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Operator's Signature

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10/2/03

2003 HOUSE GOVERNMENT AND VETERANS AFFAIRS
HB 1180

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Deanna Holladay
Operator's Signature

10/2/03
Date

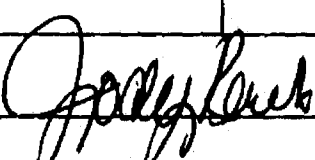
2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1180

House Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 1-24-03

Tape Number	Side A	Side B	Meter #
1	x		0-end
1		x	0-13.0
Committee Clerk Signature 			

Minutes: Chairman Klein: opened the hearing on HB 1180. All committee members present

Linda Belisle, Director OMB, Central Services Division: appeared on favor of the bill and provided testimony **(SEE ATTACHED TESTIMONY)**.

Gordy Smith, CPA, Audit Manager: appeared in favor of the bill and provided written testimony **(SEE ATTACHED TESTIMONY)**.

Iliona A. Jeffcoat-Sacco, Director, Public Utilities Division, Public Service Commission: appeared in opposition of HB 1180. **(SEE ATTACHED TESTIMONY)**.

Jeff Engleson, Director, Investments North Dakota State Land Department: appeared in opposition of HB 1180. **(SEE ATTACHED TESTIMONY)**.

Faye Kopp, Deputy Executive Director, ND Retirement and Investment Office: appeared in opposition of HB 1180 and provided written testimony. **(SEE ATTACHED TESTIMONY)**.

Deb Knudsen, Manager of Benefits Planning and Research, NDPERS: appeared in opposition

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Operator's Signature

1/24/03
Date

Page 2

House Government and Veterans Affairs Committee

Bill/Resolution Number HB 1180

Hearing Date 1-24-03

and provided written testimony (SEE ATTACHED TESTIMONY).

Representative Klein: I would like to appoint a committee to HB 1180 and I ask that

Representative Haas to chair it and Representative Winrich if you would get involved with it

because of your background in democracy, and Representative Tieman because of his

background in trying to keep the investment funds open and solid and see if we could work

something out on 1180.

Here ends presented written testimony.

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Dan H. Ball
Operator's Signature

1/21/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1180

House Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 2-13-03

Tape Number	Side A	Side B	Meter #
1		x	11.8-26.3

Committee Clerk Signature

Gregg Reinke

Minutes:

Chairman Klein: called the hearing to order on HB 1180. All committee members were present.

Representative Haas: presented amendments to HB 1180. **(SEE ATTACHED AMENDMENTS).**

Representative Meier: made a motion to move the amendments as presented by Representative Haas.

Representative Potter: second the motion to **AMEND** HB 1180.

All in favor of amendment, it carried.

Representative Meier: made a **DO PASS AS AMENDED MOTION** on HB 1180.

Representative Sitte: **SECOND** the do pass motion.

VOTE: 13 YES 0 NO 1 ABSENT (KASPER).

Motion carried.

Meeting adjourned.

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Dan Hall
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10/2/03
Date

FISCAL NOTE
Requested by Legislative Council
04/04/2003

Amendment to: HB 1180

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.*

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

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

No fiscal impact.

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.*

No fiscal impact.

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.*

No fiscal impact on appropriations.

Name:	Pam Sharp	Agency:	OMB
Phone Number:	328-4606	Date Prepared:	04/04/2003

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Dannan Hall
Operator's Signature

10/2/03
Date

FISCAL NOTE
Requested by Legislative Council
02/18/2003

Amendment to: HB 1180

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.*

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

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

No fiscal impact.

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.*

No fiscal impact on appropriations.

Name:	Pam Sharp	Agency:	OMB
Phone Number:	328-4606	Date Prepared:	02/18/2003

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Operator's Signature

Date

FISCAL NOTE
Requested by Legislative Council
01/02/2003

Bill/Resolution No.: HB 1180

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.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

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

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

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

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

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.

No fiscal impact on appropriations.

Name:	Linda Belisle, Director	Agency:	OMB, Central Services Division
Phone Number:	328-3494	Date Prepared:	01/06/2003

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10/2/03
Date

38157.0101
Title.0200

Prepared by the Legislative Council staff for
House Government and Veterans Affairs
February 14, 2003

YR
2/14/03
143

HOUSE AMENDMENTS TO HOUSE BILL NO. 1180 GVA 2-17-03

Page 1, line 1, replace "two" with "three"

Page 1, line 2, after "proposals" insert ", small purchases," and remove "resolving"

Page 1, line 4, replace "subsection" with "subsections 1," and after "2" insert ", and 4"

HOUSE AMENDMENTS TO HB 1180 GVA 2-17-03

Page 2, line 16, remove "The term includes professional services"

Page 2, remove line 17

Page 2, line 23, after the fourth comma insert "services."

Page 2, line 30, remove the overstrike over the overstruck period and replace ", except" with "Each time a purchasing agency procures professional services, the agency shall file with the office of management and budget a report describing the nature of the service procured; the process used to procure the service; and if a competitive bidding process or a competitive proposal process was not used, an explanation for the deviation from either process. The report must be filed with the office of management and budget within thirty days of the securing of the professional services."

Page 2, remove line 31

HOUSE AMENDMENTS TO HB 1180 GVA 2-17-03

Page 3, remove lines 1 and 2

Page 3, line 15, after the first "commodities" insert "and services", after the second "items" insert "those", and after the second "commodities" insert "and services"

Page 3, line 28, replace the second "and" with "or"

HOUSE AMENDMENTS TO HB 1180 GVA 2-17-03

Page 4, line 21, overstrike "The office of"

Page 4, line 22, overstrike "management and budget" and replace "or purchasing agency" with "The procurement officer"

HOUSE AMENDMENTS TO HB 1180 GVA 2-17-03

Page 7, after line 17, insert:

"SECTION 6. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Small purchases.

1. Any procurement not exceeding the amount established by written directive of the office of management and budget or by the state board of higher

Page No. 1

38157.0101

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Deanna G. Ballantyne
Operator's Signature

10/2/03
Date

education pursuant to subsection 5 of section 15-10-17 may be made in accordance with small purchase procedures.

2. Small purchases need not be made through competitive sealed bidding or competitive sealed proposals. However, small purchases must be made with competition that is practicable under the circumstances.
3. Procurement requirements may not be artificially divided as to constitute a small purchase under this section.

Page 7, line 24, replace "of the office of" with "responsible for the contract or solicitation"

Page 7, line 25, remove "management and budget or the purchasing agency"

Page 8, line 11, replace "Subsection 2" with "Subsections 1, 2, and 4"

Page 8, line 12, replace "is" with "are"

Page 8, after line 12, insert:

- "1. The office of management and budget shall establish and maintain current lists of persons that desire to provide commodities and services to the state. Every person or business entity that desires to bid or submit a proposal on contracts for commodities and services awarded under this chapter must be an approved vendor in order to receive a request for bids or proposals. Unless waived by the director of the office of management and budget, or the director's designee, a bid or proposal may not be considered under this section from any vendor that is not approved or placed on the bidders list. The office of management and budget or the purchasing agency shall use the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section.

Page 8, after line 29, insert:

- "4. The director of the office of management and budget, or the director's designee, procurement officer may waive the requirements for registration with the secretary of state as provided in this section and authorize receipt of a bid or proposal from a vendor that unqualifiedly refuses to register as provided in this section if the director or the director's designee is not on the list of approved vendors if the procurement officer makes a written determination that:
 - a. A commodity is so unique and possesses such specific characteristics essential to the government program in question that it is available only from one source and not through wholesalers or retailers;
 - b. An emergency as defined in subsection 7 of section 54-44.4-02 exists; or
 - c. The commodity to be purchased is a one-time purchase for which at least two approved vendors are not available and the director of the office of management and budget, or the director's designee, determines consideration of bids or proposals from unregistered vendors is in the best interest of the state it is in the best interest of the state to receive the bid or proposal. The successful bidder or

offeror must become approved before the award and the existence of this approval requirement must be stated in the solicitation. If an unapproved vendor is selected for award, the vendor's bid or proposal may be rejected if that vendor fails to become approved within sixty days or within a shorter period as specified in writing by the procurement officer. The procurement officer may waive approval requirement if the procurement officer determines that registration with the secretary of state and appointment of an agent for service of process in this state are not required. In the event of a tie bid or proposal, the registered approved vendor must be given preference."

Renumber accordingly

Deanna Ballard
Operator's Signature

10/2/03
Date

Date: 2-13-03
Roll Call Vote #: 1180

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House GOVERNMENT AND VETERANS AFFAIRS Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

Move to amend HB 1180

Motion Made By

Rep. Meier

Seconded By

Rep. Potter

Representatives	Yes	No	Representatives	Yes	No
Chairman M.M. Klein			B. Amernan		
Vice Chairman B.B. Grande			L. Potter		
W.R. Devlin			C. Williams		
C.B. Haas			L. Winrich		
J. Kasper					
L.R. Klemin					
L. Meier					
M. Sitte					
W.W. Tieman					
R.H. Wikenheiser					

Total (Yes)

13

No

0

Absent

(1)

Rep. Kasper

Floor Assignment _____

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

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Dan Hall

Date

10/2/03

Date: 2-13-03
Roll Call Vote #: HB 1180

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House GOVERNMENT AND VETERANS AFFAIRS Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 38157.0101

Action Taken Do Pass as amended as presented by Haas

Motion Made By Rep. Meier Seconded By Rep. Sitte

Representatives	Yes	No	Representatives	Yes	No
Chairman M.M. Klein	X		B. Amerman	X	
Vice Chairman B.B. Grande	X		L. Potter	X	
W.R. Devlin	X		C. Williams	X	
C.B. Haas	X		L. Winrich	X	
J. Kasper	A				
L.R. Klemin	X				
L. Meier	X				
M. Sitte	X				
W.W. Tieman	X				
R.H. Wilkenheiser	X				

Total (Yes) 13 No 0

Absent (1) Rep. Kasper

Floor Assignment Rep. Haas

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

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Operator's Signature Donna Hall

Date 10/2/03

REPORT OF STANDING COMMITTEE (410)
February 17, 2003 9:06 a.m.

Module No: HR-30-2866
Carrier: Haas
Insert LC: 38157.0101 Title: .0200

REPORT OF STANDING COMMITTEE

HB 1180: Government and Veterans Affairs Committee (Rep. M. Klein, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1180 was placed
on the Sixth order on the calendar.

Page 1, line 1, replace "two" with "three"

Page 1, line 2, after "proposals" insert ", small purchases," and remove "resolving"

Page 1, line 4, replace "subsection" with "subsections 1," and after "2" insert ", and 4"

Page 2, line 16, remove "The term includes professional services"

Page 2, remove line 17

Page 2, line 23, after the fourth comma insert "services."

Page 2, line 30, remove the overstrike over the overstruck period and replace "except" with
"Each time a purchasing agency procures professional services, the agency shall file
with the office of management and budget a report describing the nature of the service
procured; the process used to procure the service; and if a competitive bidding process
or a competitive proposal process was not used, an explanation for the deviation from
either process. The report must be filed with the office of management and budget
within thirty days of the securing of the professional services."

Page 2, remove line 31

Page 3, remove lines 1 and 2

Page 3, line 15, after the first "commodities" insert "and services", after the second "items"
insert "those", and after the second "commodities" insert "and services"

Page 3, line 28, replace the second "and" with "or"

Page 4, line 21, overstrike "The office of"

Page 4, line 22, overstrike "management and budget" and replace "or purchasing agency" with
"The procurement officer"

Page 7, after line 17, insert:

"SECTION 6. A new section to chapter 54-44.4 of the North Dakota Century
Code is created and enacted as follows:

Small purchases.

1. Any procurement not exceeding the amount established by written
directive of the office of management and budget or by the state board of
higher education pursuant to subsection 5 of section 15-10-17 may be
made in accordance with small purchase procedures.
2. Small purchases need not be made through competitive sealed bidding or
competitive sealed proposals. However, small purchases must be made
with competition that is practicable under the circumstances.

3. Procurement requirements may not be artificially divided as to constitute a small purchase under this section.

Page 7, line 24, replace "of the office of" with "responsible for the contract or solicitation"

Page 7, line 25, remove "management and budget or the purchasing agency"

Page 8, line 11, replace "Subsection 2" with "Subsections 1, 2, and 4"

Page 8, line 12, replace "is" with "are"

Page 8, after line 12, insert:

- "1. The office of management and budget shall establish and maintain current lists of persons that desire to provide commodities and services to the state. Every person or business entity that desires to bid or submit a proposal on contracts for commodities and services awarded under this chapter must be an approved vendor in order to receive a request for bid or proposal. Unless waived by the director of the office of management and budget, or the director's designee, a bid or proposal may not be considered under this section from any vendor that is not approved be placed on the bidders list. The office of management and budget or the purchasing agency shall use the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section.

Page 8, after line 29, insert:

- "4. The director of the office of management and budget, or the director's designee, procurement officer may waive the requirements for registration with the secretary of state as provided in this section and authorize receipt of a bid or proposal from a vendor that unqualifiedly refuses to register as provided in this section if the director or the director's designee is not on the list of approved vendors if the procurement officer makes a written determination that:
- a. A commodity is so unique and possesses such specific characteristics essential to the government program in question that it is available only from one source and not through wholesalers or retailers;
 - b. An emergency as defined in subsection 7 of section 54-44.4-02 exists; or
 - c. The commodity to be purchased is a one-time purchase for which at least two approved vendors are not available and the director of the office of management and budget, or the director's designee, determines consideration of bids or proposals from unregistered vendors is in the best interest of the state it is in the best interest of the state to receive the bid or proposal. The successful bidder or offeror must become approved before the award and the existence of this approval requirement must be stated in the solicitation. If an unapproved vendor is selected for award, the vendor's bid or proposal may be rejected if that vendor fails to become approved within sixty days or within a shorter period as specified in writing by the procurement officer. The procurement officer may waive approval requirement if the procurement officer determines that registration

REPORT OF STANDING COMMITTEE (410)
February 17, 2003 9:06 a.m.

Module No: HR-30-2888
Carrier: Haas
Insert LC: 38157.0101 Title: .0200

with the secretary of state and appointment of an agent for service of process in this state are not required. In the event of a tie bid or proposal, the registered approved vendor must be given preference."

Renumber accordingly

(2) DESK, (3) COMM

Page No. 3

HR-30-2888

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Dan H. Hall
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10/2/03
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2003 SENATE GOVERNMENT AND VETERANS AFFAIRS

HB 1180

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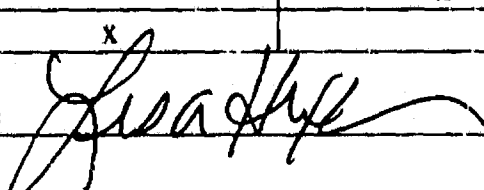
2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1180

Senate Government and Veteran's Affairs Committee

☐ Conference Committee

Hearing Date 03/06/03

Tape Number	Side A	Side B	Meter #
Tape 1	x		4500 to end
Tape 1		x	0 to end
Tape 2	x		0-2100
Committee Clerk Signature 			

Minutes:

Senator Karen Krebsbach, Chairman opens HB 1180. All senators present.

Linda Belisle, Director, OME, Central Services Division (Testimony attached)

Neutral position

Sparb Collins, PERS, (testimony attached and amendment)

John Dwyer, Chairman of Lignite Research Council (Prepared amendment attached)

If amendment is not adopted they are in opposition. Goes over how the lignite council came about and why this is not appropriate for the lignite program.

We think lignite program, which is a unique program, should be exempt from this bill.

Senator Krebsbach: How many contracts would fall under this?

Dwyer: All of them mostly.

Senator Krebsbach: How do you find the bidders?

Dwyer: All different ways.

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10/2/03
Date

Page 2

Senate Government and Veteran's Affairs Committee

Bill/Resolution Number HB 1180

Hearing Date 03/06/03

Todd Krandam, ND Society of Professional Engineers, (testimony attached and prepared amendment)

They would be opposed if amendment is not adopted.

Laura Giatt, Vice Chancellor for Administrative Affairs, ND University Systems

(Testimony attached)

Steve Cochran, Executive Director of the Retirement and Investment Office (Testimony attached)

Jason Dockter's Testimony is presented for the Information Technology Council of North Dakota (attached)

Opposition

Judy Carlson, Project Safe Send Coordinator, (Testimony attached)

Ilona Jeffcoat-Sacco, Public Utilities Division, Public Service Commission (Testimony and amendment attached)

Jeff Engelson, Director, Investments ND State Land Department, (Testimony attached)

Gordy Smith, Office of the State Auditor, Audit Manager (Testimony attached)

Senator Brown: Did you like the original form?

Smith: We supported the original bill but there are still some changes that should be made.

Senator Brown: You suggest there needs to be an oversight of the procurement process.

Smith: Yes, The agency should be given the right if the agency demonstrates they have a good policy and OMB can delegate the authority to that agency. I also feel that OMB should be able to exempt agencies if OMB feels that they are doing a fine job plus I feel there should be so kind of

Page 3

Senate Government and Veteran's Affairs Committee

Bill/Resolution Number HB 1180

Hearing Date 03/06/03

emergency clause in case they need to go out and hire someone immediately that they are able to do so and then they can work it out with OMB after the fact.

