federal, State and even Local (county) economic impacts. The Association wishes to illustrate their economic impact in the State of North Dakota, and this is how the following numbers are interpreted.

The indirect economic impact measures the employment, income, and value added that result from production in the construction industry. A concrete or asphalt manufacturer, and a gravel mine all are examples of indirect economic impact. The induced economic impact results from the expenditure of income earned by those in or supplying the construction industry. They spend their income that creates production and income in other industries, like medical services, retail trade, or government. The tables that follow give the direct, indirect, induced, and total economic impacts (the sum of the three).

Before the data is presented, it is necessary to discuss the issue of inflation as far as it affects these results. The base year for the IMPLAN model is 1997. That means that all results are given in 1997 prices. IMPLAN coefficients are based on North Dakota data so they are not biased by the fact that the inflation rate in other parts of the country is higher than in North Dakota. The problem relates to inflation since 1997. The IMPLAN model would automatically multiply every 1997 outcome by 1.04. This is the amount of inflation that has occurred on the average since 1997. Where North Dakota relates to this average is hard to say. If the figures were left unadjusted then the argument would be that there has been no inflation since 1997. If the figures are adjusted by the national average since 1997 then the implicit assumption is that North Dakota mirrors the national average experience. Probably some would want to multiply by a larger factor because our economy has had more than the national average inflation. This report will adjust the 1997 amounts by 1.04 and adopt the assumption that North Dakota is average as far as inflation is concerned.

Table 4 provides the "total value added" by the aggregate expenditure

**Table 4**  
**Total Value Added by North Dakota Construction Industry**  
**1999 Dollars**

Industry	Direct	Indirect	Induced	Total
Agriculture	0	4,223,306	2,542,451	\$6,765,755
Mining	0	7,031,378	3,642,469	\$10,673,847
Construction	846,906,378	4,188,403	7,662,253	\$858,757,053
Manufacturing	0	22,453,735	10,759,659	\$33,213,392
Transportation CPU	0	51,088,898	46,012,662	\$97,101,564
Trade	0	103,290,354	117,884,824	\$221,175,169
FIRE	0	31,526,666	89,769,405	\$121,296,074
Services	0	130,403,312	140,451,684	\$270,854,988
Government	0	4,987,330	8,004,354	\$12,991,684
Other	0	0	1,598,223	\$1,598,223
Total	0	359,193,382	428,327,981	\$1,634,427,749

of the Contractors Association. The direct impact gives North Dakota gross state product (value added) by the gross expenditure of the construction industry. The impact of the construction industry on the national gross domestic product is larger. The direct impact estimated by the model is 5% of North Dakota 1998 gross state product estimated by the U. S. Department of Commerce, Bureau of Economic Analysis. This figure is consistent with that for other years. The Contractors Association aggregate expenditure results in an economic impact of \$359,193,382 in industries supplying goods and services to it. The income from the direct and indirect impacts creates another \$428,327,981 in industries where this income is re-spent. The total economic impact of the construction industry is \$1,634,427,749. This is 9% of total North Dakota gross state product in 1998. *One out of every \$11 dollars circulating in the North Dakota economy originates in the aggregate expenditure of the industry.*

Table 5 presents the total personal income resulting from the aggregate expenditure of the Contractors Association. Total personal income represents

**Table 5**  
**Total Personal Income Added by North Dakota Construction Industry**  
**1999 Dollars**

Industry	Direct	Indirect	Induced	Total
Agriculture	\$0	\$3,094,868	\$1,510,574	\$4,605,442
Mining	\$0	\$2,975,437	\$3,834,348	\$3,834,348
Construction	\$780,280,351	\$3,857,973	\$7,115,219	\$791,253,565
Manufacturing	\$0	\$15,845,827	\$6,881,431	\$22,727,259
Transportation CPU	\$0	\$32,523,573	\$18,685,023	\$51,208,593
Trade	\$0	\$62,517,516	\$74,379,835	\$136,897,347
FIRE	\$0	\$13,230,369	\$19,022,168	\$32,252,538
Services	\$0	\$110,957,966	\$125,131,885	\$236,089,851
Government	\$0	\$4,804,522	\$5,863,586	\$10,668,107
Other	\$0	\$0	\$1,598,223	\$1,598,223
Total	\$780,280,351	\$249,808,050	\$261,046,854	\$1,291,135,273

the sum of wages, profits, rents, interest and dividends. Subsequent Tables 6, 7, and 8 give the breakdowns of these totals. The aggregate expenditure of the Contractors Association generates \$780,280,351 of personal income directly. This is 5.3% of North Dakota total personal income. There is \$259,808,050 of income created by construction industry suppliers. Another \$261,046,854 is created when this income is re-spent. *Overall, the construction industry contributes \$1,291,135,273, or 8.7% of North Dakota total personal income. Thus, one of every \$11 dollars of income earned in North Dakota is derived from the construction industry.*