Senator Brown: I think that you could admit if someone is afraid of the unknown it could go both ways.

Smith: That is true. Is the agency accomplishing what it set out to accomplish is what they should be looking at. I would look at contracts for services and auditing and managing those contracts. Are they making sure they are getting what they are suppose to be getting. For instance an agency was paying a contractor 150% more than what the contract said. The reason for that was the contract was over 8 years old and they just agreed verbally on an increase price without putting out any chance for new bids. If you are not protecting the state from liability standpoint. They also should all have a out clause in case they cannot get any funding from appropriations.

Senator Wardner: When you are doing investigations audits is your concern that the agencies do not have any kind of policy from contract services or that agencies are all different or both?

Smith: I would say both. We found instances where agencies decent systems for example Human Services. DOT had 200 contracts that met our perimeters and they virtually had no system as far as contract management. I think some agencies do have a process that they do go through but not all the things that the attorney general wants. I am not trying to point fingers at any agencies I think that they may not have the proper procedure that should have been given to them and that is not necessarily there fault.

Senator Krebsbach: So you think part of the problem could be the agencies have been waiting for guidelines that were directed to be out. Unless you know what you are suppose to do sometimes it is a little hard to meet the standards.

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10/2/03
Date

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Senate Government and Veteran's Affairs Committee

Bill/Resolution Number HB 1180

Hearing Date 03/06/03

Smith: Yes, I think OMB should have had the guidelines out long before they have. They held meetings to draw agencies and get information. The procurement office was trying to get a consultant.

Senator Wardner: The "out" Clause, everybody should be doing that.

Smith: I agree. We were surprised at all the different types of contracts out there, so not all guidelines will fit each one.

Senator Brown: Is one of the number's just the number's of contracts they have?

Smith: Volume is a big problem for the agencies and the way they do it and the system.

Closed HB 1180

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1180

Senate Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 03/20/03

Tape Number	Side A	Side B	Meter #
HB 1180		x	1300-2400
Committee Clerk Signature			

Minutes:

Committee discussion on HB 1180. Senator Brown is absent.

Senator Krebapach wants to finalized the draft with the review of the attorney general's office and have each agency do their own. Let's take care of the agencies with the problems.

Senator Wardner : When there is someone who doesn't follow these rules why doesn't the audit and fiscal interim committee take care of it.

Senator Nelson : When we hoghouse it lets keep the important parts left in. Don't give OBM the micro management authority just the guidelines agencies should conform to follow.

Senator Krebsbach; I spoke to someone in the Attorney General's office and they thought it would be a good idea.

Closed HB 1180

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1180

Senate Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 03/28/03

Tape Number	Side A	Side B	Meter #
Tape 1	x		0
Committee Clerk Signature			

Minutes:

Senator Karen Krebsbach, Chairman reopens HB 1180. All senators present.

Jennifer Clark from Legislative Council brings in new amendments that would hoghouse the bill. She goes over all the current changes.

Senator Nelson moves to adopt amendments

Senator Wardner 2nd

6 Yes 0 No

Senator Wardner moves for a Do pass as amended

Senator Brown 2nd

6 Yes 0 No

Carrier: Senator Krebsbach

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10/2/03
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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1180

Senate Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 04/01/03

Tape Number	Side A	Side B	Meter #
Tape 1	x		1527-end
Tape 1		x	0-27
Committee Clerk Signature			

Minutes:

Senator Karen Krebsbach, Chairman reopens HB 1180. All senators present.

Senator Krebsbach goes over hoghouse amendment already adopted by committee.

Linda Belisle from OMB, Gordy Smith from the Auditor's office, Steve Cochran from Retirement Investment office are present and all in favor of the amendment.

Illona Jeffcoat Sacco, Public Service Commission states she just doesn't want to see that OMB is the final say when they are following rules set by other entities such as the Attorney General's office.

Jennifer Clark from Legislative Council listens to the committee's concerns regarding the PCS and feels discusses with them what they feel might be a good change to fit their wishes.

Senator Wardner after listening to all parties states he feels that this doesn't even go into effect until June 30, 2004 and that if the agencies have a problem then the legislature meets again in 6

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Senato Government and Veterans Affairs Committee

Bili/Resolution Number HB 1180

Hearing Date 04/01/03

months and they can bring back their concerns then but feels that the concerns they have have been addressed in the hoghouse amendment.

Committee agrees

Senator Krebsbach closes HB 1180

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Date

38157.0204
Title.

Prepared by the Legislative Council staff for
Senate Government and Veterans Affairs
March 31, 2003

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1180

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 54-44.4 of the North Dakota Century Code, relating to procurement of services, competitive sealed bid proposals, small purchases, and protested solicitations and awards; to amend and reenact sections 44-08-05.1, 54-44.4-01, 54-44.4-02, and 54-44.4-04, subsections 1 and 2 of section 54-44.4-05, section 54-44.4-06, and subsections 1, 2, and 4 of section 54-44.4-09 of the North Dakota Century Code, relating to purchasing policy, purchasing by the office of management and budget, solicitation criteria, exempt records, limited competitive and noncompetitive purchases, multistep sealed bids, and vendor registration; to require the director of the office of management and budget to study the state procurement process; to provide an effective date; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 44-08-05.1 of the North Dakota Century Code is amended and reenacted as follows:

44-08-05.1. Vouchers - Requirements for approval - Penalty - Action for violations. Any public officer or employee who has the power to approve a voucher for a department, agency, or institution for travel expenses or any other state expenditure of public funds shall determine before approving ~~such~~ the voucher ~~the following:~~

1. That the expenditure for travel or other expenditures were for lawful and official purposes.
2. If for travel expense, that the travel actually occurred, and that the sums claimed for travel expenses are actually due the individual who is seeking reimbursement, allowance, or payment.
3. If the voucher is for expenditure other than travel expense, that the expenditure is lawful and that the voucher contains no false claims.

For purchases made with the use of a purchasing card authorized under ~~subsection 8 of section 54-44.4-02~~ section 11 of this Act, an employee of the office of management and budget designated by the director of the office of management and budget, on behalf of all agencies, may review and approve vouchers under this section and make payments pursuant thereto. Any public officer or employee who willfully approves a voucher with knowledge it contains false or unlawful claims or that it does not otherwise meet the requirements of this section for approval is guilty of theft and punishable under ~~the provisions of~~ chapter 12.1-23. Any public officer or employee who, without the use of ordinary care and diligence, negligently approves a voucher for a department, agency, or institution containing false or unlawful claims or which does not otherwise meet the requirements of this section for approval is personally liable for any funds improperly expended. The director of the office of management and budget, members of the office of the budget, state auditor, or any other person who has knowledge of an actual or possible violation of this section shall make such information known to the attorney general. The attorney general shall investigate any alleged ~~violations~~ violation and, if a violation appears to exist, shall ~~examinally~~ prosecute under chapter 12.1-23 or bring a civil suit for the recovery of such funds as may actually have been improperly paid against the payee and officer or employee who approved such voucher in violation of ~~any of the above requirements~~ or shall bring both such criminal action and civil suit. The officer or employee who approves any voucher negligently has the right of

Page No. 1

38157.0204

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subrogation against the payee of such voucher in the event public funds have been improperly paid to the payee.

SECTION 2. AMENDMENT. Section 54-44.4-01 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-01. Declaration of policy - Definitions. It is hereby declared to be state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons and firms to sell to the state, each state agency and institution shall obtain its necessary supplies commodities and equipment services at competitive cost, consistent with quality, time, and performance requirements, except as otherwise provided by law. As used in this chapter, unless the context requires otherwise:

1. "Commodities" means all property, including equipment, supplies, materials, printing, insurance, and leases of equipment.
2. "Procurement officer" means an individual duly authorized to enter and administer purchasing contracts and make written determinations with respect thereto and also includes an authorized representative acting within the limits of authority.
3. "Professional services" means those services requiring special knowledge, education, or skills when the qualifications and experience of the individual rendering the services are of primary importance and the individual is required to exercise professional judgment. Professional services providers include appraisers, attorneys, accountants, psychologists, physicians, dentists, planners, analysts, and consultants. The term includes human services under which a person provides direct health or social welfare services to the citizens on behalf of the state. The term does not include services defined in section 54-44.7-01.
4. "Purchasing agency" means a governmental entity in the executive branch of government other than the office of management and budget which is authorized by this chapter, rules adopted under this chapter, written policy of the office of management and budget, or by way of delegation from the office of management and budget to enter purchasing contracts for commodities and services.
5. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. The term does not include professional services.

SECTION 3. AMENDMENT. Section 54-44.4-01 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-01. Declaration of policy - Definitions. It is hereby declared to be state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons and firms to sell to the state, each state agency and institution shall obtain its necessary supplies commodities and equipment services at competitive cost, consistent with quality, time, and performance requirements, except as otherwise provided by law. As used in this chapter, unless the context requires otherwise:

1. "Commodities" means all property, including equipment, supplies, materials, printing, insurance, and leases of equipment.

2. "Procurement officer" means an individual duly authorized to enter and administer purchasing contracts and make written determinations with respect thereto and also includes an authorized representative acting within the limits of authority.
3. "Professional services" means those services requiring special knowledge, education, or skills when the qualifications and experience of the individual rendering the services are of primary importance and the individual is required to exercise professional judgment. Professional services providers include appraisers, attorneys, accountants, psychologists, physicians, dentists, planners, analysts, and consultants. The term includes human services under which a person provides direct health or social welfare services to the citizens on behalf of the state. The term does not include services defined in section 54-44.7-01.
4. "Purchasing agency" means a governmental entity in the executive branch of government other than the office of management and budget which is authorized by this chapter, rules adopted under this chapter, written policy of the office of management and budget, or by way of delegation from the office of management and budget to enter purchasing contracts for commodities and services.
5. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. The term includes professional services.

SECTION 4. AMENDMENT. Section 54-44.4-02 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-02. Office of management and budget purchasing services. The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, services, and other commodities, ~~except the~~. The following commodities and services, however, are not subject to the procurement requirements of this chapter:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.
3. Public books, maps, periodicals, and technical pamphlets.
4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. Procurements through a contract or other instrument executed by the industrial commission under chapter 54-17.5.
6. Professional services, unless the office of management and budget agrees to procure professional services in response to an agency's written request.
- ~~6.~~ 7. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.
- ~~7.~~ 8. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or

when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file.

8. ~~Such specific items or items~~
9. Commodities and services costing less than a specified amount as determined and indicated by written directive by the director of the office of management and budget. The director may organize and administer, including by contract with a provider, a system of procurement for items agencies are authorized to purchase under this subsection which includes use of a procurement card. If the director establishes and administers a purchasing card system, the director may designate which agencies are required to use it for purchasing of items designated under this subsection costing less than a specified amount designated in writing by the director.
10. Specified commodities and services as determined by written directive by the director of the office of management and budget.
11. Employee benefit services, trust-related services, and investment management services obtained by an agency with a fiduciary responsibility regarding those services.

All purchases made by the office of management and budget or a state agency or institution to which authority to purchase has been delegated by the office of management and budget must be made in accordance with this chapter, rules adopted under this chapter, and written policies of the office of management and budget. The office of management and budget shall purchase items commodities or services as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government. The agencies and institutions under the jurisdiction of the state board of higher education, with the office of management and budget, shall make such joint purchases of like items commodities or services of high common usage as determined jointly by the agencies and institutions under the jurisdiction of the state board of higher education and the office of management and budget as will result in less cost to the state. The office of management and budget, pursuant to terms and conditions imposed by it, may agree with political subdivisions that have organized a purchasing group pursuant to a joint powers agreement under chapter 54-40.3 to cooperatively purchase certain specific items commodities or services designated by the office of management and budget if the cooperative purchase will result in a benefit to the state and to the political subdivisions participating in the joint powers agreement.

SECTION 5. AMENDMENT. Section 54-44.4-02 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-02. Office of management and budget purchasing services. The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, services, and other commodities, ~~except the~~. The following commodities and services, however, are not subject to the procurement requirements of this chapter:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.
3. Public books, maps, periodicals, and technical pamphlets.

4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. ~~Professional services, unless the office of management and budget agrees to procure professional services in response to an agency's written request~~ Procurements through a contract or other instrument executed by the industrial commission under chapter 54-17.5.
6. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.
7. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file.
8. ~~Such specific items or items~~ Commodities and services costing less than a specified amount as determined ~~and indicated by written directive by the director of the office of management and budget. The director may organize and administer, including by contract with a provider, a system of procurement for items agencies are authorized to purchase under this subsection which includes use of a procurement card. If the director establishes and administers a purchasing card system, the director may designate which agencies are required to use it for purchasing of items designated under this subsection costing less than a specified amount designated in writing by the director.~~
9. Specified commodities and services as determined by written directive by the director of the office of management and budget.
10. Employee benefit services, trust-related services, and investment management services obtained by an agency with a fiduciary responsibility regarding those services.

All purchases made by the office of management and budget or a state agency or institution to which authority to purchase has been delegated by the office of management and budget must be made in accordance with this chapter, rules adopted under this chapter, and written policies of the office of management and budget. The office of management and budget shall purchase ~~items~~ commodities or services as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government. The agencies and institutions under the jurisdiction of the state board of higher education, with the office of management and budget, shall make such joint purchases of like ~~items~~ commodities or services of high common usage as determined jointly by the agencies and institutions under the jurisdiction of the state board of higher education and the office of management and budget as will result in less cost to the state. The office of management and budget, pursuant to terms and conditions imposed by it, may agree with political subdivisions that have organized a purchasing group pursuant to a joint powers agreement under chapter 54-40.3 to cooperatively purchase certain specific ~~items~~ commodities or services designated by the office of management and budget if the cooperative purchase will result in a benefit to the state and to the political subdivisions participating in the joint powers agreement.

SECTION 6. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Procurement of services. All services purchased by the office of management and budget or by an agency or institution in the executive branch of state government must comply with the standards and guidelines for procurement of services established by the office of management and budget. Before March first of each year, each agency or institution in the executive branch of state government which purchases services shall file with the office of management and budget a report regarding the services purchased the preceding year. The report must be provided on forms established and made available by the office of management and budget.

SECTION 7. AMENDMENT. Section 54-44.4-04 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-04. Office of management and budget - Rules. The office of management and budget shall adopt, pursuant to in accordance with the procedures provided by chapter 28-32, rules necessary to administer this chapter. The written directives issued by the director exercising authority provided in subsection 8 of section sections 54-44.4-02 and section 54-44.4-03 need not be adopted as rules under in accordance with chapter 28-32.

SECTION 8. AMENDMENT. Subsections 1 and 2 of section 54-44.4-05 of the North Dakota Century Code are amended and reenacted as follows:

1. Except as otherwise provided in sections 44-08-01 and 25-10.2-02, and in this section chapter, purchasing contracts must be awarded through a competitive bidding process to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability, unless it is determined to be advantageous to the state to select a contractor through a competitive proposal process using other or additional criteria. The office of management and budget procurement officer may reject any or all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state. Until the date and time set for receiving and opening bids and proposals pursuant to a request for bids or proposals, all All bids and proposals received under this chapter pursuant to a competitive sealed bid are exempt records under subsection 5 of section 44-04-17.1 until the date and time the bids are opened.
2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:
 - a. The commodity or service is available from only one supplier source.
 - b. The commodity or service is available from another governmental entity's contract.
 - c. The commodity or service is to be purchased for experimentation or trial.

- d. ~~Competitive bidding has failed to produce a bidder~~ No acceptable bid or proposal was received pursuant to a competitive bidding or competitive proposal process.
- e. Commodities are being purchased for over-the-counter resale.
- f. ~~Acceptable goods~~ commodities or services are produced or provided by correctional institutions or other government agencies.
- g. The anticipated cost of purchasing specified ~~goods~~ commodities or services is less than an amount determined by the office of management and budget which would justify the expense of a competitive bidding or competitive proposal process.
- h. A used commodity is advantageous to the state and the commodity is available only on short notice.
- i. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
- j. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
- k. The agency provides documentation indicating that the services or the circumstances are of such a nature that deviation from the procurement procedure is appropriate.

SECTION 9. AMENDMENT. Section 54-44.4-06 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-06. All purchases to be made in accordance with specifications - Multistep sealed bids.

1. For purposes of this chapter, specification means a description of all required physical, design, performance, functional, and other characteristics of ~~an item~~ a commodity or service the purchaser requires and, consequently, what a bidder must offer. ~~All purchases made by the office of management and budget, institutions of higher education, or any state agency or institution to which authority to purchase has been delegated, must be made in accordance with written policies of the office of management and budget and the agencies and institutions under the jurisdiction of the state board of higher education. The office of management and budget and institutions of higher education shall develop similar specifications for purchases of items~~ commodities and services of high common usage. State agencies and institutions shall provide such assistance as may be requested by the office of management and budget and the institutions of higher education in the development of specifications. The office of management and budget and the institutions of higher education shall implement such procedures as are necessary for the inspection, testing, and acceptance of ~~supplies and equipment~~ commodities or services to determine that ~~goods~~ those received are in conformity with contract specifications.
2. When it is determined to be impractical to initially prepare a purchase description to support an award based on price, a solicitation may be issued requesting the submission of unpriced offers to be followed by a competitive bidding or competitive proposal process limited to those bidders or offerors found to be qualified under the criteria set forth in the first solicitation.