Table 6 illustrates the impact of the Contractors Association on employee income in North Dakota. The direct impact of the aggregate expenditure produces a total of \$599,132,186 of employee compensation. A total of \$206,151,573 employee compensation is produced in industries supplying inputs to the construction industry. This income, when re-spent creates another \$227,461,826 of employee compensation. *The total employee compensation created in North Dakota is over 1 billion dollars. Thus, one of every \$9 dollars of employee compensation in North Dakota is the result of the construction industry.*

Table 7 gives the calculations for proprietors income. Proprietors do not exist in government, and hence there is no proprietors income unlike employee

**Table 6**  
**Employee Compensation Added by North Dakota Construction Industry**  
**1999 Dollars**

Industry	Direct	Indirect	Induced	Total
Agriculture	\$0	\$1,634,708	\$866,142	\$2,500,851
Mining	\$0	\$2,843,105	\$731,800	\$3,574,905
Construction	\$599,132,186	\$2,966,050	\$5,460,339	\$607,558,548
Manufacturing	\$0	\$15,393,164	\$6,608,239	\$22,001,402
Transportation CPU	\$0	\$25,253,488	\$15,993,874	\$41,247,365
Trade	\$0	\$53,005,056	\$64,008,755	\$117,013,811
FIRE	\$0	\$12,384,275	\$17,562,703	\$29,946,977
Services	\$0	\$87,867,204	\$108,768,167	\$196,635,363
Government	\$0	\$4,804,522	\$5,863,586	\$10,668,107
Other	\$0	\$0	\$1,598,223	\$1,598,223
<b>Total</b>	<b>\$599,132,186</b>	<b>\$206,151,573</b>	<b>\$227,461,826</b>	<b>\$1,032,745,552</b>

**Table 7**  
**Proprietors Income from North Dakota Construction Industry**  
**1999 Dollars**

Industry	Direct	Indirect	Induced	Total
Agriculture	\$0	\$1,460,160	\$644,432	\$2,104,592
Mining	\$0	\$132,332	\$127,111	\$259,443
Construction	\$181,148,232	\$891,922	\$1,654,880	\$183,695,034
Manufacturing	\$0	\$452,663	\$273,193	\$725,857
Transportation CPU	\$0	\$7,270,083	\$2,691,149	\$9,961,231
Trade	\$0	\$9,512,461	\$10,371,084	\$19,883,546
FIRE	\$0	\$846,095	\$1,459,466	\$2,305,560
Services	\$0	\$23,090,766	\$16,363,722	\$39,454,488
Government	\$0	\$0	\$0	\$0
Other	\$0	\$0	\$0	\$0
<b>Total</b>	<b>\$181,148,232</b>	<b>\$43,656,481</b>	<b>\$33,585,036</b>	<b>\$258,389,750</b>

compensation. Proprietors in the North Dakota construction industry receive a total of \$181,148,232 because of the aggregate spending of the Contractors Association. Another \$43,656,481 of proprietors income is created in industries supplying production inputs to the construction industry. This income creates another \$33,585,036 of proprietors income when it is re-spent. *Altogether, the aggregate spending of the Contractors Association results in a grand total of \$258,389,750 of income for proprietors, over one-quarter billion dollars in 1999. This is also approximately one of every nine dollars of proprietors income.*

Table 8 gives the results for other property incomes, which includes interest, dividends (corporate income), and rent. The direct impact of the

**Table 8**  
**Other Property Income from North Dakota Construction Industry**  
**1999 Dollars**

Industry	Direct	Indirect	Induced	Total
Agriculture	\$0	\$957,485	\$856,983	\$1,814,468
Mining	\$0	\$3,601,675	\$2,465,243	\$6,066,918
Construction	\$495,824	\$285,584	\$470,126	\$49,380,827
Manufacturing	\$0	\$5,905,537	\$3,350,071	\$9,255,607
Transportation CPU	\$0	\$15,219,812	\$21,786,696	\$37,006,507
Trade	\$0	\$19,097,919	\$20,427,089	\$39,525,009
FIRE	\$0	\$15,977,632	\$59,889,344	\$75,866,977
Services	\$0	\$16,548,538	\$12,379,274	\$28,927,812
Government	\$0	\$182,808	\$2,140,769	\$2,323,577
Other	\$0	\$0	\$0	\$0
Total	\$495,824	\$77,776,991	\$123,765,595	\$250,167,701

aggregate expenditure of the Contractors Association is \$495,824. Both the indirect and induced impacts are much larger at \$77,776,991 and \$123,765,595 respectively. The total impact on other property income is \$250,167,701, or one-quarter billion 1999 dollars.

Table 9 reports the impact on total industry output resulting from the aggregate expenditure of the Contractors Association. These numbers indicate a \$2.718 billion dollar direct impact and a total direct, indirect, and induced

**Table 9**  
**Output Impact from North Dakota Construction Industry**  
**1999 Dollars**

Industry	Direct	Indirect	Induced	Total
Agriculture	\$0	\$6,091,996	\$14,150,291	\$20,242,288
Mining	\$0	\$11,217,465	\$6,354,478	\$17,571,942
Construction	\$2,717,519,933	\$7,738,522	\$15,267,609	\$2,740,525,998
Manufacturing	\$0	\$75,739,905	\$55,016,840	\$130,756,746
Transportation CPU	\$0	\$115,144,532	\$72,683,445	\$187,827,977
Trade	\$0	\$140,082,808	\$171,609,169	\$311,691,994
FIRE	\$0	\$45,177,637	\$120,965,736	\$166,143,378
Services	\$0	\$268,554,940	\$355,871,110	\$521,466,051
Government	\$0	\$8,513,286	\$18,066,185	\$26,579,471
Other	\$0	\$0	\$1,598,223	\$1,598,223
Total	\$2,717,519,933	\$678,261,092	\$728,623,086	\$4,124,404,067

economic impact on total output of \$4.124 billion 1999 dollars. The output impact of an industry is much larger than the other estimates included here because it is the sum of the intermediate and final demand for that industry. It also can be calculated by summing total outlays on both intermediate and primary inputs for the industry. Hence, it is either gross state income or gross regional product (outlays). Both of these figures include the impact of trade with the "outside" world, including other States and countries.

Table 10 gives the employment impact. The direct impact to the State's

**Table 10**  
**Employment Impact from North Dakota Construction Industry**  
**1999**

Industry	Direct	Indirect	Induced	Total
Agriculture	0	319	129	448
Mining	0	76	20	96
Construction	24,494	121	230	24,845
Manufacturing	0	549	239	788
Transportation CPU	0	1,016	471	1,487
Trade	0	3,242	5,091	8,333
FIRE	0	486	785	1,271
Services	0	5,271	5,493	10,764
Government	0	110	177	286
Other	0	0	194	194
<b>Total</b>	<b>24,494</b>	<b>11,190</b>	<b>12,828</b>	<b>48,512</b>

economy is 24,494 jobs. There are 11,190 jobs created in firms that supply the construction industry production inputs. Another 12,828 jobs are created as a result of the "responding effect". A grand total of 48,512 jobs represents the total impact of the aggregate expenditure of the Contractors Association. The model's estimate of 24,494 jobs is slightly less than that reported by North Dakota Job Service-- 24,556 jobs. The estimate represents 5.5% of all North Dakota employment. The total employment impact is 10.9% of all North Dakota employment. *Nearly 1 in 9 employed North Dakotans would lose their job if the aggregate expenditure of the Contractors Association stopped today.*

The next three tables summarize the impact of the construction industry on tax collections. The above tables provided useful information about the industry's impact on government. Table 4 informed that government creates value by nearly \$13 million 1999 dollars because of the aggregate expenditure by the Contractors Association. Table 5 stated that government employees received \$10.668 million 1999 dollars worth of income because of the construction industry. Government actually receives "other owners income" worth \$2.33 million. Moreover, government employment is 286 employees higher than it

would be without the construction industry. The following tables tell the rest of the story about tax collections that result from the economic activity created by the aggregate expenditures of the Contractors Association.

Table 11 gives the indirect business taxes impact of the aggregate expenditure by the Contractors Association. The Contractors pay \$18,000,898

**Table 11**  
**Indirect Business Taxes Impact from Construction Industry**  
**1999 Dollars**

Industry	Direct	Indirect	Induced	Total
Agriculture	\$0	\$170,952	\$174,893	\$345,845
Mining	\$0	\$454,266	\$318,315	\$772,581
Construction	\$18,000,898	\$44,847	\$76,908	\$18,122,653
Manufacturing	\$0	\$702,371	\$528,157	\$1,230,528
Transportation PCU	\$0	\$3,345,517	\$5,540,942	\$8,886,459
Trade	\$0	\$21,674,915	\$23,077,893	\$44,752,810
FIRE	\$0	\$2,318,666	\$10,857,887	\$13,176,554
Services	\$0	\$2,896,800	\$2,940,519	\$5,837,319
Government	\$0	\$0	\$0	\$0
Other	\$0	\$0	\$0	\$0
<b>Total</b>	<b>\$18,000,898</b>	<b>\$31,608,334</b>	<b>\$43,515,513</b>	<b>\$93,124,748</b>

1999 dollars. Because of economic activity generated as a result of the aggregate expenditure of the Contractors Association supplying businesses pay \$31,608,334 and businesses affected by re-spending pay an additional \$43,515,513. The total indirect business taxes paid as a result of the construction industry is \$93,124,748. The next two tables show the breakdown of this amount between Federal and State/Local government as well as indicate the purpose of the tax.