SECTION 10. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Competitive sealed proposals - Exempt records.

1. A contract for commodities or services may be entered by competitive sealed proposals when a determination is made that the use of competitive sealed bidding is either not practicable or not advantageous to the state. The request for proposal must state the relative importance of price and other factors and subfactors, if any.
2. Proposals must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. All proposals received pursuant to a competitive sealed proposal process are exempt records under subsection 5 of section 44-04-17.1 until an award is made.
3. Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before award for the purpose of obtaining best and final offers. In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing offerors.
4. Unless all proposals are rejected, award must be made to the responsible offeror whose proposal conforms to the solicitation and is determined, in writing, to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The contract file must contain the basis on which the award is made. Written notice of the award of the contract to the successful offeror must be promptly given to all offerors.

SECTION 11. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Small purchases.

1. A procurement not exceeding the amount established by written directive of the director of the office of management and budget under section 54-44.4-02 or by the state board of higher education under subsection 5 of section 15-10-17 may be made in accordance with small purchase procedures.
2. A small purchase need not be made through competitive sealed bidding or competitive sealed proposals. However, small purchases must be made with competition that is practicable under the circumstances.
3. Procurement requirements may not be artificially divided as to constitute a small purchase under this section.
4. The director of the office of management and budget may establish and administer, including by contract with a provider, a system of procurement for commodities agencies are authorized to purchase under this section. If the director establishes a purchasing card system under this subsection, the director may designate which agencies are required to use the purchasing card system for purchasing commodities under this section.

SECTION 12. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Resolution of protested solicitations and awards.

1. An interested party may protest the award of a contract, the notice of intent to award a contract, or a solicitation for commodities or services by the office of management and budget or purchasing agency under this chapter. The protest must be submitted in writing to the procurement officer responsible for the contract or solicitation within seven calendar days after the protestor knows or should have known of the facts giving rise to the protest.
2. If a contract has been awarded, the procurement officer immediately shall give notice of a protest to the contractor. In the case of pending award, a stay of award may be requested. A stay must be granted unless a written determination is made that the award of the contract without delay is necessary to protect the interests of the state.
3. If the protest is not resolved by mutual agreement, the procurement officer promptly shall send by certified mail to the protestor a written decision containing the basis for the decision and inform the protestor of the protestor's right to appeal.
4. The protestor may file an appeal of the decision rendered by the procurement officer with the director of the office of management and budget or designee. An appeal must be filed in writing within seven calendar days after the protestor receives the decision rendered by the procurement officer of the office of management and budget or the purchasing agency. The appeal must include a copy of the decision being appealed and the basis for the appeal. Within seven calendar days the director of the office of management and budget or the director's designee shall send by certified mail written notice of the decision to the protestor.

SECTION 13. AMENDMENT. Subsections 1, 2, and 4 of section 54-44.4-09 of the North Dakota Century Code are amended and reenacted as follows:

1. The office of management and budget shall establish and maintain current lists of persons that desire to provide commodities or services to the state. Every person or business entity that desires to bid or submit a proposal on contracts for commodities or services awarded under this chapter must be an approved vendor in order to receive a request for bids or proposals. Unless waived by the director of the office of management and budget, or the director's designee, a bid or proposal may not be considered under this section from any vendor that is not approved be placed on the bidders list. The office of management and budget or the purchasing agency shall use the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section.
2. To become an approved vendor a person or business entity shall file an application with the office of management and budget. The application must contain information requested by the office of management and budget, including business and persons' names, telephone numbers, addresses, federal tax identification numbers, type of business organization, other permits or licenses issued by this state and related numbers, the nature of the business and the products sold, the types of bids or proposals in commodities or services for which the applicant is interested, references in receiving solicitations, and other business information the office of management and budget determines relevant.

The application must also contain a statement appointing the secretary of state as the applicant's agent for service of process pursuant to subsection 3. The application must be signed and certified by an owner, partner, or company officer authorized by company bylaws or other organizational document to bind the company. The signature requirement may include the use of an electronic signature as defined in section 9-16-01 when authorized under section 9-16-17. The office of management and budget may require proof of the signing person's authority by certified copy of appropriate company documents.

4. ~~The director of the office of management and budget, or the director's designee, procurement officer may waive the requirements for registration with the secretary of state as provided in this section and authorize receipt of a bid or proposal from a vendor that unqualifiedly refuses to register as provided in this section if the director or the director's designee is not on the list of approved vendors if the procurement officer makes a written determination that:~~
- a. ~~A commodity is so unique and possesses such specific characteristics essential to the government program in question that it is available only from one source and not through wholesalers or retailers;~~
 - b. ~~An emergency as defined in subsection 7 of section 54-44-02 exists; or~~
 - c. ~~The commodity to be purchased is a one-time purchase for which at least two approved vendors are not available and the director of the office of management and budget, or the director's designee, determines consideration of bids or proposals from unregistered vendors is in the best interest of the state. It is in the best interest of the state to receive the bid or proposal. The successful bidder or offeror must become approved before the award and the existence of this approval requirement must be stated in the solicitation. If an unapproved vendor is selected for award, the vendor's bid or proposal may be rejected if that vendor fails to become approved within sixty days or within a shorter period as specified in writing by the procurement officer. Before issuing a solicitation, the procurement officer may waive the approval requirement if the procurement officer determines, in consultation with the secretary of state, that registration with the secretary of state and appointment of an agent for service of process in this state are not required. The waiver of the approval requirement must be stated in the solicitation. In the event of a tie bid or proposal, the registered approved vendor must be given preference.~~

SECTION 14. OFFICE OF MANAGEMENT AND BUDGET - PROCUREMENT STUDY. During the 2003-04 interim, the director of the office of management and budget shall conduct a comprehensive study of the state procurement process, including all relevant laws, rules, and guidelines. The director shall prepare a bill to address inefficiencies, inconsistencies, and outmoded procurement provisions discovered as a result of this study and request introduction of the bill as an agency bill in the fifty-ninth legislative assembly.

SECTION 15. EFFECTIVE DATE. Sections 3, 5, and 6 of this Act become effective on July 1, 2004.

SECTION 16. EXPIRATION DATE. Sections 2 and 4 of this Act are effective through June 30, 2004, and after that date are ineffective."

Renumber accordingly

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38157.0204

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Operator's Signature

Date

Date: 3/28/03
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1180

Senate Government and Veteran Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Adopt Amendments (Add new section to bill)

Motion Made By Nelson Seconded By Wardner

Senators	Yes	No	Senators	Yes	No
Senator Karen Krebsbach, Chr.	X		Senator April Fairfield	X	
Senator Dick Dever, Vice Chr.	X		Senator Carolyn Nelson	X	
Senator Richard Brown	X				
Senator Rich Wardner	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

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

Legislative Council drafting a new section.

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Donna Hallmark
Operator's Signature

10/2/03
Date

Date: 3-28-03
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate Government and Veteran Affairs 1180 Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended

Motion Made By Wardner Seconded By Brown

Senators	Yes	No	Senators	Yes	No
Senator Karen Krebsbach, Chr.	X		Senator April Fairfield	X	
Senator Dick Dever, Vice Chr.	X		Senator Carolyn Nelson	X	
Senator Richard Brown	X				
Senator Rich Wardner	X				

Total (Yes) 7 (six) No 0

Absent 0

Floor Assignment Krebsbach

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

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Danna Hall 10/2/03
Operator's Signature Date

REPORT OF STANDING COMMITTEE (410)
April 1, 2003 2:06 p.m.

Module No: SR-58-6354
Carrier: Krebebach
Insert LC: 38157.0204 Title: .0300

REPORT OF STANDING COMMITTEE

HB 1180, as engrossed: Government and Veterans Affairs Committee (Sen. Krebebach, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1180 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 54-44.4 of the North Dakota Century Code, relating to procurement of services, competitive sealed bid proposals, small purchases, and protested solicitations and awards; to amend and reenact sections 44-08-05.1, 54-44.4-01, 54-44.4-02, and 54-44.4-04, subsections 1 and 2 of section 54-44.4-05, section 54-44.4-06, and subsections 1, 2, and 4 of section 54-44.4-09 of the North Dakota Century Code, relating to purchasing policy, purchasing by the office of management and budget, solicitation criteria, exempt records, limited competitive and noncompetitive purchases, multistep sealed bids, and vendor registration; to require the director of the office of management and budget to study the state procurement process; to provide an effective date; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 44-08-05.1 of the North Dakota Century Code is amended and reenacted as follows:

44-08-05.1. Vouchers - Requirements for approval - Penalty - Action for violations. Any public officer or employee who has the power to approve a voucher for a department, agency, or institution for travel expenses or any other state expenditure of public funds shall determine before approving ~~each~~ the voucher the following:

1. That the expenditure for travel or other expenditures were for lawful and official purposes.
2. If for travel expense, that the travel actually occurred, and that the sums claimed for travel expenses are actually due the individual who is seeking reimbursement, allowance, or payment.
3. If the voucher is for expenditure other than travel expense, that the expenditure is lawful and that the voucher contains no false claims.

For purchases made with the use of a purchasing card authorized under ~~subsection 8 of section 54-44.4-02~~ section 11 of this Act, an employee of the office of management and budget designated by the director of the office of management and budget, on behalf of all agencies, may review and approve vouchers under this section and make payments pursuant thereto. Any public officer or employee who willfully approves a voucher with knowledge it contains false or unlawful claims or that it does not otherwise meet the requirements of this section for approval is guilty of theft and punishable under ~~the provisions of~~ chapter 12.1-23. Any public officer or employee who, without the use of ordinary care and diligence, negligently approves a voucher for a department, agency, or institution containing false or unlawful claims or which does not otherwise meet the requirements of this section for approval is personally liable for any funds improperly expended. The director of the office of management and budget, members of the office of the budget, state auditor, or any other person who has knowledge of an actual or possible violation of this section shall make such information known to the attorney general. The attorney general shall investigate any alleged ~~violations~~ violation and, if a violation appears to exist, shall ~~criminally~~ prosecute under chapter 12.1-23 or bring a civil suit for the recovery of such funds as may actually have been improperly paid against the payee and officer or employee who approved such

(2) DESK, (3) COMM

Page No. 1

SR-58-6354

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Deanna Hall
Operator's Signature

10/2/03
Date

voucher in violation of any of the above requirements or shall bring both such criminal action and civil suit. The officer or employee who approves any voucher negligently has the right of subrogation against the payee of such voucher in the event public funds have been improperly paid to the payee.

SECTION 2. AMENDMENT. Section 54-44.4-01 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-01. Declaration of policy - Definitions. It is hereby declared to be state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons and firms to sell to the state, each state agency and institution shall obtain its necessary supplies commodities and equipment services at competitive cost, consistent with quality, time, and performance requirements, except as otherwise provided by law. As used in this chapter, unless the context requires otherwise:

1. "Commodities" means all property, including equipment, supplies, materials, printing, insurance, and leases of equipment.
2. "Procurement officer" means an individual duly authorized to enter and administer purchasing contracts and make written determinations with respect thereto and also includes an authorized representative acting within the limits of authority.
3. "Professional services" means those services requiring special knowledge, education, or skills when the qualifications and experience of the individual rendering the services are of primary importance and the individual is required to exercise professional judgment. Professional services providers include appraisers, attorneys, accountants, psychologists, physicians, dentists, planners, analysts, and consultants. The term includes human services under which a person provides direct health or social welfare services to the citizens on behalf of the state. The term does not include services defined in section 54-44.7-01.
4. "Purchasing agency" means a governmental entity in the executive branch of government other than the office of management and budget which is authorized by this chapter, rules adopted under this chapter, written policy of the office of management and budget, or by way of delegation from the office of management and budget to enter purchasing contracts for commodities and services.
5. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. The term does not include professional services.

SECTION 3. AMENDMENT. Section 54-44.4-01 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-01. Declaration of policy - Definitions. It is hereby declared to be state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons and firms to sell to the state, each state agency and institution shall obtain its necessary supplies commodities and equipment services at competitive cost, consistent with quality, time, and performance

requirements, except as otherwise provided by law. As used in this chapter, unless the context requires otherwise:

1. "Commodities" means all property, including equipment, supplies, materials, printing, insurance, and leases of equipment.
2. "Procurement officer" means an individual duly authorized to enter and administer purchasing contracts and make written determinations with respect thereto and also includes an authorized representative acting within the limits of authority.
3. "Professional services" means those services requiring special knowledge, education, or skills when the qualifications and experience of the individual rendering the services are of primary importance and the individual is required to exercise professional judgment. Professional services providers include appraisers, attorneys, accountants, psychologists, physicians, dentists, planners, analysts, and consultants. The term includes human services under which a person provides direct health or social welfare services to the citizens on behalf of the state. The term does not include services defined in section 54-44.7-01.
4. "Purchasing agency" means a governmental entity in the executive branch of government other than the office of management and budget which is authorized by this chapter, rules adopted under this chapter, written policy of the office of management and budget, or by way of delegation from the office of management and budget to enter purchasing contracts for commodities and services.
5. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. The term includes professional services.

SECTION 4. AMENDMENT. Section 54-44.4-02 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-02. Office of management and budget purchasing services. The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, services, and other commodities, ~~except the~~. The following commodities and services, however, are not subject to the procurement requirements of this chapter:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.
3. Public books, maps, periodicals, and technical pamphlets.
4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. Procurements through a contract or other instrument executed by the industrial commission under chapter 54-17.5.

REPORT OF STANDING COMMITTEE (410)
April 1, 2003 2:06 p.m.

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6. Professional services, unless the office of management and budget agrees to procure professional services in response to an agency's written request.
6. 7. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.
7. 8. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file.
8. ~~Such specific items or items~~
9. Commodities and services costing less than a specified amount as determined and indicated by written directive by the director of the office of management and budget. ~~The director may organize and administer, including by contract with a provider, a system of procurement for items agencies are authorized to purchase under this subsection which includes use of a procurement card. If the director establishes and administers a purchasing card system, the director may designate which agencies are required to use it for purchasing of items designated under this subsection costing less than a specified amount designated in writing by the director.~~
10. Specified commodities and services as determined by written directive by the director of the office of management and budget.
11. Employee benefit services, trust-related services, and investment management services obtained by an agency with a fiduciary responsibility regarding those services.

All purchases made by the office of management and budget or a state agency or institution to which authority to purchase has been delegated by the office of management and budget must be made in accordance with this chapter, rules adopted under this chapter, and written policies of the office of management and budget. The office of management and budget shall purchase ~~item~~commodities or services as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government. The agencies and institutions under the jurisdiction of the state board of higher education, with the office of management and budget, shall make such joint purchases of like ~~item~~commodities or services of high common usage as determined jointly by the agencies and institutions under the jurisdiction of the state board of higher education and the office of management and budget as will result in less cost to the state. The office of management and budget, pursuant to terms and conditions imposed by it, may agree with political subdivisions that have organized a purchasing group pursuant to a joint powers agreement under chapter 54-40.3 to cooperatively purchase certain specific ~~item~~ commodities or services designated by the office of management and budget if the cooperative purchase will result in a benefit to the state and to the political subdivisions participating in the joint powers agreement.

SECTION 5. AMENDMENT. Section 54-44.4-02 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-02. Office of management and budget purchasing services. The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, ~~services~~, and other commodities, ~~except the~~. The following commodities and services, however, are not subject to the procurement requirements of this chapter:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.
3. Public books, maps, periodicals, and technical pamphlets.
4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. ~~Professional services, unless the office of management and budget agrees to procure professional services in response to an agency's written request~~ Procurements through a contract or other instrument executed by the industrial commission under chapter 54-17.5.
6. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.
7. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file.
8. ~~Such specific items or items~~ Commodities and services costing less than a specified amount as determined and indicated by written directive by the director of the office of management and budget. ~~The director may organize and administer, including by contract with a provider, a system of procurement for items agencies are authorized to purchase under this subsection which includes use of a procurement card. If the director establishes and administers a purchasing card system, the director may designate which agencies are required to use it for purchasing of items designated under this subsection costing less than a specified amount designated in writing by the director.~~
9. Specified commodities and services as determined by written directive by the director of the office of management and budget.
10. Employee benefit services, trust-related services, and investment management services obtained by an agency with a fiduciary responsibility regarding those services.

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All purchases made by the office of management and budget or a state agency or institution to which authority to purchase has been delegated by the office of management and budget must be made in accordance with this chapter, rules adopted under this chapter, and written policies of the office of management and budget. The office of management and budget shall purchase ~~home~~ commodities or services as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government. The agencies and institutions under the jurisdiction of the state board of higher education, with the office of management and budget, shall make such joint purchases of like ~~home~~ commodities or services of high common usage as determined jointly by the agencies and institutions under the jurisdiction of the state board of higher education and the office of management and budget as will result in less cost to the state. The office of management and budget, pursuant to terms and conditions imposed by it, may agree with political subdivisions that have organized a purchasing group pursuant to a joint powers agreement under chapter 54-40.3 to cooperatively purchase certain specific ~~home~~ commodities or services designated by the office of management and budget if the cooperative purchase will result in a benefit to the state and to the political subdivisions participating in the joint powers agreement.