Table 12 shows the impact of the Contractor Association aggregate expenditures on Federal tax collections. The abbreviations in the table are as follows: IBT means Indirect Business Tax; PT means Personal Tax; and, SIT stands for Social Insurance Tax. North Dakota employers pay over \$161 million to the Social Security Administration. North Dakota proprietors pay Federal taxes of nearly \$14 million. Households pay taxes of nearly \$108 million. Corporations pay \$22 million. Over \$11 million are paid in the form of indirect business taxes. The Indirect Business Tax "Non-Tax" amount is mostly employer premiums paid to the Federal Unemployment Insurance Fund. *The grand total Federal tax collection that results from income created by the Contractors Association aggregate expenditure is nearly \$317 million, almost one-third billion dollars.*

**Table 12**  
**Federal Tax Collections from North Dakota Construction Industry**  
**1999 Dollars**

Type of Tax	Employee Compensation	Proprietary Income	Household Expenditures	Corporations	Indirect Business Tax	Grand Total Federal
Corporate Profits Tax	\$0	\$0	\$0	\$22,308,355	\$0	\$22,308,355
IBT: Custom Duty	\$0	\$0	\$0	\$0	\$2,375,793	\$2,375,793
IBT: Excise Tax	\$0	\$0	\$0	\$0	\$7,212,228	\$7,212,228
IBT: Fed Non Tax	\$0	\$0	\$0	\$0	\$1,769,723	\$1,769,723
PT: Estate & Gift	\$0	\$0	\$1,937,750	\$0	\$0	\$1,937,750
PT: Income Tax	\$0	\$0	\$105,463,432	\$0	\$0	\$105,463,432
PT: Non Tax (fines)	\$0	\$0	\$566,759	\$0	\$0	\$566,759
SIT: Employee Cont.	\$71,457,134	\$13,875,792	\$0	\$0	\$0	\$85,332,927
SIT: Employer Cont.	\$89,935,626	\$0	\$0	\$0	\$0	\$89,935,626
<b>Total</b>	<b>\$161,392,760</b>	<b>\$13,875,792</b>	<b>\$107,967,941</b>	<b>\$22,308,355</b>	<b>\$11,357,744</b>	<b>\$316,902,591</b>

Table 13 presents North Dakota tax collections that result from the aggregate expenditure of the Contractors Association. The table shows that the

**Table 13**  
**State Tax Collections from North Dakota Construction Industry**  
**1999 Dollars**

Type of Tax	Employee Compen	Proprietar Income	Household Expend	Corporate	Indirect Bus Tax	Total State Tax
Profit/Dividend Tax	\$0	\$0	\$0	\$5,694,296	\$0	\$5,694,296
IBT: Motor Veh.Lic.	\$0	\$0	\$0	\$0	\$798,478	\$798,478
IBT: Other Taxes	\$0	\$0	\$0	\$0	\$2,598,705	\$2,598,705
IBT: Property Taxes	\$0	\$0	\$0	\$0	\$26,448,396	\$26,448,396
IBT: S/L Non Taxes	\$0	\$0	\$0	\$0	\$12,928,396	\$12,785,930
IBT: Sales Tax	\$0	\$0	\$0	\$0	\$31,027,160	\$31,026,640
IBT: Severance Tax	\$0	\$0	\$0	\$0	\$8,108,853	\$8,108,853
PT: Estate & Gift	\$0	\$0	\$451,315	\$0	\$0	\$451,315
PT: Income Tax	\$0	\$0	\$14,710,124	\$0	\$0	\$14,710,124
PT: Motor Veh.Lic.	\$0	\$0	\$2,539,858	\$0	\$0	\$2,539,858
PT: Non Tax (fines)	\$0	\$0	\$4,856,325	\$0	\$0	\$4,856,325
PT: Other (fish/hunt)	\$0	\$0	\$1,539,087	\$0	\$0	\$1,539,087
PT: Property Tax	\$0	\$0	\$603,849	\$0	\$0	\$603,849
SIT: Employee Cont.	\$3,755,596	\$0	\$0	\$0	\$0	\$3,755,596
SIT: Employer Cont.	\$9,139,153	\$0	\$0	\$0	\$0	\$9,139,153
<b>Total</b>	<b>\$12,894,749</b>	<b>\$0</b>	<b>\$24,700,557</b>	<b>\$5,694,296</b>	<b>\$81,767,002</b>	<b>\$125,056,603</b>



State of North Dakota collects a substantial \$125,056,603 because of economic activity in and that created by the aggregate expenditure of the Contractors Association. The State collects nearly \$5.7 million on profits and dividends. It collects nearly \$13 million in Social Insurance Tax. Households pay nearly \$25 million for estate and gift tax, income tax, motor vehicle license fees, fines and fees, fishing and hunting licenses and personal property taxes. The State collects a total of \$81,767,002 indirect business taxes. Around \$11 million of this (the model aggregates a few payments into this category) is collected as insurance premiums for the North Dakota Unemployment Insurance Fund. Property tax represents the largest amount in the indirect business tax column. *Economic activity generated by the construction industry is approximately responsible for 8.3% of total State tax collections.*

This completes the review of the results of running the IMPLAN input-output model with the aggregate expenditure of the North Dakota Contractors Association. This industry is one of the foundation blocks of the State economy. Along with agriculture, mining, and manufacturing it accounts for the bulk of economic activity in the transportation, communication, and public utilities industry. Economic activity in these base industries is responsible for nearly all economic activity in trade, finance, insurance and real estate, services and government.

Construction is fundamental to investment, whether that is in infrastructure or capital. Economic activity in this industry is an important indicator of growth in North Dakota gross state product, total personal income, and employment.

### **Impact of the Construction Industry on the Unemployment Insurance Fund**

The final section of this paper on the construction industry examines the impact of this industry on the North Dakota Unemployment Insurance Fund. The main concern addressed here is the demand for funds created by the seasonal and cyclical nature of the construction industry. The cost to society is tied to funding the unemployment that occurs during the winter months in the outdoor segment of the industry and the unemployment that occurs when interest rates rise. High unemployment rates in the construction trades place a significant draw on the fund and create the potential for a significant mismatch between income and expense.

North Dakota Job Insurance Handbook, 1970-1999 (Job Service North Dakota, June 2000) provides information useful to evaluating the issue. The construction industry covered unemployment rate is higher than the rates observed in manufacturing, agriculture, and mining. It is also higher than similar rates in transportation, (communications, and public utilities) finance

(insurance and real estate), trade, services, and government. The highest observed rates in mining came in 1983, 1986, and 1987 when the covered unemployment rate reached 20-25 percent. The highest rates observed in agriculture were reached in 1983-1989 when rates reached 20-25 percent. The construction industry also reached 30-35% during the same time frame.

This experience led the North Dakota legislature to reformulate (beginning in 1987) the premiums charged to employers. Since 1990, North Dakota State law requires that the state's trust fund be at 60 percent of the average annual amount of benefits paid. The latter amount is one-third of the total amount of benefits paid (and projected to be paid) for the prior 36 months.

Given this constraint the method of charging employers is to assign a job insurance tax rate to each employer based on their unemployment experience (called the reserve ratio system). Employers with lower unemployment experience pay lower rates than those with the opposite. The job insurance tax rate in 1999 ranged from a minimum of 0.2 percentage to 5.4% for non-construction. *Construction industry employers are charged a higher rate—8.5% for highway and street construction, and 7% for other construction industry employers.* It is very clear from these facts that the 1987 North Dakota legislature has already imposed a higher cost on construction industry employers to reflect the fact that they benefit proportionally more than employers in other industries. Consequently, the fund balance has increased from negative \$6,624,164 in 1986 to \$30,508,037 in 1999.

Since 1987, construction industry contributions have averaged (mean) 78.9% of benefits paid while ranging from 54.62 to 98.6 percent. Table 14 gives

**Table 14**  
**Mean North Dakota Industry Contributions as Fraction of Benefits Paid**  
**1987-1999**

	Ag	Min	Cons	Manf	TCU	Whol	Ret	FIRE	Serv	Govt
AV	.7286	.6669	.7890	.8903	1.201	1.071	1.559	1.796	1.742	.9308
LOW	.5194	.3533	.5462	.4583	.4212	.4373	.4851	.5899	.7003	.2020
HI	1.112	1.273	.9860	1.607	2.536	1.998	2.939	4.216	3.256	2.085

the mean of the ratio contributions to benefits paid for every industry. The State average is 1.0045. The table indicates that the tertiary industries, except government are subsidizing the fund. The primary and secondary industries are benefiting from the subsidy. Mining receives the greatest relative subsidy since 33.31% of benefits paid are contributed by other industries. Agriculture is second, construction third, manufacturing fourth and government fifth in this list of relative subsidy.

Is there any logic to the fact that the tertiary industries, except government are subsidizing the primary industries? The answer is yes. First, employment in these industries is more stable than the primary and secondary industries. Secondly, the primary and secondary industries create the foundation of the economy on which other industries grow. If there were no farmers, miners, manufacturers, and construction contractors then there would be less trade, fewer services, less transportation (communication and public utilities), and government. Society benefits from subsidizing the seasonal and cyclical unemployment problems in the primary industries. The spillover benefits, which are income, spending, and income in the tertiary industries is the classic argument in favor of a subsidy.

There is also a good reason to subsidize the construction industry seasonal and cyclical unemployment problem. If we didn't then the labor force and proprietors would migrate to areas of the country where construction is a year-round business. The North Dakota winter creates a very large opportunity cost for North Dakota construction industry members relative to other parts of the United States: three or more months of unemployment. This represents lost income. Such a large opportunity cost would no doubt result in outmigration. The result would be a scarcity of workers and higher wages. Labor market shortages and higher labor costs would no doubt eliminate smaller operators so the supply of contractors would decrease. The smaller supply of contractors and workers and higher construction costs would affect building. Families would dwell in smaller homes and apartments. Children would attend smaller schools. Businesses would have higher capital costs. The public would travel on fewer roads. Things like a fiber optic Internet would take more years before they would be built. The actual cost to the public of these effects is impossible to calculate, but it is considerable enough to justify the wisdom of the actuaries managing the North Dakota Unemployment Insurance Fund.