SECTION 6. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Procurement of services. All services purchased by the office of management and budget or by an agency or institution in the executive branch of state government must comply with the standards and guidelines for procurement of services established by the office of management and budget. Before March first of each year, each agency or institution in the executive branch of state government which purchases services shall file with the office of management and budget a report regarding the services purchased the preceding year. The report must be provided on forms established and made available by the office of management and budget.

SECTION 7. AMENDMENT. Section 54-44.4-04 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-04. Office of management and budget - Rules. The office of management and budget shall adopt, pursuant to in accordance with the procedures provided by chapter 28-32, rules necessary to administer this chapter. The written directives issued by the director exercising authority provided in subsection 8 of section sections 54-44.4-02 and section 54-44.4-03 need not be adopted as rules under in accordance with chapter 28-32.

SECTION 8. AMENDMENT. Subsections 1 and 2 of section 54-44.4-05 of the North Dakota Century Code are amended and reenacted as follows:

1. Except as otherwise provided in sections 44-08-01 and 25-16.2-02, and in this ~~section~~ chapter, purchasing contracts must be awarded through a competitive bidding process to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability, unless it is determined to be advantageous to the state to select a contractor through a competitive proposal process using other or additional criteria. ~~The office of management and budget procurement officer~~ may reject any or all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state. ~~Until the date and~~

~~time set for receiving and opening bids and proposals pursuant to a request for bids or proposals, all~~ All bids and proposals received under this chapter pursuant to a competitive sealed bid are exempt records under subsection 5 of section 44-04-17.1 until the date and time the bids are opened.

2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:
 - a. The commodity or service is available from only one supplier source.
 - b. The commodity or service is available from another governmental entity's contract.
 - c. The commodity or service is to be purchased for experimentation or trial.
 - d. ~~Competitive bidding has failed to produce a bidder~~ No acceptable bid or proposal was received pursuant to a competitive bidding or competitive proposal process.
 - e. Commodities are being purchased for over-the-counter resale.
 - f. Acceptable goods commodities or services are produced or provided by correctional institutions or other government agencies.
 - g. The anticipated cost of purchasing specified goods commodities or services is less than an amount determined by the office of management and budget which would justify the expense of a competitive bidding or competitive proposal process.
 - h. A used commodity is advantageous to the state and the commodity is available only on short notice.
 - i. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
 - j. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
 - k. The agency provides documentation indicating that the services or the circumstances are of such a nature that deviation from the procurement procedure is appropriate.

SECTION 9. AMENDMENT. Section 54-44.4-06 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.4-06. All purchases to be made in accordance with specifications :
Multistep sealed bids.**

1. For purposes of this chapter, specification means a description of all required physical, design, performance, functional, and other

characteristics of ~~an item~~ a commodity or service the purchaser requires and, consequently, what a bidder must offer. ~~All purchases made by the office of management and budget, institutions of higher education, or any state agency or institution to which authority to purchase has been delegated, must be made in accordance with written policies of the office of management and budget and the agencies and institutions under the jurisdiction of the state board of higher education.~~ The office of management and budget and institutions of higher education shall develop similar specifications for purchases of ~~some commodities and services~~ of high common usage. State agencies and institutions shall provide such assistance as may be requested by the office of management and budget and the institutions of higher education in the development of specifications. The office of management and budget and the institutions of higher education shall implement such procedures as are necessary for the inspection, testing, and acceptance of ~~supplies and equipment commodities or services~~ to determine that goods those received are in conformity with contract specifications.

2. When it is determined to be impractical to initially prepare a purchase description to support an award based on price, a solicitation may be issued requesting the submission of unpriced offers to be followed by a competitive bidding or competitive proposal process limited to those bidders or offerors found to be qualified under the criteria set forth in the first solicitation.

SECTION 10. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Competitive sealed proposals - Exempt records.

1. A contract for commodities or services may be entered by competitive sealed proposals when a determination is made that the use of competitive sealed bidding is either not practicable or not advantageous to the state. The request for proposal must state the relative importance of price and other factors and subfactors, if any.
2. Proposals must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. All proposals received pursuant to a competitive sealed proposal process are exempt records under subsection 5 of section 44-04-17.1 until an award is made.
3. Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submissions and before award for the purpose of obtaining best and final offers. In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing offerors.
4. Unless all proposals are rejected, award must be made to the responsible offeror whose proposal conforms to the solicitation and is determined, in writing, to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The contract file must contain the basis on which the award is made. Written notice of the

award of the contract to the successful offeror must be promptly given to all offerors.

SECTION 11. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Small purchases.

1. A procurement not exceeding the amount established by written directive of the director of the office of management and budget under section 54-44.4-02 or by the state board of higher education under subsection 5 of section 15-10-17 may be made in accordance with small purchase procedures.
2. A small purchase need not be made through competitive sealed bidding or competitive sealed proposals. However, small purchases must be made with competition that is practicable under the circumstances.
3. Procurement requirements may not be artificially divided as to constitute a small purchase under this section.
4. The director of the office of management and budget may establish and administer, including by contract with a provider, a system of procurement for commodities agencies are authorized to purchase under this section. If the director establishes a purchasing card system under this subsection, the director may designate which agencies are required to use the purchasing card system for purchasing commodities under this section.

SECTION 12. A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

Resolution of protested solicitations and awards.

1. An interested party may protest the award of a contract, the notice of intent to award a contract, or a solicitation for commodities or services by the office of management and budget or purchasing agency under this chapter. The protest must be submitted in writing to the procurement officer responsible for the contract or solicitation within seven calendar days after the protestor knows or should have known of the facts giving rise to the protest.
2. If a contract has been awarded, the procurement officer immediately shall give notice of a protest to the contractor. In the case of pending award, a stay of award may be requested. A stay must be granted unless a written determination is made that the award of the contract without delay is necessary to protect the interests of the state.
3. If the protest is not resolved by mutual agreement, the procurement officer promptly shall send by certified mail to the protestor a written decision containing the basis for the decision and inform the protestor of the protestor's right to appeal.
4. The protestor may file an appeal of the decision rendered by the procurement officer with the director of the office of management and budget or designee. An appeal must be filed in writing within seven calendar days after the protestor receives the decision rendered by the procurement officer of the office of management and budget or the

purchasing agency. The appeal must include a copy of the decision being appealed and the basis for the appeal. Within seven calendar days the director of the office of management and budget or the director's designee shall send by certified mail written notice of the decision to the protestor.

SECTION 13. AMENDMENT. Subsections 1, 2, and 4 of section 54-44.4-09 of the North Dakota Century Code are amended and reenacted as follows:

1. The office of management and budget shall establish and maintain current lists of persons that desire to provide commodities or services to the state. Every person or business entity that desires to bid or submit a proposal on contracts for commodities or services awarded under this chapter must be an approved vendor in order to receive a request for bids or proposals. Unless waived by the director of the office of management and budget, or the director's designee, a bid or proposal may not be considered under this section from any vendor that is not approved be placed on the bidders list. The office of management and budget or the purchasing agency shall use the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section.
2. To become an approved vendor a person or business entity shall file an application with the office of management and budget. The application must contain information requested by the office of management and budget, including business and persons' names, telephone numbers, addresses, federal tax identification numbers, type of business organization, ~~other permits or licenses issued by this state and related numbers, the nature of the business and the products sold, the types of bids or proposals in commodities or services for which the applicant is interested, references in receiving solicitations, and other business information the office of management and budget determines relevant.~~ The application must also contain a statement appointing the secretary of state as the applicant's agent for service of process pursuant to subsection 3. The application must be signed and certified by an owner, partner, or company officer authorized by company bylaws or other organizational document to bind the company. The signature requirement may include the use of an electronic signature as defined in section 9-16-01 when authorized under section 9-16-17. The office of management and budget may require proof of the signing person's authority by certified copy of appropriate company documents.
4. ~~The director of the office of management and budget, or the director's designee, procurement officer may waive the requirements for registration with the secretary of state as provided in this section and authorize receipt of a bid or proposal from a vendor that unqualifiedly refuses to register as provided in this section if the director or the director's designee is not on the list of approved vendors if the procurement officer makes a written determination that:~~
 - a. ~~A commodity is so unique and possesses such specific character~~ is so unique and possesses such specific character that it is available only from one source and not through wholesalers or retailers;
 - b. ~~An emergency as defined in subsection 7 of section 54-44.4-02 exists; or~~

REPORT OF STANDING COMMITTEE (410)
April 1, 2003 2:06 p.m.

Module No: SR-58-6354
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- or ~~The commodity to be purchased is a one-time purchase for which at least two approved vendors are not available and the director of the office of management and budget, or the director's designee, determines consideration of bids or proposals from unregistered vendors is in the best interest of the state. It is in the best interest of the state to receive the bid or proposal. The successful bidder or offeror must become approved before the award and the existence of this approval requirement must be stated in the solicitation. If an unapproved vendor is selected for award, the vendor's bid or proposal may be rejected if that vendor fails to become approved within sixty days or within a shorter period as specified in writing by the procurement officer. Before issuing a solicitation, the procurement officer may waive the approval requirement if the procurement officer determines, in consultation with the secretary of state, that registration with the secretary of state and appointment of an agent for service of process in this state are not required. The waiver of the approval requirement must be stated in the solicitation. In the event of a tie bid or proposal, the registered approved vendor must be given preference.~~

SECTION 14. OFFICE OF MANAGEMENT AND BUDGET - PROCUREMENT STUDY. During the 2003-04 interim, the director of the office of management and budget shall conduct a comprehensive study of the state procurement process, including all relevant laws, rules, and guidelines. The director shall prepare a bill to address inefficiencies, inconsistencies, and outmoded procurement provisions discovered as a result of this study and request introduction of the bill as an agency bill in the fifty-ninth legislative assembly.

SECTION 15. EFFECTIVE DATE. Sections 3, 5, and 6 of this Act become effective on July 1, 2004.

SECTION 16. EXPIRATION DATE. Sections 2 and 4 of this Act are effective through June 30, 2004, and after that date are ineffective."

Renumber accordingly

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2003 TESTIMONY
HB 1180

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HB 1180 in favor of.

SUMMARY OF DRAFT STANDARDS & GUIDELINES FOR PROCUREMENT OF SERVICES

The purpose of the Standards and Guidelines for Procurement of Services is to assist state employees with the procurement of services for state agencies and State Board of Higher Education (SBHE) institutions. Any specific requirements or dollar thresholds listed other than N.D.C.C. statutes apply to all state agencies except for SBHE institutions. Please refer to SBHE policies and procedures for specific requirements.

Chapter 1 Introduction to Procurement of Services

Purpose: This chapter provides definitions of categories of services, and it identifies statutes related to procurement of services. Successful procurement of services is dependent upon 1) conducting a well thought out, competitive procurement; 2) obtaining a performance-based contract; 3) providing strong contract administration.

Guidelines:

- State law grants state agencies and institutions the authority to procure services, and they may request services be procured through the State Procurement Office. The State Board of Higher Education has statutory authority to determine policy for purchasing in cooperation with OMB (Section 1.2).
- Agencies and institutions are encouraged to develop internal procedures to ensure that individuals responsible for procurement of services are familiar with these standards and guidelines (Section 1.3).
- Establishes a training program for those individuals who procure services (Section 1.4).

Chapter 2 Outsourcing Decision

This chapter discusses options that need to be considered before deciding to procure services.

Guidelines:

- No procurement process is necessary if the needed services is available from an existing state contract, another agency, or from another government entity (Sections 2.1 and 2.2)
- If a GSA contractor is used in lieu of a competitive bidding process, the noncompetitive procurement should be justified and approved by the agency head (Section 2.3)
- Agencies should coordinate with agencies that provide centralized services, such as banking, hazardous material disposal, indemnification (Section 2.4).
- Be sure any cooperative purchases with other government entities comply with ND statutes (Section 2.5).
- Guidelines for determining whether an independent contractor vs. employee relationship exists, and discussion of temporary employment contracts (Section 2.6 and 2.7)

Chapter 3 Planning the Solicitation and Service Contract

This chapter outlines the process of planning the solicitation. It describes how to determine the scope of the needed service.

Guidelines:

- Suggests a standard format for the Statement of Work that includes: background, scope of work, directives, technical exhibits, deliverables (Section 3.2)

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- The solicitation needs to contain all the terms and conditions and other requirements that will be incorporated into the resultant contract (Section 3.3)
- Provides minimum contract requirements: a purchase order may be issued for services up to \$5,000; over \$5,000 prepare a written contract using the Attorney General's Contract Drafting and Review Manual (Section 3.4)

Chapter 4 Selecting the Procurement Procedure

This chapter describes formal and informal methods of competition. It also discusses the differences between Invitations for Bids and Requests for Proposals.

Guidelines

- If federal funds are used, determine if any federal guidelines that apply (Section 4.2)
 - Don't artificially fragment to avoid recommended level of competition (Section 4.4)
 - Defines minimum levels of competition, except for State Board of Higher Education institutions. Please refer to SBHE policies and procedures for specific requirements.
 - \$5,000 or less: One quote, if fair and reasonable. Limit of \$20,000 awarded to any single service provider without a competitive process.
 - \$5,001 - \$25,000: Solicit three written informal quotes or proposals.
 - \$25,000-\$50,000: Solicit five informal written quotes or proposals with on-line posting.
 - Over \$50,000: Formal sealed bids or proposals with on-line posting.
- (NOTE: Chapter 8, Noncompetitive and Limited Competition Procurements, describes procedures when making an emergency purchase or using a lesser level of competition..)
- Establish a contract file (Section 4.6)

Chapter 5 Vendor Management

Purpose: Provide instruction on identifying potential service providers who are qualified to provide needed services.

Guidelines:

- Agencies and institutions are highly encouraged to inform potential bidders about ND's vendor registration process (Section 5.1)
- Purchasing agencies must ensure that potential service providers are approved to do business in the State before executing a contract and performance of work (Section 5.2)
- State agencies and institutions must ensure that vendors are properly licensed by the appropriate regulatory or licensing agency. Defines acceptable evidence. Requires clause in the solicitation document (Section 5.3)
- Public Notice for formal sealed bids/proposals over \$50,000, except for State Board of Higher Education institutions. Please refer to SBHE policies and procedures for specific requirements. When making a formal procurement, agencies must do at least two of the following public notice methods:
 - Mail solicitations to vendors who have registered as bidders on the state procurement vendor database.

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- Post solicitation to the State of North Dakota On-line Internet system (to be created) at least 21 working days before opening. Document circumstances if shorter period is used.
- Public advertising, published at least two consecutive weeks, at least two weeks before the bid opening.

Chapter 6 Request for Proposal Process

Purpose: This chapter is intended to guide the agency through preparing the RFP and planning the solicitation evaluation process.

Guidelines

- Custom the standard solicitation and contract document for the contract being contemplated. Legal counsel should review standard clauses that are modified or newly drafted (Section 6.2).
- Solicitation and resultant contract must state the initial term of the contract and any options for renewals or extensions. (Section 6.3).
- If the contract will cross fiscal year, include "Subject to Funding" clause (Section 6.4).
- Solicitation and resultant contract must contain an indemnification/hold harmless clause. Any revision of a standard insurance or indemnification/hold harmless clause requires the review of the Division of Risk Management (Section 6.5).
- A transcript of all substantive questions and answers must be prepared and given to all potential offerors at least seven days before the proposal due date (Section 6.6).
- Pre-solicitation conferences may be mandatory or optional and must be stated as such in the solicitation. After a pre-solicitation conference, provide written answers to all potential offerors at least seven days before the proposal due date (Section 6.7).
- Letters of intent to propose should not be made mandatory (Section 6.8).
- RFP must describe how award will be made (Section 6.10)
 - Solicitations must state minimum requirements necessary to accomplish the task, such as licensing, registration, certification, minimum experience, etc.
 - Solicitations should state evaluated requirements that will be used to compare competing proposals/offerors and select the best proposal.
 - Cost weighed less than forty (40) percent should be justified in writing (Section 6.11)
- Proposal evaluation committees should consist of at least three state employees or officials. If someone other than a state employee or officials is used on an evaluation committee, the reason should be documented (Section 6.12).
- Include appropriate provisions in the RFP if the evaluation committee will 1) check references; 2) require demonstrations; 3) require an on-site visit; 4) Require oral presentations (Section 6.13).
- Clearly marked proposals should be received and kept in sealed envelopes until the advertised opening date and time (Section 6.15).

Dorena G. Baller
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Chapter 7 Evaluation and Award

Purpose: Management of the evaluation and award selection process. This chapter describes strategies for evaluating proposals and use of evaluation worksheets, rating scales, and reciprocal preference.

Guidelines:

- Proposals deemed non-responsive should not be evaluated by the evaluation committee (Section 7.1).
- If a conflict of interest exists, that employee cannot be a member of the evaluation committee (Section 7.2).
- Before evaluating cost proposals, determine whether state preference laws must be applied (Section 7.3—Note: should be 7.6)
- During the evaluation process, only the procurement officer or evaluation committee may communicate with an offeror to clarify uncertainties or eliminate confusion (Section 7.8).
- If it is determined to be in the best interest of the State to request best and final offers, document the reason. The opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award (Section 7.9).
- After a successful proposal is selected, a notice of award should be sent to all offerors and any other interested parties. The successful vendor must be given notice that they are required to execute a contract with the state and provide any required proof of insurance or bonds within a specified number of days (Section 7.10)
- Written justification is required whenever a decision is made to reject all bids or proposals (Section 7.11).