In 1999, the North Dakota unemployment insurance fund paid benefits equal to \$11,769,377 while employers paid \$10,768,980 in taxes (premiums). This is a difference of only \$1,000,397. The construction industry supplies at least \$90 million more to the legislature by its presence to cover the cost that is not funded by construction industry taxes. Combining this amount with the amount the public saves by having lower construction costs creates a benefit to the public much greater than the cost of the subsidy. The subsidy is the rational thing for North Dakota citizens to do not only for the construction industry, but also for agriculture, mining, and manufacturing. The only defect that seems to exist in the North Dakota unemployment insurance program is that taxes are calculated based on the prior three years of experience. The result is that the ratio of contributions to benefits paid falls during good times (1990s) and rises during bad times (1980s). This must make the tax burdensome for employers during

bad times when revenues are already off. The actuaries should introduce work to reduce this ratio during bad times and to increase it during good times.

While the tertiary industries, except government subsidizes the primary and secondary industries the overall result is a benefit to the other industries and to the public. This is also true of the construction industry, and possibly more so than agriculture, mining, and manufactures. This is because the construction industry produces investment goods and these are typically much more expensive than raw materials that ultimately become consumer goods.

## Conclusions

Where the national construction industry experienced declining employment and rising unemployment rates the North Dakota construction industry experienced the opposite: rising employment and falling unemployment rates. The North Dakota construction industry experienced faster growth rates in total personal income, gross state product, and employment than the overall North Dakota economy. The share of the State's income, expenditure, and employment generated by the construction industry has been increasing since 1991.

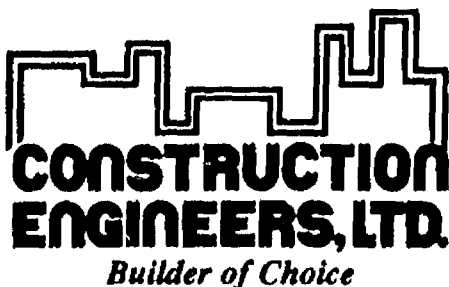
An August, 2000 study funded by North Dakota's Department of Economic Development and Finance, "Our Competitive Landscape: A Report on the Composition and Performance of the North Dakota Economy", included the North Dakota construction industry in the list of "dynamic" industries for these reasons.<sup>2</sup> Dynamic industries are growing relative to other North Dakota industries in economic importance. This report is important in that it allows North Dakota policy makers to identify the strong parts of the economy where the citizens of this State can receive the greatest benefit to cost ratio for their public expenditures.

## Footnotes

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<sup>1</sup> Two similar studies were done in 1986 and 1987. See Randall C. Coon, Donald F. Scott, and F. Larry Leistritz, "The Contribution of the Road Construction and Maintenance Industry to the North Dakota Economy" Agricultural Economics Miscellaneous Report No. 104, North Dakota State University, Fargo, ND, December 1986; and, Randal C. Coon and F. Larry Leistritz, "The North Dakota Construction Industry's Contribution to the State Economy" Agricultural Economics Miscellaneous Report No. 113, North Dakota State University, Fargo, ND, December 1987. The current study is most similar to the latter in that the latter study examines the impact of the 3 segments of the construction industry: general building, heavy (highway), and special trade. It was also prepared for the North Dakota General Contractors Association. There are a number of differences. Most important would be that they used the North Dakota Input-Output Model where this study uses IMPLAN. Secondly, their study does not attempt to analyze the unemployment compensation fund issue. Finally, this report offers published data so that the results of this model can be compared to U. S. Department of Commerce data.

<sup>2</sup> This study was conducted by RFA of West Chester, PA. This study and its details can be examined at <http://www.growingnd.com/allmedia.pdf?mediaID=137&sz=217214>. There are instructions available in this summary on where and how to examine the entire report.



Kurt F. Elckhof, CEO  
John K. Elckhof, President

Wednesday, March 07, 2001

Dwight Cook  
ND Senate Political Subdivisions  
ND State Capitol Building  
Bismarck, ND

RE: House Bill No. 48-01.1-09 of ND Century Code,  
relating to construction managers

Chairman Cook and committee members:

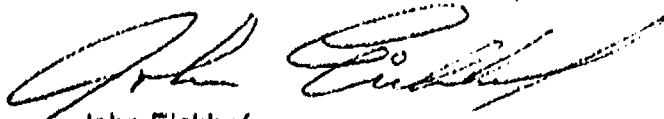
I have been a General Contractor in Grand Forks, ND for the past 22 years. We have worked very hard to gain recognition as a reputable and successful builder in our city. A very important part of what we have to offer our clients is the capability to offer a bonding line of credit which guarantees completion, quality, and insures the owner against financial risks that are inherent in many construction projects. Our bonding line of credit is based on a relationship of trust and financial commitment between us and our bonding company.