Chapter 8 Noncompetitive and Limited Competition Procurement

This chapter prescribes procedures for situations when no competition or less competition is obtained.

Guidelines:

- Emergency purchases - limit the purchase to what is necessary to respond to the emergency, obtain the level of competition practicable, and document the basis for the emergency and selection of that particular service provider. Recommended that agencies send a copy of documentation for purchases over \$25,000 to the State Procurement Office, except for institutions under the State Board of Higher Education. Please refer to SBHE policies and procedures (Section 8.1).
- Noncompetitive procurement may be justified when the agency or institution determines there is only one source for the needed service or a sole source of expertise is required (Section 8.2).
- A limited competitive purchase may be justified when there are circumstances that make a formal sealed competitive process not practicable, such as a geographic procurement or urgent requirement (Section 8.3).
- Noncompetitive and limited competition purchases over \$5,000 must be justified in writing and approved by the head of the agency or designee. If the procurement is over \$25,00, it is also recommended that the agency sent a copy of the documentation to the

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State Procurement Office, except for State Board of Higher Education Institutions. Please refer to SBHE policies and procedures for specific requirements (Section 8.4).

- Negotiate with sole source providers to obtain pricing, delivery, and terms that are advantageous to the State (Section 8.5)

Chapter 9 Contracts and Contract Amendments

Purpose: Facilitate the transition from solicitation process to the contract award and administration stage of the procurement cycle.

Guidelines:

- Contract instrument will vary depending upon the type of solicitation used (Section 9.1).
- Discuss of various types of contracts, as classified by payment structure. Cost-plus-a-percentage contracts are discouraged (Section 9.2).
- Discussion of the contract negotiation process (Section 9.3).
- Recommends that agencies establish a system of assigning and tracking contract numbers (Section 9.4)
- Requires written amendment of material changes to the original contract. If the contract was subject to review by another agency with oversight responsibility, that agency should also review the amendment (Section 9.5).
- Any unanticipated adjustments to contract price must be justified. The amendment must not increase the level of competition that would have been required. For contracts over \$25,000, cost increases exceeding 20% must be treated as a new procurement or an amendment exception requiring the agency head's approval, except for State Board of Higher Education Institutions. Please refer to SBHE policies and procedures for specific requirements (Section 9.6).
- Amendments to contract terms must be specifically authorized in the solicitation. The amendment to extend or renew the contract must be executed before the expiration date of the original contract period, and the amendment is not effective until it has been executed (Section 9.7).

Chapter 10 Contract Administration

Purpose: This chapter is intended to help agencies get contracts off to a good start, administer the contract, and manage contractor performance problems.

Guidelines:

- A project manager from within the ranks of the agency should be appointed to monitor the contract (Section 10.1).
- Start-up conferences are one method to get the contract off to a good start, but they can only be mandatory if stated in the solicitation (Section 10.2).
- Project manager must monitor the contractor's performance to ensure the work meets standards, quality levels, time schedules, and other requirements (Section 10.3).
- When problems are detected, the project manager should immediately notify the procurement officer and address the vendor in writing (Section 10.4).
- Prescribes actions and necessary documentation when attempting to resolve problems (Section 10.5).

- Discusses invoking contractual remedies (Section 10.6).
- Notify the State Procurement Office when contractors do not perform satisfactorily or breach a contract. Vendors on the State Procurement Vendor Database may be removed for cause (Section 10.7).

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testimony for
minutes

Testimony
HB 1180

Presented by: Linda Belisle, Director
OMB, Central Services Division

Before: Government and Veterans Affairs Committee
Matt Klein, Chair

Date: January 24, 2002

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

Background: The Office of the State Auditor conducted a performance audit of contracts for services early in 2000. Some of the recommendations in the report that was issued in March of 2000 were that OMB develop policies related to the procurement of services and ensure that state agencies receive proper training. The Auditor's Office also recommended that OMB introduce legislation to allow OMB to establish these policies. A bill was introduced during the 2001 Legislative Session. Section 2 of the bill removed the exemption for agencies in the procurement of services.

Agencies vehemently opposed that section of the bill. As a result, the bill was amended to add a legislative intent. It reads as follows:

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

The State Procurement Office surveyed all state agencies and institutions and asked them to provide a copy of their existing guidelines for the procurement of services and also asked them to identify one contact person to work with the Procurement Office in developing the standards and guidelines. The State Procurement Office then contracted with the National Association of State Procurement Officials (NASPO) States Helping States Program to review existing agency guidelines and help develop a manual of standards and guidelines for the procurement of services based on best practices in public procurement.

The State Procurement Office met with agencies in October to discuss the development of these guidelines. Agencies were provided a copy of the draft guidelines. We met with the agencies again in November to discuss the guidelines as they had been written at that point. Concerns expressed at this meeting were addressed and incorporated in the manual. The revised manual was reviewed by our legal counsel and sent to the agencies on January 3, 2003.

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The guidelines reflect best practice and are designed to serve as a desktop reference for all persons involved with the procurement of services. They are not intended to restrict the effectiveness of the individuals involved in procurement but to provide for legal, effective, consistent, and complete consideration of the procurement process while ensuring fair and professional treatment of vendors desiring to do business with the State.

Now I would like to talk about HB 1180. Although I've listed every change in my prepared testimony, I will only address the major ones in each section.

HB 1180

Section 1

- Updates the terminology used today from supplies and equipment to commodities and services. These terms are more descriptive of how business is conducted today. This is done throughout the bill.
- Adds definitions for commodities, procurement officer, professional services, purchasing agency, and services.

Section 2

- Continues the exemption for professional services but requires agencies to procure those services according to procedures established in this chapter and rules and policies adopted by OMB.
- Updates terminology from items to commodities.
- Changes the word procurement to purchasing card to be consistent with terminology used in this section.
- Moves language from 54-44.4-06 to this section so it is more appropriately placed. (from Page 6, lines 4 through 8)

Section 3

- Requires contract awards be made through a competitive bidding process to the lowest responsible bidder.
- Allows for a competitive proposal process.
- Allows the purchasing agency as well as OMB to reject bids or negotiate for a lower price with a successful bidder.
- Allows for competitive sealed bids to become subject to open records laws upon opening.
- Extends allowances for when competition may be waived or limited and when negotiations may be used to services, not just commodities.
- Rewrites #d, Line 10 on Page 5 for clarification.
- Updates goods to commodities or services.

Section 4

- Updates item to commodity or service
- Removes language regarding delegation of authority to more appropriate section. (to page 3, lines 25 through 29)
- Updates supplies and equipment to commodities or services

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- Allows for a multistep sealed bidding process.

Section 5

- Allows for a competitive sealed proposal process.
- Exempts proposals from the open records law until an award is made.

Section 6

- Establishes a protest and appeal process.

Section 7

- Removes unnecessary language and clarifies existing language regarding the vendor application.
- Allows for the use of electronic signature on the vendor application.

At this time, I would like to submit two amendments to HB 1180. They are listed on the attachment to my testimony.

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

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OMB Central Services Division
January 24, 2003

HB 1180
Proposed Amendments

Page 2, Line 30 -- after "except" insert "as otherwise provided by law," and delete "that".

Renumber accordingly.

Page 3, line 28 -- change the second "and" to "or".

Statement of purpose of amendments:

Amendment 1: Exempts those agencies that have authorities in other sections the North Dakota Century Code.

Amendment 2: Clarifies the requirement that OMB, agencies with delegated authority, and the institutions of higher ed to make purchases in accordance with this chapter, rules adopted under this chapter, and written policies of OMB or Higher Ed but not both.

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STATE AUDITOR
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**TESTIMONY BEFORE THE
GOVERNMENT AND VETERANS AFFAIRS COMMITTEE**
January 24, 2003

House Bill No. 1180

Testimony - Presented by Gordy Smith, CPA
Audit Manger

Chairman Klein, members of the committee, my name is Gordy Smith. I'm here to testify in favor of House Bill No. 1180.

On March 27, 2000 the State Auditor's Office issued a performance audit on Contracts for Services. This performance audit focused on current practices surrounding procurement of services by state entitles and whether they were providing for an efficient and effective use of state resources.

The performance audit found that in fiscal year 1999, the State of North Dakota expended in excess of \$99 million on procurement of services. We estimate this figure be much higher for 2002. The total for fiscal years 1997, 1998 and 1999 was over \$270 million. We estimate the total for fiscal years 2000, 2001 and 2002 to be significantly higher. A critical area the performance audit uncovered is the almost complete lack of any formally established laws, rules or regulations governing the procurement of services by state entitles.

The performance audit found numerous problem areas which were grouped into 3 broad categories:

- a) processes to enter into contracts for services;
- b) contract terms and language and;
- c) contract monitoring/management.

Examples of problems we encountered included: state entitles procuring services without having a written contract; state entitles entering into contracts without following a bidding process; contracts which did not have a non-appropriation clause; contracts not signed by the appropriate parties prior to the effective date of the contract; contracts which did not contain a clause allowing access to vendor records as they relate to the services provided; contracts which had amendments entered into after the contract had ended; and absence of documentation justifying a contract being classified as "sole source".

Page 1 of 2

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A bill to provide the Office of Management and Budget the authority to establish rules and procedures surrounding the procurement of services was introduced during the last legislative session. It passed the House relatively intact. However the Senate significantly weakened the legislation by indicating state entities were encouraged to follow OMB's rules and procedures rather than requiring them to be followed. The bill was then passed and signed by the Governor.

We recently completed audit follow-up work on our performance audit of contracts for services. This report was presented to the Legislative Audit and Fiscal Review Committee this week at it's meeting on Wednesday. The results of our limited review indicate that the circumstances we found during our original performance audit continue to exist today. As a result we believe the state is not utilizing its moneys efficiently or effectively to procure services.

HB1180 authorizes the Office of Management and Budget to establish rules and procedures relating to the procurement of services that must be followed by state entities. This is a critical first step to ensure the state is efficiently and effectively using its resources when procuring services. These rules and procedures help ensure state entities follow a sound, logical process to procure services.

There will probably be state entities which will stand up and testify that they have a sound process they follow to procure services and that this bill will only add to bureaucracy. My first response to those entities is that during our original performance audit we asked state entities to provide us a listing of their contracts for services. We established parameters for those contracts that had to be provided to us. This should be an easy request to comply with if the state entity has a sound system in place. We visited 15 state entities after we received their listings and in every single case we found instances where contracts that met our parameters had been omitted. In addition, I would point out to legislators that OMB has the authority to establish procedures and policies for the procurement of goods. I am not familiar with any legislation over the past 25 years that sought to remove that authority from OMB. If the Legislature believes it is good government to have OMB establish rules for procuring goods, why isn't it good government to have OMB do the same for procuring services?

If any member of the committee would like a copy of our original performance audit or our audit follow-up report, I will gladly provide them to you.

Mr. Chairman, this would conclude my testimony and I would urge passage of HB1080. I'm willing to answer any questions the committee may have.

Page 2 of 2

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Gary D. Preszler, Commissioner

TESTIMONY OF JEFF ENGLESON
Director, Investments
North Dakota State Land Department

[Signature]

IN OPPOSITION TO HOUSE BILL 1180
House Government and Veterans Affairs Committee

January 24, 2003

Section 2 of HB1180 requires executive branch agencies to procure services through procedures that are consistent with the procedures established in Chapter 54-44.4 and rules and policies adopted by the office of management and budget. HB1180 also contains language that codifies specific procedures related to competitive sealed proposals and establishes a process for protesting contracts that have been awarded by state agencies. Although we understand why the legislature is interested in having the state develop standards and guidelines for the procurement of contracts for services, we feel that HB1180 conflicts with the Board's fiduciary responsibilities under the State Constitution and current North Dakota law.

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

HB1180 essentially takes away the Board's authority to enter into these service contracts, and gives control of the contracting process to OMB. If the Land Board is required to follow rules and policies over which it has no control, investment and other management decisions could be delayed, or prevented, potentially costing the permanent trusts millions in lost revenues.

Contracting for investment services is not the same as contracting for the purchase of goods or the purchase of many other types of services. When purchasing investment services, many factors, both tangible and intangible, weigh into the decision to hire a specific firm. Although the bid price is important, other criteria weigh more heavily into determining which firm is most capable of providing the desired service. When searching for investment services, Land Department staff develop criteria that potential service providers must meet. Data is analyzed, RFPs are issued and reviewed, and meetings are held with only those companies that best meet the established criteria. The entire process is documented to ensure that a fair and impartial decision has been made.

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Date

HB 1180

Testimony of Jeff Engleson

House Government and Veterans Affairs Committee

January 24, 2003

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

As I stated earlier, we understand why the legislature is interested in having the state develop standards and guidelines to help the state better manage the many service contracts entered into by various agencies. We are more than willing to work with OMB, and other agencies, to develop standards and guidelines that would help us better manage how we contract for services. However, we believe that requiring the Land Board to follow standards and guidelines that it has no control over is not the answer. If guidelines are going to be developed they should be just that; guidelines, not requirements.

In addition to the broad concerns we have about giving OMB authority over the Land Board's contracting process, we have other concerns with HB1180. Section 5 of this bill puts into code specific language as to how competitive sealed bids must be handled. Although we feel that it may make sense to follow these procedures and processes in most cases, there are exceptions to almost every situation. As this bill is currently written, the failure to fully comply with any of the specific procedures laid out in Section 5 would be a violation of the law, when in fact the act was probably just an unintentional mistake or a poor policy decision. We feel the issues addressed in bullet points 3 and 4 of Section 5 would be better addressed by policy or guidelines that allow for flexibility if circumstances warrant it.

Section 6 of this bill establishes a multi-level formal process for interested parties to protest the awarding of a contract. This process gives OMB the ultimate control over the contracting process and could delay or prevent the implementation of decisions made by the Land Board.

For the reasons outlined above, we respectfully oppose HB1180 in its current format. In the alternative we would request that the bill be amended to either:

- make adhering to OMB contracting rules and policies voluntary, rather than a requirement
- exempt the Board of University and School Lands from the provisions in this bill

HB 1180

**HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
JANUARY 24, 2003**

**Fay Kopp, Deputy Executive Director
ND Retirement and Investment Office**

Good morning Mr. Chairman and members of the committee. My name is Fay Kopp and I serve as Deputy Director of the Retirement and Investment Office (RIO). RIO is charged with administering the Teachers' Fund for Retirement (TFFR) and the State Investment Board (SIB). Steve Cochrane, our Executive Director, is currently attending the monthly State Investment Board meeting and sends his regards. I am here today to request that HB 1180 be amended to remove its effects on our fiduciarily grounded service procurement procedures. We are requesting this exemption for two reasons:

1. Because of the fiduciary responsibility of the TFFR and SIB Boards.
2. The statutory provisions relating to the Teachers' Fund for Retirement and the State Investment Board.

As you know, the Retirement and Investment Office enters into contracts with many investment managers, investment consultants and actuaries. We have approximately 30 such relationships in effect today. In our many years of experience, we have found the critical aspects for considering such entities for retention to be diverse and unique to each situation. Demonstrated skills, areas of expertise, personnel, relevant investment strategies, compatibility to the investment program and other important service relationship factors vary considerably from firm to firm. While fees are certainly considered before contracts are signed, they sometimes have a low correlation to the selection of the service professional based on the most important considerations.

Authority to select and retain services is granted to our boards by state law. While recognizing the fiduciary responsibilities of the boards in discharging their duties, the law does not prescribe a detailed procedure for executing these fiduciary duties. Through collective wisdom, experience and astute advice, the boards have responded to each hiring situation over the years as appropriate to the situation. Flexibility has been a key to the boards' success in efficiently executing their duties, understanding the key criteria for each selection process.

The fiduciary responsibilities of TFFR and the SIB are entrusted to the Boards of Directors who are the trustees under state statutes. As trustees, their sole responsibility is the programs that they administer. Therefore, in order to fulfill their responsibilities they must be assured that they have a level of independence sufficient to permit them to perform these duties and to do so effectively and efficiently. As trustees they are somewhat different from other state agencies in that they are subject to an extensive and stringent set of fiduciary obligations to the program participants and beneficiaries. These obligations both require and justify the need for independence.

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

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

By requiring the Boards' contracts to comply with regulations designed for all state agencies, we believe that OMB could in effect exercise control over the Boards' choice of service providers. This type of interference impairs the ultimate accountability of the trustees for selecting service providers, making it unclear whether they may be held responsible for the consequences of an imprudent selection of a service provider. Therefore, we feel that from a fiduciary standpoint it remains important that the Boards are not subject to this provision, and we respectfully request your consideration of the attached amendment to HB1180.

In summary, we believe that exempting the TFFR and SIB programs as administered by RIO from HB 1180 is justified in order to maintain the Boards' fiduciary responsibility for their programs and accountability to their members and program clients. Further, we believe it is consistent with the intent of prior legislatures in establishing the Boards as the fiduciary. Finally, we believe it is justified since the legislature has already established for TFFR and the SIB specific statutory requirements that grant authority in contracting.

Thank you.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1180

Page 3, after line 24, insert the following:

9. Investment provider, actuarial, benefit consultant and benefit provider services. Notwithstanding any other provision of law, fund fiduciary policies and procedures shall apply to the purchase of these services regardless of whether those policies and procedures are consistent with the procedures established in this chapter or the rules and policies adopted by the office of management and budget.

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Deanna H. Smith
Operator's Signature

10/2/03
Date

HB1180

House Government and Veterans Affairs Committee
January 24, 2003

Good morning Mr. Chairman and members of the committee. My name is Deb Knudsen and I am the Manager of Benefits Planning and Research at the North Dakota Public Employees Retirement System (NDPERS). I am here on behalf of the NDPERS Board, as Mr. Sparb Collins was unable to attend. As you are aware, the NDPERS board oversees the pension funds for public employees and has responsibilities that are similar to the TFFR Board. Three NDPERS Board members also serve on the State Investment Board. Due to the many similarities in our organizational missions and circumstances, our concerns with House Bill 1180 are consistent with those expressed by the Retirement and Investment Board office. NDPERS' concern with our inclusion in this bill is not with the mechanics and procedures of the bill, but rather with the fiduciary responsibilities that have already been outlined by Fay.

We support the amendment proposed by the Retirement and Investment Office and respectfully request that you adopt it.

At this time we wish to commend the Office of Management and Budget for keeping NDPERS "in the loop" on this subject and also want to thank them for seeking NDPERS' input.

Mr. Chairman, that concludes my testimony.

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Deanna Hallmark
Operator's Signature

1/24/03
Date

HB 1180

Presented by: Illona A. Jeffcoat-Sacco
Director, Public Utilities Division
Public Service Commission

Before: House Government and Veterans Affairs Committee
Honorable Matthew M. Klein, Chairman

Date: 24 January 2003

3rd TESTIMONY *Illona*

Chairman and committee members, I am Illona Jeffcoat-Sacco, director of the Public Service Commission's Public Utilities Division. The Public Utilities Division administers the Commission's jurisdiction over telephone, gas and electric public utilities in North Dakota. The Commission asked me to appear here today to oppose HB 1180 as it relates to procurement of services.

The Public Service Commission has several divisions that are involved in procurement of services. Our Abandoned Mine Lands Program is one hundred percent federally-funded with an annual budget between 1.5 and 2.0 million dollars. In AML, construction and professional services for the reclamation of abandoned mine sites are procured using procurement procedures patterned after the Federal Acquisition

Regulations (FAR) and the Department of Transportation Standard Specifications for Road and Bridge Construction. Competitive sealed bidding is the primary method by which services are procured, except in the case of emergencies or where only one contractor is available to provide a service. All procurement procedures, including sole source procurement, are handled in strict compliance with the Commission's procurement policy, a copy of which is included with this testimony. The procurement policy was initially adopted by the Commission in 1981 after extensive consultation with and approval of the Attorney General. The policy is updated as needed.

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

We are concerned with both the substantive and procedural impacts of HB 1180. The process envisioned by House Bill 1180 could slow the procurement process for construction and professional services. The period during which construction may occur in North Dakota is limited, and a timely procurement of services is critical.

We have an additional concern with the requirement that potential bidders for services be registered vendors in North Dakota. This requirement will limit the number of vendors available to the Commission and impose financial and administrative burdens on potential contractors. While each of our service contracts is very important to successful implementation of our programs, we do not believe that the amount of business we may provide those vendors will justify their registration time and expense.

Finally, and perhaps most importantly, by mandating that service procurement be 'consistent' with yet unwritten OMB guidelines, HB 1180 will impose conditions on our procurement of services that neither we nor you even know about today. We cannot support legislation that imposes unknown conditions on how the Commission carries out its statutory responsibilities.

For all of these reasons, the Public Service Commission opposes HB 1180. In the alternative, the Public Service Commission respectfully requests an exemption from HB 1180 for the procurement of all professional services and for services procured for the reclamation of abandoned coal mines, authorized under N.D.C.C. 38-14-2.

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Deanna Hall
Operator's Signature

10/2/03
Date



Public Service Commission
State of North Dakota

COMMISSIONERS

Susan B. Wefald, President
Leo M. Relabold
Anthony T. Clark

Executive Secretary
Jon H. Mielke

600 E Boulevard Ave. Dept. 408
Bismarck, North Dakota 58505-0480
web: www.psc.state.nd.us
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TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

Memorandum

To: House Government and Veterans Affairs Committee
Honorable Matthew M. Klein, Chairman

From: Ilona A. Jeifcoat-Sacco
Director, Public Utilities Division
Public Service Commission *DAAS*

Re: HB 1180 – Supplemental Testimony

Date: January 24, 2003

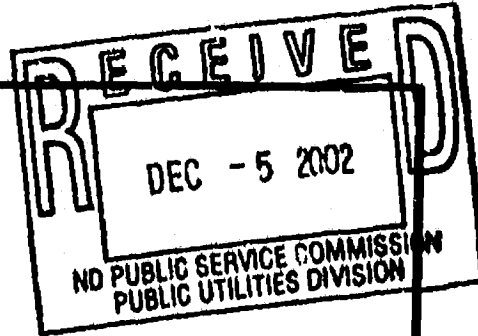
Attached are copies of the Public Service Commission's Contract Procedures, Procurement Procedures and a copy of the Commission's signed consulting contract in Qwest Corporation's interconnection wholesale price investigation, Case No. PU-2342-01-296.

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Deanna Baller
Operator's Signature

1/24/03
Date

CONTRACT



Administrator:

Public Service Commission
State Capitol - 12th Floor
Bismarck, ND 58505-0480
(701) 328-2400

Date: November 20, 2002

Anthony T. Clark
Commissioner

Susan E. Weisald
President

Leo M. Reinbold
Commissioner

Contractor

Ben Johnson Associates, Inc.

Name

2252 Killeam Center Blvd. Tallahassee FL 32309 850-893-8600

Address

City/State/Zip

Phone

Ben Johnson

President and Consulting
Economist

Typed Name

Title

12/2/02

Signature

Date

Agreement Information

Contract No.: PU-447-02

Start Date: 11-20-02

End Date: 6-30-03

Program Title: PU-2342-01-296

Type of Contract: () Fixed Price
(X) Cost Reimb. () Unit Price
() Other

Budget Information

Cost Center: 7700

Services: \$82,995

Optional on-site
review: 0

Expenses: 0

ID 59-1943774

Type of Contractor: () Individual
(X) Corporation () Partnership
() Public Agency
() Nonprofit Organization
() Other

This contract is entered into between the above two parties. This contract consists of this sheet, general provisions and specific provisions.

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12/2/03
Date

GENERAL PROVISIONS

CONTRACTUAL FEATURES

Legal Authority

The Contractor assures that it possesses legal authority to participate in this contract.

Assignment/Subcontracting

The Contractor may not assign this contract or any part thereof, or assign any of the monies to be paid hereunder, nor shall any part of the work done or material furnished under this contract be sublet.

The Contractor may not enter into subcontracts for any of the work contemplated under this contract unless included in the specific provisions of this contract.

Termination

The Commission, by ten days written notice listing causes and reasons, may terminate this contract in whole or in part when it is determined that the Contractor has failed to meet the conditions of the contract. The Commission will be liable only for payment provisions of this contract for services satisfactorily rendered prior to the effective date of termination.

Significant deviation from performance standards in this contract may result in reduced or terminated financial participation of the Contractor, subsequent to negotiations with the Commission.

The Contractor or the Commission may terminate this contract in whole or in part upon settlement or when both parties agree that the continuation of the contract would not produce results commensurate with further expenditures of funds. The two parties shall agree upon the termination conditions including effective date and in the case of partial terminations, that portion to be terminated.

In the event state or federal funds are reduced or terminated, the financial participation of the Commission may be reduced or terminated.

Disputes

The Contractor agrees to attempt to resolve disputes arising from this contract by administrative process and negotiations in lieu of litigation. Continued performance by the Contractor during disputes is assured.

Any dispute concerning a question of fact arising under this contract which is not settled by the informal means shall be decided by the authorized representative of the Commission who shall reduce the decision to writing and mail or otherwise furnish a copy thereof to the Contractor.

The Contractor shall be afforded an opportunity to be heard and to offer evidence in support of an appeal. Pending final decision of a dispute, the Contractor shall proceed diligently with the performance of the contract and in accordance with the decision of the Commission.

FISCAL RESPONSIBILITIES

Records

The Contractor agrees to maintain program records required by the Commission and to produce program narrative and statistical data at times prescribed by the Commission.

The Contractor agrees to maintain and retain all books, records, and other documents required by the Commission relevant to this agreement for four years after final payment. Records shall be retained beyond four years if audit findings have not been resolved.

No Claim for Additional Work

No claim for additional services not specifically herein provided, done, or furnished by the Contractor will be allowed, nor shall the Contractor do any work or furnish any material not covered by the contract, unless such work is ordered in writing by the Commission.

Time Keeping Procedures

The Contractor shall require employees and subcontractors, if applicable, whose positions are funded under this contract or included as match, to maintain adequate documentation for services provided. For positions that are funded from more than one source, an analysis of duties performed by program shall also be prepared.

Monitoring, Evaluation and Audit

The Contractor agrees to cooperate with any monitoring, evaluating and/or audit conducted by the Commission, or their designees who shall have full access to and the right to examine all books, records and other relevant documents.

The Contractor agrees to take immediate corrective action on deficiencies disclosed through program monitoring of costs disallowed in the course of an audit, review, or monitoring.

PROGRAM REQUIREMENTS

Equal Opportunity

No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with this contract because of race, color, disability, or political affiliation or belief.

The Contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, national origin, disability, age, sex, political affiliation or belief or citizenship.

Nondiscrimination

This contract and any subcontract hereunder is subject to the Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act, Title VI of the Civil Rights of 1964 and the Americans with Disabilities Act of 1990.

Copyrights and Rights in Data

The contractor agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with federal grant or state funds), technical reports, operation manuals and other work submitted with a proposal or grant application or which are specified to be delivered under this contract or which are developed or produced and paid for under this contract (referred to in this clause as "subject data") are subject to the rights of the Commission to use, duplicate and disclose the subject data in whole or in part, in any manner for any purpose whatsoever, and have others do so. If the material is copyrightable, the contractor may copyright the material, subject to the rights in the government, but the Commission reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish and use the material, in whole or in part, and to authorize others to do so. The contractor shall include provisions appropriate to effectuate the purposes of this condition in all subcontracts expected to produce copyrightable "subject data."

Dennis J. Baller
Operator's Signature

10/2/03
Date

SPECIFIC PROVISIONS
November 20, 2002

Purpose

On June 7, 2001 Qwest Corporation (Qwest), petitioned the Commission to open a proceeding to review and approve or determine Qwest's prices for interconnection, network elements and resale as set forth in Qwest's Statement of Generally Available Terms (SGAT). On July 11, 2001 the Commission opened an investigation, Case No. PU-2342-01-296. Also, several issues discussed in the Commission's Case No. PU-314-97-193 concerning said prices were deferred to this cost proceeding.

The Commission requires assistance to analyze Qwest's filing and to provide written recommendations regarding Qwest's prices for interconnection, network elements and resale and cost docket issues not resolved in Case No. PU-314-97-193. Contractor will assist the Commission Staff in reviewing and analyzing the cost studies filed by Qwest in Case No. PU-2342-00-282 and the UNE rates developed in Case Nos. PU-453-96-497 and PU-2342-00-282. Contractor will review the various studies, methodologies and resulting rates prepared and submitted by Qwest, and determine the extent to which they are reasonable and/or comply with all applicable state and federal criteria. Contractor will also make recommendations concerning potential improvements to the cost models and recommend changes to key inputs and assumptions to help ensure that the resulting UNE prices comply with the Telecommunications Act of 1996, North Dakota law and FCC regulations. Contractor will also make recommendations concerning the extent to which certain of Qwest's costs are avoidable when retail services are provided on a wholesale basis for resale. Contractor will also evaluate the Qwest's and other parties' positions on other key issues in this proceeding and make appropriate recommendations concerning the public policy implications of those issues. Project work will include:

1. Discovery and Analysis of Cost Studies
 - X Review the cost studies submitted by Qwest and other parties and confer with Staff to coordinate efforts.
 - X Gather additional information, as needed, with particular focus on North Dakota-specific cost inputs.
 - X Develop data requests and analyze responses.
 - X Determine necessary and appropriate modifications and improvements to cost studies submitted by Qwest, if any.
 - X Periodically report, by conference call or in writing, on project status.
2. Preparation of Testimony
 - X Prepare narrative description of various cost studies and key issues.
 - X Receive input from Staff concerning points of emphasis, modifications and improvements to cost studies, etc.
 - X Develop conclusions and recommendations.
 - X Prepare draft testimony.
 - X Receive input from Staff concerning draft testimony.
 - X Prepare final testimony, supported by full documentation, including a complete set of work papers.
3. Response to Data Requests Regarding Staff Testimony
 - X Review data requests and coordinate with Staff regarding responses.

- X Prepare responses to assigned requests.
- 4. Review of Other Parties' Testimony, Prepare Rebuttal and Assist with Cross Examination
 - X Review other parties' testimony.
 - X Prepare written summary analyses of the testimony of other witnesses, highlighting areas for cross examination and rebuttal.
 - X Prepare draft rebuttal testimony.
 - X Receive input from Staff concerning draft rebuttal testimony.
 - X Prepare final rebuttal testimony.
- 5. Participation at Hearing and After
 - X Prepare for hearing.
 - X Attend hearing, as scheduled by the Commission.
 - X Present and defend testimony.
 - X Provide post-hearing assistance.

Work under this contract will be completed prior to the commission's fiscal year ending June 30, 2003.

The work will include sufficient detail as is necessary to successfully testify under cross-examination.

Compensation

The Contractor will be compensated based on periodic submittal of progress reports. Final payment will be made upon satisfactory completion of the described project work, as determined by the Commission.

In the event the case is settled or this agreement is otherwise terminated prior to completion of project work, then compensation will be awarded for work satisfactorily completed.

No part of this contract may be assigned, sublet or subcontracted.

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Doranne Hall
Operator's Signature

10/2/03
Date

NORTH DAKOTA
PUBLIC SERVICE COMMISSION

CONTRACT PROCEDURES

Adopted: January 12, 1981

7th Revision December 2002

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Dan H. Hall
Operator's Signature

12/2/03
Date

NORTH DAKOTA
PUBLIC SERVICE COMMISSION
PROCUREMENT PROCEDURES

Adopted: January 12, 1981

7th Revision: April, 2001

I. GENERAL STATEMENT

- A. The purchase of goods and services through full and fair competition is Commission policy. All procurement will be conducted in a manner that provides maximum open and free competition. Unacceptable restrictions on competition include: (1) unreasonable qualification requirements placed on firms, (2) non-competitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience requirements.
- B. Whenever required, purchases will be made in accordance with statutes and rules through the Office of Management and Budget. N.D.C.C., Chapter 54-44.4-01.
- C. The Commission will take affirmative steps to use small and minority businesses when possible as sources of supplies, equipment, construction, and services. Affirmative steps may include:
 - 1. Placing qualified small, minority and women's businesses on solicitation lists.
 - 2. Solicitation of small and minority businesses whenever they are potential sources.
 - 3. When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.
 - 4. Where possible, establishing delivery schedules which will encourage participation by small and minority business.
 - 5. Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of

Commerce and the Community Services Administration as required by the Federal Government.

6. If any subcontracts are to be let, the prime contractor will take the affirmative steps in 1 through 5 above.
- D. Except as otherwise provided by state law, the procurement policy will apply to the Commission, its contractors and subcontractors.
- E. Procurement policy provisions will be followed in procurements involving use of federal grant funds. However, in procurements involving uses of state funds, Commission compliance with procurement policy provisions is discretionary.
- F. Standard contract provisions will be incorporated into relevant Commission contracts. However, in any contract, the Commission may agree to change, add, or delete contract provisions to the extent that such changes, additions, or deletions are not inconsistent with federal and state law.

II. DEFINITIONS AND MISCELLANEOUS POLICY PROVISION

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

invoices. The contract administration function is jointly assigned to the procurement officer, the project manager, and contract officer.