We have earned the right to be able to guarantee our work in this manner by always being very conscientious, diligent, and careful in the way that we build our projects. The financial risks for nonperformance on a bonded construction project are very severe and it is only the most capable and financially stable companies that are bonded by insurance companies. It is in the best interest of the State of North Dakota to promote **bonding capacity** as the main criteria to be used to judge a construction companies capability to manage and build.

The Associated General Contractors legal counsel has done a very good job of pointing out the potential pitfalls of scenarios where construction projects are not adequately insured by the proper bonding (see Vogel Law Firm letter dated 2/20/01). The ND Century Code as it is presently written allows the use of Construction firms that do not provide adequate financial insurance for their work. The potential for averting disastrous consequences can be controlled by the passage of the legislation that we are promoting. Please seriously consider the significance of our testimony when you vote on this bill.

Very Truly Yours,

CONSTRUCTION ENGINEERS, LTD.



John Elckhof  
President



Fifty-seventh  
Legislative Assembly  
of North Dakota

## ENGROSSED HOUSE BILL NO. 1386

Introduced by

Representatives Wald, Carlson, Svedjan

Senator Tollefson

1 A BILL for an Act to amend and reenact section 48-01.1-09 of the North Dakota Century Code,  
2 relating to construction managers.

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

4 **SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century Code is  
5 amended and reenacted as follows:

6 **48-01.1-09. Use of construction manager.** If a governing body uses a construction  
7 manager on a public improvement, the construction manager must be a licensed contractor. A  
8 construction manager awarded a contract for construction of a public improvement shall bond  
9 the entire cost of the project through a single bond, ~~or through bonds~~ supporting all bid  
10 packages and the construction manager's ~~bond for the full amount of the construction~~  
11 ~~manager's~~ services.





# BERGSTROM ELECTRIC, INC.

Full Service • Design • Construction • Industrial • Underground • Overhead • Contracting

Hwy. 81 North, Box 13152 • 3100 North Washington Street • Grand Forks, ND 58208-3152  
Phone (701) 775-8897 • Toll (800) 637-6985 • Fax (701) 772-4951/772-1568 • Email: berg@compcomm.net

March 7, 2001

Senate Political Sub-Committee  
North Dakota Senate  
Bismarck, North Dakota

RE: HB 1386

I am requesting your support for the house bill 1386 regarding Construction Manager bonding requirements.

We feel that the current bonding requirements are inadequate to cover projects constructed under the construction management process.

Currently subcontractors only bond the amount of their subcontract. If losses were obtained for rework or repairs in excess of the subcontract amount, no coverage would be available to cover the additional costs.

Sincerely

Cliff Moen  
General Manager  
Bergstrom Electric Inc.



# INDUSTRIAL CONTRACT SERVICES, INC.

P.O. Box 13158 - Highway 81 North  
Grand Forks, North Dakota 58208-3158  
(701) 775-8480 • FAX: (701) 775-8479

March 7, 2001

Senate Political Sub-Committee  
North Dakota Senate  
Bismarck, North Dakota

RE: HB 1386

I am writing to request your support for the above bill regarding Construction Manager bonding requirements.

We are concerned that if the current law regarding bonding by a construction manager is not changed some governing body is soon going to experience a major loss due to inadequate bond coverage.

At the present time, subcontractors only bond the amount of their sub-contract. If work performed by other subcontractors has to be modified or re-accomplished, in order to repair or replace defective work, no bond coverage currently exists for that rework.

Your support in adopting this House Bill would be appreciated.

Thank you,

Gary Bridgeford, P.E.  
General Manager, ICS, Inc.

GB:sml



PO Box 12845  
1445 North 52nd Street  
Grand Forks, ND 58208-2845

Telephone 701-775-0645

Fax 701-775-0646

March 06, 2001

TO: All North Dakota Legislators

RE: HB1386 (Construction Managers)

We would recommend support of House Bill 1386 which institutes liability unto Construction Managers on public improvement projects.

Construction Managers should be required to furnish a surety bond for 100% of their projects for the following reasons:

- 1) It would assure liability and responsibility on the Construction Manager's part.
- 2) Over-all cost for a single bond would actually be less than multiple bonds.
- 3) Smaller, individual bonds only guarantee that work covered by any single contract, and do not incorporate costs for demolition and reconstruction that could be required.
- 4) Single source responsibility would assure quality workmanship from the beginning of a job, not creating a 'domino' fault situation, whereas someone installing sub-quality workmanship affects all trades following him.

Should you have questions, please feel free to consult me.

Sincerely,

Joe Solseng  
President  
Structures, Inc.

March 7, 2001

Dear Chairman Cook & Senators:

I support senate bill SB 1386 and I urge you to support it. The following are the reasons why I support this bill.