- F. Contract Execution.** A contractor may not begin work until a contract has been executed. The Commissioners or a designated representative, as provided for in Policy No. 5-01-93(0), are the only persons authorized to execute contracts to which the Commission is a party.
- G. Contractor.** The contractor is the individual, partnership, firm, corporation, company, or any acceptable combination or joint venture contracting with the Commission for performance of prescribed work.
- H. Contractor Selection.** Contractor selection is the process of choosing a contractor from all those that submitted a bid or proposal to provide goods or services sought by the Commission. Among factors which may be considered when selecting a contractor are:
1. Whether the offeror's bid, proposal, or statement is responsive to the invitation to bid or request for proposal or standards for unsolicited proposals.
 2. Whether the offeror has the technical ability and resources to perform in the manner described in its bid or proposal.
 3. Whether the offeror has the financial ability and resources to complete the project.
 4. Whether the contractor is responsible as shown by its integrity, compliance with public policy, prior contracts with the Commission, and record of past performance with the State of North Dakota.
 5. For construction bids, whether the bidder is the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.
 6. The Commission reserves the right to waive minor irregularities in a bid or proposal and the right to reject any and all bids. The Commission has the authority to require literal and exact compliance with all requirements specified in its request for bids or proposals. These factors will be

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

- I. **Emergency.** Any catastrophic event to property or person that requires an immediate remedy.
- J. **Final Report.** Following project close-out and final payment, the project manager will submit, to the procurement office and the contract officer, a final report evaluating the quality of the contractor's performance, including: adequacy of communication, timeliness, reliability, attention to detail, interest in accomplishing quality project work, and interest in giving advice to produce the best value for the state. The final report may serve as a basis for subsequent procurement analysis. The procurement officer or the procurement officer's designee will present a report to the Commission when conditions may warrant removal of a contractor from a Commission Bidder List or Request For Proposal List.
- K. **Invitation for Bid Request for Proposal.** An invitation for bid (IFB) or a request for proposal (RFP) is a solicitation issued by the Commission with the intent of eventually procuring a contractor to perform a particular service or deliver a particular product. The IFB or RFP must contain the following: the scope of work required or product specifications; the date, time, and place of bid opening or proposal closing; and evaluation factors to be used. Bids and proposals will be solicited in a manner that is consistent with Commission policy and state and federal law.
- L. **Preference.** Preference will be given to a resident North Dakota bidder when accepting bids for the provision of professional services, including research and consulting services, goods, merchandise, supplies, equipment, structures, and reclamation services. Nonresident bidders will be given preference equal to the preference given or required by the state of the nonresident bidder, seller, or contractor (N.D.C.C. 44-08-01).
- M. **Procurement.** Procurement is the purchase of goods or services. There are four methods of procurement for goods or services: small purchase

procedures, competitive sealed bids (formal advertising), competitive negotiation, and non-competitive negotiation (sole-source procurement).

- N. Procurement Officer.** The procurement officer or the procurement officer's designee is the Commission employee charged with the responsibility of directing the procurement process. This person may also draft a proposed contract and assist the project manager in monitoring a contractor's performance. This person works with the Commission, Commission Executive Secretary, and project manager during the procurement and contract administration process.
- O. Project Closeout.** The project closeout is a written verification that all the requirements of the project have been satisfied; it is based on a final technical and financial review. The review may include an audit. When all the contract work has been completed, the project will be closed-out. Following Commission acceptance of the project closeout, the contractor will receive final project payment.
- P. Proposal-Bid.** A proposal is any offer of other submission presented to the Commission by a potential contractor and used as a basis for contractor selection. Proposals are submitted by firms or individuals interested in undertaking projects for the Commission and, unless unsolicited, are based on the scope of work description set forth in the RFP issued by the Commission. Bids are similar to proposals. However, while proposals generally relate to the submission of work plans and costs for the provisions of services, bids usually involve the offer of specific materials and construction work and address physical specifications and fixed or unit prices.
- Q. Subcontractor.** A subcontractor is an individual, partnership, firm, corporation, company, or any acceptable combination or joint venture to which the contractor sublets part of the contract.

III. PSC EMPLOYEE AND PUBLIC CONTRACTOR CODE OF CONDUCT

A. General Rule

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

B. Gifts

1. Bidders and Commission contractors and subcontractors and their employees or agents will not directly or indirectly offer nor will Commissioners or employees directly or indirectly accept or solicit any gift, gratuity, entertainment, favor, loan, or any other thing of monetary value which might reasonably be interpreted as intended to secure a contract or favorable treatment in award, amendment, or administration of a contract.
2. During an audit or inspection, Commissioners, employees, or agents will neither solicit nor accept gratuities, food, favors, or anything of monetary value from a bidder, contractor, or party to a sub agreement.
3. As a general rule, project managers, inspectors, and any other employees of the Commission should refrain from engaging in after-hour socialization with contractors and their employees during the contract performance period.
4. No political contribution may be offered, solicited, or accepted for the purpose of affecting the award, amendment, or administration of a contract.

IV. Procurement Procedural Requirements

A. Proposed Procurement Action Review

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

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

B. Procurement Procedure

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

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

C. Method of Procurement

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

1. **Small Purchase Procedures.** Any procurement estimated by the procurement officer or the procurement officer's designee not to exceed ten thousand dollars (\$10,000) and not subject to Chapter 54-44.7, N.D.C.C., or the authority of the Office of Management and Budget may be made with small purchase procedures. Small purchase may be made when the item or service is available from more than one source, there is no public exigency or emergency, and time and expense does not justify competitive bidding. Small purchase procedure will include contact with an adequate number but not fewer than three qualified firms selected from the bidders list. The procurement officer or the procurement officer's designee will select the qualified firms. The selection of the qualified firms will be based on what the procurement officer or the procurement officer's designee knows about the experience, past performance, integrity, compliance with public policy, and financial and technical resources of the firm. Qualified firms will be selected fairly without unreasonable restrictions or procedures calculated to restrict competition. The procurement officer or the procurement officer's designee will write each firm to explain the supplies or services needed and request an offer from each firm for described supplies or services. After a reasonable time during which all potential offers have been made, the procurement officer or the procurement officer's designee will recommend to the Commission which offer to accept. Acceptance will be based on what the Commission believes will be the best use of public funds.

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

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

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

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

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

Dan Hall
Operator's Signature

10/2/03
Date

- 2) The invitation for bids, including specifications and pertinent attachments, will clearly define the items or services needed and state:
 - a) When and where the plans, drawings, and specifications may be examined; and how copies may be obtained.
 - b) The place where and the time when the bids will be publicly opened.
 - c) That each bid will be accompanied by a bidder's bond, executed by a surety company authorized to do business in this state, a certified check or a cashier's check in the sum equal to five (5) percent of the bid. A certified check or a cashier's check must be drawn on the Bank of North Dakota or a federally insured, solvent bank. If, within ten days after notice of an award, the successful bidder should fail to execute a contract with the owner, then the surety will pay unto the owner for the use and benefit of the owner five (5) percent of the bid or bids on the contract on which there is a default or the certified check or cashier's check of the bidder will be forfeited to the owner. If the principal's bid is accepted and the contract is awarded, the principal, within 10 days after notice of award, will execute a contract consistent with the terms of the bid and performance and payment bonds as specified by the Commission.
 - d) That all public contractor bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
 - e) That the right of the Commission to reject any and all bids is reserved.
- 3) That inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.

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Dorena G. Baller
Operator's Signature

10/2/03
Date

- 4) Copies of all plans, drawings, and specifications will be filed in the Commission Abandoned Mine Lands' office. Upon written request, copies of all plans, drawings, and specifications will be mailed at cost to the office of any firm.
- 5) Bids will be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and other relevant information as may be necessary, together with the name of each bidder, will be recorded; the record and each bid will be open to public inspection.
- 6) Bids will be unconditionally accepted without alteration or correction except as authorized in this policy. Bids will be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award will be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids will set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.
- 7) Withdrawal of erroneous bids before award, or cancellation of awards or contracts based on such bid mistakes, will be permitted. After bid opening no changes in bid prices or other provisions of bids will be permitted. Except as otherwise provided, all decisions to permit the withdrawal of bids, or to cancel awards or contracts based on bid mistakes, will be supported by a written determination made by the procurement officer or procurement officer's designee.
- 8) Upon Commission approval, Commission will award a firm fixed or fixed unit price contract with reasonable promptness by

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

3. Competitive Bidding - Construction Maintenance. Competitive bids for construction maintenance on abandoned coal mine reclamation sites will be solicited by mail, FAX or through the Internet and a firm-fixed-price contract (lump sum or unit price) will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.
 - a. A complete and realistic specification or purchase description will be available.
 - b. Three or more responsible suppliers must be willing and able to compete effectively for the Commission's business.
 - c. The procurement lends itself to a firm fixed or fixed unit price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.
 - d. At a minimum, five (5) days prior to the date set to receive bids, bids will be solicited from an adequate number of known suppliers or firms. This solicitation will be in written form and provided to prospective bidders.

- e. All bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
 - f. The right of the Commission personnel to reject any and all bids is reserved.
 - g. The inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.
 - h. Contract award, based on the lowest responsive bid, may be made by Commission personnel or through formal Commission action.
 - i. Provisions of this section do not apply to abandoned mine land emergencies.
4. Competitive Negotiation. In competitive negotiation, qualification statements or proposals are requested from a number of sources and the request is publicized. Negotiations may be conducted with sources submitting statements or proposals. Either a fixed price or cost reimbursable not-to-exceed contract will be awarded. Under some circumstances, competitive negotiation may be required. Under other circumstances, competitive negotiation is discretionary and may be used if conditions are not appropriate for the use of formal advertising or small purchase.
- a. When purchasing architect, engineering, or land surveying, research or professional services, the Commission will follow the competitive negotiation procedures specified in Chapter 54-44.7, N.D.C.C. The Commission may use the procedures described in Chapter 54-44.7, N.D.C.C., to procure other professional services including lawyers, accountants, economists, and real estate appraisers. When using the procedures described in Chapter 54.44.7, N.D.C.C., the following apply:
 - 1) Notice of invitation may be published in newspapers of general circulation and in trade or professional publications of general circulation calculated to reach the type of firms needed. Adequate public notice includes mailing of the invitation to a

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

- 2) The invitation will state the relative importance of evaluation criteria used to select and rank the most qualified firms. No other factors or criteria will be used in the evaluation.
- b. An alternative to the procedures prescribed by Chapter 54-44.7 may be used to procure services other than architect's, engineer's, and surveyor's professional services, e.g., lawyers, accountants, and real estate appraisers.
 - 1) Proposals will be solicited through a request for proposal (RFP).

The request for proposal will state:

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

- a) Project title
 - b) Scope of work
 - c) Description of professional services required
 - d) Submittal of a flat rate or line item price quote
 - e) Resume of personnel providing the services
 - f) Documentation of related work experiences
 - g) Scheduled performance period
 - h) Rating system used in evaluating proposals
 - i) Provide at least three client references
 - j) Conflict of Interest disclaimer
- 4) Proposals will be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals will be prepared and will be open for public inspection after contract award.
- 5) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors will be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there will be no disclosure of information derived from proposals submitted by competing offerors.
- 6) Upon recommendation by the procurement officer or the procurement officer's designee, award will be made to the responsible offeror whose proposal is determined by the Commission to be the most advantageous to the state taking into consideration price and the evaluation factors set forth in the request proposal. No other factors or criteria will be used in the

evaluation. The contract file will contain the basis on which the award is made and contract negotiation minutes.

5. Noncompetitive Negotiation (Sole-Source Procurement)

A sound procurement system should provide for full and open competition that is both fair and equitable to all potential bidders.

However, there are times when circumstances are such that the desired action cannot be accomplished through the lengthy process of solicitation of bids. Under those unique conditions sole-source contracting may be warranted.

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

- a. The proposed item or service is available only from a single source.
- b. The person or organization has the unique product or the special skills, knowledge, abilities to provide the required services (at the exclusion of others) and is considered the preeminent deliverer of that product or service at the time of selection.
- c. Emergency or severe time constraints preclude issuing a formal Request for Proposals.
- d. The service is available within the existing structure of state or local government. The following steps should be followed to secure a sole-source contract:
 - 1) Draft a written justification for sole-source procurement and present it to the Commission or the designated authority for approval.
 - 2) If approved, contact the proposed provider and proceed to negotiate the contract. Minutes of the negotiation session will be taken and the prepared minutes sent to the other party for concurrence.

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

6. Emergency

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

- a. Right-of-Entry documentation will be obtained from the landowner, or at a minimum, permission will be received from the landowner to begin the emergency work, and a completed Right-of-Entry form will be obtained when possible.
- b. An OSM Emergency Investigation Report will be completed prior to beginning work if time permits, and then faxed to OSM. A letter of eligibility is required to be completed by the Commission Commerce Counsel.
- c. Attempt to receive bids from at least two contractors. Interested contractors will receive a faxed copy of the emergency bid sheet documents, detailing plans and specifications of the proposed work, or contractors will be handed the bid documents to be completed on-site if a pre-bid meeting is scheduled.
- d. A contractor that is currently under contract to the PSC may be utilized, providing they offer a bid that is considered reasonable by a PSC Project Manager. Commission personnel have the authority to reject any and all bids.
- e. An emergency contract will be issued (SFN 19716 Rev. 05-2000) to the contractor selected for emergency reclamation work.
- f. The successful bidder will provide a current North Dakota Contractor's license within the classification value of the project, and

be covered by a liability insurance policy of no less than \$500,000 per person and \$1,000,000 per occurrence.

D. Unsolicited Proposal.

1. General. An unsolicited proposal is a proposal submitted by a potential supplier which is not solicited by the Commission. The unsolicited proposal is an effective tool by which unique or innovative methods or approaches developed outside the Commission can be made available to the Commission. The offeror who submits an unsolicited proposal hopes the Commission will enter into a sole source contract with the offeror for further development of the innovative idea contained in the unsolicited proposal. If the Commission finds an offer sufficiently innovative, it will not become the subject of a competitive procurement.
2. Required Information.
 - a. Introduction. The introduction should identify the general subject matter of the proposal. It should explain the need for the work, study, or research. The need should be expressed in terms of past work or research and the manner in which the offeror believes that the proposed work study or research will support Commission activities or functions.
 - b. Objectives. The objectives must be stated as specifically as possible. The objectives are the foundation of the project and the basis of all work, study, or research plans. They may be described as hypotheses to be tested. Objectives or hypotheses may be changed, but only after a demonstration that the change is warranted. They must describe the direction of the work, study, or research to those not technically familiar as well as to those who are. If the project is contemplated to continue for more than one year, the proposal should state long-term objectives as well as short-term objectives. The stated short-term objectives, i.e., those to be accomplished within one year, should be presented in such a

manner as to show their relevance in meeting the long-term goals or objectives.

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

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

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

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

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

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

3) **Reports.** The proposal should state when reports will be delivered to the Commission. The proposal should also state what the reports will cover. All reports should be written in a form acceptable to the relevant professional or scientific

community and the Commission. Each final report should stand alone as a finished product which meets the stated objectives of the proposal.

- d. **Personnel and Management.** All project staff, including the principal investigator, should be identified, their relevant qualifications described, and vitae attached. The skills and experience appropriate to the proposal should be stated. The project responsibilities of all staff should be stated.
- e. **Related Experience.** Proposals should include a brief description of previous experience relevant to the proposed project, including the identification of specific projects undertaken and completed and a bibliography of relevant resulting publications.
- f. **Facilities and Equipment.** A description of physical facilities and relevant, available project equipment to be used should be included.
- g. **Other Work.** The proposal should include a projection of other foreseeable workload for the period of the proposed work.
- h. **Budget.** The proposal must include a budget. The budget is a representation of the project expressed in dollars of estimated expenses. At minimum, where federal grant funds are involved, the budget must be submitted in a form that meets the standards of the federal grantor agency. The budgeted amounts must be realistic and well justified. Cost estimates must be in sufficient detail to enable the Commission to conduct an evaluation. Unless self-explanatory, the proposer should submit a separate explanation of how budget items were estimated. The budget must correspond to the proposer's narrative materials.
- i. **Contract Details.** The proposer should set forth the type of contract anticipated and the period the proposal is available for Commission acceptance. Clear statements should be included regarding the proposed duration of the effort together with any statements regarding cost sharing.

3. Commission Review and Evaluation

- a. Timely Proposal Submission. Unsolicited proposals should be submitted sufficiently in advance of the time work is to start.
 - b. Sufficiency Review. After receiving an unsolicited proposal, the Commission Executive Secretary and designated procurement officer or the procurement officer's designee will expeditiously review the proposal to see if it contains sufficient information to enable a meaningful evaluation. If the unsolicited proposal meets this criterion, it may be evaluated in detail.
 - c. Detailed Evaluation. For detailed evaluation the proposal will be circulated among and evaluated by Commission personnel and if necessary others. In the circulation process, a cover memorandum will be attached to the proposal clearly identifying it as unsolicited. This identification is to insure that a private, i.e. non-governmental proposal is treated as proprietary and unique to the proposer. The purpose of the evaluation is to identify whether the proposal in fact contains unique or innovative ideas or concepts which have not independently been conceived by the Commission or other government agencies. Additionally, the potential contribution to the Commission's function will be evaluated together with the capabilities and qualifications of the potential contractor.
4. Proposed Procurement Action Review. If after the detailed evaluation, a favorable finding is issued by the relevant designated procurement officer, the Commission Executive Secretary and designated procurement officer or the procurement officer's designee in consultation with the Commission will discuss and determine in written memorandum form if:
- a. Funds are available;
 - b. The purchase must be processed by the Office of Management and Budget;

- c. The purchase may be avoided because it is unnecessary or duplicative;
 - d. The substance of the proposal is available to the Commission from another source without restriction;
 - e. The proposal closely resembles a pending competitive solicitation or is otherwise not sufficiently unique to justify acceptance;
 - f. The purchase should be broken out to obtain a more economical purchase;
 - g. A lease versus a purchase or hourly rate versus fixed fee would be most economical;
 - h. Greater economy and efficiency would be fostered by entering into state cooperative agreements with other state agencies for procurements or use of common goods and services;
 - i. There are compelling reasons for non-competitive procurement; and
 - j. North Dakota law sets purchase procedures.
5. Method of Procurement. If in addition to receiving a favorable detailed evaluation the unsolicited proposal passes the proposed procurement action review, the Commission may direct the relevant procurement officer or the procurement officer's designee to conduct a negotiated non-competitive procurement.
6. Limited Commission Use of Data. Restrictive statements inserted by the private or non-governmental proposer that restrict the Commission's use of the submitted data to evaluation of the unsolicited proposal will be heeded. Even when the Commission receives an unsolicited proposal which does not contain such restrictive statements, if the Commission determines that detailed evaluation by personnel outside of state government is required, the Commission will obtain written permission from the prospective private or non-governmental contractor prior to release of the proposal for evaluation. When an unsolicited proposal is submitted to a non-governmental evaluator, the Commission will secure

a written agreement from the evaluator not to disclose the information contained in the proposal.