- 1) This bill will lower the bond cost to the governing body on their building projects. Say on a \$3,000,000.00 dollar job the bond costs on a \$3,000,000.00 dollar bond are lower than the costs of ten \$300,000.00 dollar bonds. You may hear some of those opposing this bill say that it will cause double bonding, by the Construction Manager (CM) paying for the single bond and then having all of the bid packages back bond the CM. The back bonds from the bid package contractors to the CM are strictly optional at the choice of the CM. If the CM chooses to have the bid package contractors back bond to him, he will have to either absorb the bond costs or increase his fee. Let's say the CM increases his fee. Then another CM would have a competitive advantage by not increasing his. There would be no difference from me as a General Contractor (GC). I presently provide a single bond for my entire bid. If I choose to back bond a sub contractor I have to decide if I should pay for the back bond, or if I should add the back bond to my bid. If I add it to my bid and raise my price, the competition of a free market might cause me to no longer be the low bidder and loose the job.
- 2) Another reason I support this bill is to make a level playing field. A Construction Manager (CM) and General Contractor (GC) provide similar services. They both manage construction projects. Presently the GC has to provide a single bond for the whole project. This bill will level the playing field by having the CM provide a single bond for the entire project.



- 3) This bill will also provide greater security for the owner if a performance problem should come up and the responsible contractor won't perform. If there is a single bond to guaranty performance the owner just has to go to one performance bond. What would happen if there were a performance problem integral to 3 different contractors and 3 different bonds? Whose bond should the owner go to after?

Example: We had a job that we had just finished. With the first spring rain the owner called and said the roof leaks. This building had high and low metal roof that was connected by a wall with an EIFS finish and caulk joints. After investigating and recreating the leak we found that it was not a roof leak at all, but the EIFS returns had not been properly finished and caused the leak. The issue here is that, had we refused to perform the owner would only have to go after one bond. Had this been a CM job with a separate bond for each of the contractors involved, who refused to perform, whose bond would they go after?

Most likely the owner would go after the metal roof contractors bond. After the metal roof contractors bonding company had come to the site, only to find out that they are not the responsible party. The owner would then be liable to this bonding company for their expenses and have to start all over again.

- 4) This bill also provides the owner with a much greater degree of performance protection. Attached to my testimony is a discussion by attorney William A. Schlossman Jr. of the Vogel Law Firm. His discussion describes the great potential that presently exists to have a performance failure on a portion of the work performed by a subcontractor.

You may ask if this has ever happened or could it happen. Let me give you a few examples.


- A. During construction of the Alerus Center in Grand Forks they had the steel roof joists collapse one night. Lucky no one was hurt and the major damage was just to the failed steel joists. But what if these joists had failed months later after the roof was on and the floors and bleachers in place. This collapse would have caused catastrophic damages. If this collapse was a performance failure and the erection subcontractor had then refused to make all of the repairs to the building the city would have only had his bond.
- B. A mechanical contractor has told me about a process plant that they did the mechanical work on. After they had finished the floors started to settle causing this mechanical contractors pipes to break. The floor settlement was caused by the dirt subcontractor improper backfilling. This project had one prime contract and one bond.

Had the project only had the bond of the dirt subcontractor to fall back on, to remove and replace the pipes, to remove and replace the floors and to remove and replace the improperly backfill soil. It would not have covered their losses.

- C. Another example is A \$4,000,000.00 project that we had a number of years ago. When we started to pour the foundations, our foreman ordered the wrong concrete mix. We caught the mistake when we got our first 7-day test back and then had to fix the problem. Had this been a CM project and the concrete subcontractor had not caught the mistake and the foundation had later failed the only recourse this owner would have had was a \$50,000.00 bond for the whole \$4,000,000.00 project.

Thus I conclude that the potential for a performance failure is real.

Sincerely yours,  
BAUKOL BUILDERS, INC.



Glenn Moen  
Vice President  
AGC of ND Board of Directors Member

## CONSTRUCTION MANAGERS - PROVISIONS OF SELECTED SURROUNDING STATES

This memorandum discusses the provisions of selected surrounding states governing the use of construction managers. North Dakota Century Code Section 48-01.1-09 provides:

If a governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. A construction manager awarded a contract for construction of a public improvement shall bond the entire cost of the project through a single bond, or through bonds supporting all bid packages and the construction manager's bond for the full amount of the construction manager's services.

A review of the statutes of Minnesota, South Dakota, and Montana does not reveal a similar statutory provision in those states. We contacted the Associated General Contractors of Minnesota, the

Associated General Contractors of South Dakota, and the Montana Contractors Association, Inc., a chapter of the Associated General Contractors of America, concerning the use of construction managers in those states. A representative of the Associated General Contractors of Minnesota indicated that Minnesota does not have any legislation regarding construction or project managers and that contractors do not have to be bonded in Minnesota. A representative of the Associated General Contractors of South Dakota indicated that South Dakota has not enacted any legislation regarding construction managers, but the association has considered proposing legislation and intends to have legislation introduced in the 2002 legislative session. A representative of the Montana Contractors Association, Inc., indicated that there is no reference to construction or project managers in the Montana laws governing construction and contractors.

Sen. Cook  
Shared this  
at conf. 4/10/01

4-10-01