E. Procurement Officer.

1. Designation. The procurement officer or the procurement officer's designee will be designated by motion of the Commission. Ordinarily, the procurement officer or the procurement officer's designee for a project may be the Commission division director of the division most closely connected with the project goals.
2. Duties. The procurement officer or the procurement officer's designee will:
 - a. Administer Commission procurement policy.
 - b. Cooperate with the Commission Executive Secretary and the Office of Management and Budget to ensure orderly procurement of goods and services.
 - c. With the approval of the Commission, appoint, when necessary, a sufficient number of evaluation committee members from Commission staff and other state agencies.
 - d. Establish and maintain programs for inspection, testing and acceptance of supplies, services, and construction.
 - e. Make written evaluation committee and other reports to the Commission recommending award.
 - f. After Commission approval, send a notification of Commission procurement decisions to all interested persons.
3. Powers. In addition to other powers prescribed, the procurement officer or the procurement officer's designee will have the power to:
 - a. Adopt operational procedures consistent with Commission procurement policy and sound procurement practices on such matters including but not limited to bid or proposal solicitation, evaluation, and contract negotiation, award, administration, and enforcement; and

- b. Designate a project manager from within the Commission. If none is designated, the procurement officer or the procurement officer's designee may also be the project manager.

F. Executive Secretary.

1. The Commission Executive Secretary will supervise Commission procurement officers or the procurement officer's designees and cooperate with the Office of Management and Budget to establish and maintain Commission procurement in compliance with Commission policy and state law.
2. The Abandoned Mine Lands Division procurement officer or the procurement officer's designee may maintain bidder lists. The lists may be used as a basis for making future solicitations. A mailing list need not be limited to the firms on a bidder list and a mailing list need not include all firms on the bidder list. The procurement officer or the procurement officer's designee, may adopt procedures on bidder list use and bidder removal or suspension from bidder lists.

G. Evaluation Committee.

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

H. Notice and Appeal.

1. Those participating in a small purchase, competitive sealed bid, or competitive negotiation will receive by mail notice of the Commission's

intent to award or notice of the Commission's selection and ranking of firms. The notice will state:

- a. The interested person has the right to appeal the Commission's decision for cause;
- b. The right must be exercised within a specified time;
- c. The right must be exercised in writing; and
- d. The reasons for appeal must be stated.

2. If there is an appeal a formal hearing will be scheduled and interested parties notified as the Commission deems just and reasonable.

I. Project Manager.

1. The key person in the state-contractor relationship is the state's project manager. This individual will control and monitor the contractor's activities and provide the proper level of leadership and coordination which will satisfy the Commission's obligations under the contract and which will be conducive to a healthy business relationship.
2. Since a professional service contract may contain only a limited description of the overall scope of the project of service to be performed by the contractor, the project manager must be able to distinguish between specific provisions in the contract and that which he desires from a professional point of view.
3. The project manager does not have unilateral authority to change the scope of work or specification under a contract. Should circumstances arise where the project manager deems immediate changes, suspensions or delays are necessary or prudent, the Commission Executive Secretary and the procurement officer or the procurement officer's designee will be notified. The project manager will write detailed contemporaneous memoranda regarding the change, suspension or delay, and report to the full Commission at the earliest opportunity. A change, suspension, or delay will not take effect without formal Commission action unless the Commission has otherwise formally authorized the project manager to effect changes, suspension, or delays.

4. Among the many responsibilities assigned by the procurement officer or the procurement officer's designee to the project manager, the following tasks should be given serious consideration:
- a. The project manager should initiate a contract review with the contractor's team leader and prime assistants. This conference should include a detailed examination of the contract documents, project time schedules, and the establishment of procedures for submission of contract progress reports. Required interviews with Commission staff should be scheduled through the project manager to minimize disruption of the Commission operation.
 - b. The project manager should require frequent and periodic conferences with the contractor and staff, even though the quality and performance of the contractor has been excellent. Such conferences should be divided into two parts. The first part should address past performance and the second should address the future activities of the contractor. Matters of substance should be fully documented.
 - c. The project manager must recognize that indecision and procrastination will be two major problems in working with a professional service contractor. Time is money to a consultant, and he is prepared to demand payment for downtime and delays if the fault lies with the agency regardless of the contractual stipulations related to price. The project manager must comprehend that time does not normally cure or solve technical problems and may very well compound them beyond repair; timely decisions are crucial to the success of the project.
 - d. The project manager must establish himself as a leader in the state-contractor relationship. Experience has shown that where a vacuum exists in state leadership, professional service contractors tend to move forward and fill the void in order to complete and deliver the

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end products. Consequently, quality control may not be maintained in the process.

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

The project manager should establish an internal accounting system for the contractor's invoices and supporting documentation and correspondence. This system is necessary if the contract is based upon a not-to-exceed price or contains any variables which may affect payment. A clear, precise audit trail of all activities related to payment of funds and acceptances of deliverables must be maintained and accessible to the contract officer at all times.

J. The Commission

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

K. Contract Officer

1. The procurement officer or the procurement officer's designee insures that terms of the contract are met. The procurement officer or the procurement officer's designee will:
 - a. Insure that all laws, executive orders, clearances, and approvals are met and that sufficient funds are available;
 - b. Insure that contractors receive impartial, fair, and equitable treatment.

V. BONDS

A. Bid Security

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

B. Contract Performance and Payment Bonds.

1. When a construction contract is awarded, the following bonds or security will be delivered to the Commission and will become binding on the parties upon execution of the contract:
 - a. A performance bond satisfactory to the Commission, executed by a surety company authorized to do business in this state in an amount equal to 100 percent of the price specified in the contract; and
 - b. A payment bond satisfactory to the Commission, executed by a surety company authorized to do business in this state and by the U.S. Treasury Department, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond will be in an amount equal to 100 percent of the price specified in the contract.

2. Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, for which a payment bond is furnished under this section and who has not been paid in full therefore before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, will have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractor furnishing said payment bond, will have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice will be personally served or served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.
3. Every suit instituted upon a payment bond will be brought in a North Dakota court, but no suit will be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

C. Bond Forms and Copies

1. The Commission will supply the form of the bonds required.
2. Any person may request and obtain from the Commission a certified copy of a bond upon payment of the cost of reproduction of the bond

Donna Baller
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and postage, if any. A certified copy of a bond will be prima facie evidence of the contents, execution and delivery of the original.

VI. CONTRACT PRICING

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

VII. PROCUREMENT RECORDS

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

SECTION 2
CONTRACT PROCEDURES
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NORTH DAKOTA
PUBLIC SERVICE COMMISSION
CONTRACT PROCEDURES
Adopted January 12, 1981
5th Revision June 1995

I. PSC EMPLOYEE AND PUBLIC CONTRACTOR CODE OF CONDUCT

A. General Rule

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

B. Gifts

Commission contractors and subcontractors and their employees or agents will not directly or indirectly offer nor will Commissioners or employees directly or indirectly accept or solicit any gift, gratuity, entertainment, favor, loan or any other thing of monetary value which might reasonably be interpreted as intended to secure a contract or favorable treatment in award, amendment, or administration of a contract.

During an audit or inspection, Commissioners, employees or agents will neither solicit nor accept gratuities, food, favors or anything of monetary value from a bidder, contractor, or party to a subagreement.

No political contribution may be offered, solicited or accepted for the purpose of affecting the award, amendment or administration of a contract.

II. CHECK LIST FOR NEGOTIATING CONTRACTS

1. Is there a clear and accurate description (in unambiguous terms) of the services to be performed?

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2. When will the work begin? When will it be completed? The dates should be specified in the contract.
3. Will periodic progress reports be submitted (weekly, monthly, quarterly)?
4. What are the deliverables (written reports, statistical tables, oral testimony, etc)? Draft form or final?
5. Who has ownership of the materials produced or purchased under the contract?
6. Is there a cost/price analysis to determine if the cost is fair and reasonable?
7. What is the method of compensation (cash advance," fixed fee, unit price, cost reimbursable)?
8. What expenses other than compensation for services will be allowed?
9. Will the contractor be allowed to contract out (sub-contract) part of the work? If so, identify options 1 through 8 of this Section that will be allowable under sub-contracts.

III. STANDARD CONTRACT PROVISIONS

Reference: N.D.C.C. 43-07-01

A. All Contracts.

1. Remedies. Except as otherwise provided in this contract, all claims, counterclaims, disputes and other matters in question between the Commission and the contractor arising out of or relating to this agreement will be decided by arbitration if the parties hereto mutually agree, or in a court of competent jurisdiction within North Dakota.
2. Termination For Default; Damages For Delay; Time Extensions.
 - a. If the contractor refuses or fails to prosecute the work, or any separable part with diligence to insure its completion within the time specified in the contract, or any extension of time, or fails to complete the work within that time, the Commission may, by written notice to the contractor, terminate his right to proceed with the work or that part of the work that has been delayed. In that event, the Commission may take over and prosecute the work to completion,

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by contract or otherwise, and in completing the work may take possession of and use necessary materials, appliances and plant as may be on the work site. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties will be liable for any damage to the Commission resulting from his refusal or failure to complete the work within the specified time.

- b. If fixed and agreed liquidated damages are provided in the contract and if the Commission terminates the contractor's right to proceed, the resulting damage will consist of the liquidated damages. The resulting damages will be the liquidated damages for the reasonable time required for final completion of the work together with any increased costs incurred by the Commission in completing the work.
- c. If fixed and agreed liquidated damages are provided in the contract and if the Commission does not terminate the contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.
- d. The contractor's right to proceed will not be terminated nor the contractor charged with resulting damage if:
 - 1) The delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the contractor, including acts of God, acts of a public enemy, acts of the Commission in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Commission, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from causes other than normal weather beyond the control and without the fault or negligence of both the contractor and such subcontractors or suppliers, and
 - 2) The contractor, within 10 days from the beginning of the delay (unless the Commission grants additional time before the date of

final payment under the contract), will notify the Commission in writing of the causes of delay. The Commission will ascertain the facts and the extent of delay and extend the time for completing the work when in its judgment, the findings of fact justify an extension, and its findings of fact will be final and conclusive on the parties, subject only to appeal as provided in the "Remedies" clause of this contract.

- e. If, after notice of termination of the contractor's right to proceed under the provisions of this clause, the Commission determines that the contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties will, if the contract contains a clause providing for termination for convenience of the Commission, be the same as if the notice of termination had been issued under the termination for convenience clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Commission, the contract will be equitably adjusted to compensate for the termination and the contract modified accordingly; failure to agree to adjustment will be subject to the "Remedies" clause of this contract.
- f. The rights and remedies of the Commission provided in this clause are in addition to any other rights and remedies provided by law or under this contract.
- g. As used in paragraph d, subparagraph 1 of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier.

3. Termination for Convenience.

- a. The performance of work under this contract may be terminated by the Commission by this clause in whole, or in part, whenever the Commission determines that termination is in the best interest of the state. Termination will be effected by delivery to the contractor of a

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notice of termination specifying the extent performance of work under the contract is terminated, and the date upon which such termination becomes effective.

- b. After receipt of a notice of termination, and except as otherwise directed by the Commission, the contractor will:
- 1) Stop work under the contract on the date and to the extent specified in the notice of termination;
 - 2) Place no further orders or subcontracts for materials, services or facilities except as may be necessary for completion of that portion of the work under the contract not terminated;
 - 3) Terminate all orders and subcontracts to the extent they relate to the performance of work terminated by the notice of termination;
 - 4) Assign to the Commission, in the manner, at the times, and to the extent directed by the Commission, all of the right, title and interest of the contractor under the orders and subcontracts so terminated, in which case the Commission will have the right, in its discretion, to settle or pay any or all claims arising out of the termination of orders and subcontracts;
 - 5) Settle all outstanding liabilities and all claims arising out of termination of orders and subcontracts, with the approval or ratification of the Commission to the extent it may require, which approval or ratification will be final for all the purposes of this clause;
 - 6) Transfer title to the Commission, and deliver in the manner, at the times, and to the extent directed by the Commission:
 - a) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated; and
 - b) The completed or partially completed plans, drawings, information and other property which, if the contract had

been completed, would have been required to be furnished to the Commission.

- 7) Use his best efforts to sell, in the manner, at the times, to the extent and at the price or prices directed or authorized by the Commission, any property of the types referred to in subparagraph 6 above provided, however, that the contractor:
 - a) Will not be required to extend credit to any purchaser; and
 - b) May acquire any such property under the conditions prescribed and at a price or prices approved by the Commission; and provided further that the proceeds of any such transfer of disposition will be applied in reduction of any payments to be made by the Commission to the contractor under this contract or will otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Commission may direct;
 - 8) Complete performance of the work not terminated by the notice of termination; and
 - 9) Take action as may be necessary, or as the Commission may direct, for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the Commission has or may acquire an interest.
- c. After receipt of a notice of termination, the contractor will submit to the Commission his termination claim, in the form and with the certification prescribed by the Commission. Such claim will be submitted promptly but in no event later than one year from the effective date of termination, unless a written extension is granted by the Commission upon written request of the contractor made within the one-year period. However, if the Commission determines that the facts justify, it may receive and act upon any termination claim within the time allowed, the Commission may determine, on the basis of information available to it, the amount due the contractor by

reason of the termination and will then pay to the contractor the amount determined.

- d. Subject to the provisions of paragraph c of this clause, the contractor and the Commission may agree upon the whole or any part of the amount to be paid to the contractor by reason of the total or partial termination of work under this clause, which amount may include a reasonable allowance for profit on work done; provided that the agreed amount, exclusive of settlement costs, will not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract will be amended accordingly, and the contractor will be paid the agreed amount. Nothing in paragraph e of this clause, prescribing the amount to be paid to the contractor and the Commission to agree upon the whole amount to be paid to the contractor by reason of the termination of work under this clause, will be deemed to limit, restrict or otherwise determine or affect the amount which may be agreed upon to be paid to the contractor under this paragraph.
- e. In the event of the failure of the contractor and the Commission to agree as provided in paragraph d upon the whole amount to be paid to the contractor by reason of the termination of work under this clause, the Commission will determine, on the basis of information available to it, the amount due to the contractor by reason of the termination and will pay to the contractor the amounts determined as follows:
- 1) With respect to all contract work performed prior to the effective date of the notice of termination, the total (without duplication of any items) of:
 - a) The cost of the work;
 - b) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as

provided in paragraph b subparagraph 5 of this clause, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the notice of termination of work under this contract, which amounts will be included in the cost on account of which payment is made under this subparagraph, part a above; and

- c) A sum, as profit on part a above, determined by the Commission to be fair and reasonable; provided, however, that if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit will be included or allowed under this part c and an appropriate adjustment will be made reducing the amount of the settlement to reflect the indicated rate of loss; and

- 2) The reasonable cost of the preservation and protection of property incurred under paragraph b subparagraph 9 and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the contractor as the result of the termination of work under this contract.

The total sum to be paid to the contractor under subparagraph 1 above will not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Commission will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to the contractor under subparagraph 1 above, the fair value, as determined by the Commission of property which is destroyed, lost, stolen or damaged so as to become undeliverable to the Commission or to a buyer pursuant to paragraph b, subparagraph 7.

- f. The contractor will have the right to dispute under the "Remedies" clause of this contract any determination made by the Commission under paragraph c or e above, except that, if the contractor has failed to submit his claim within the time provided in paragraph c above and has failed to request extension of that time, he will have no right of appeal. In any case where the Commission has made a determination of the amount due under paragraph c or e above, the Commission will pay to the contractor the following:
- 1) If there is no right of appeal under the contract or if timely appeal has not been taken, the amount so determined by the Commission; or
 - 2) If a "Remedies" proceeding is initiated, the amount finally determined in the "Remedies" proceeding.
- g. In arriving at the amount due the contractor under this clause, there will be deducted:
- 1) All advance or other payments made to the contractor, applicable to the terminated portion of this contract;
 - 2) Any claim which the Commission may have against the contractor in connection with this contract; and
 - 3) The agreed price for, or the proceeds of sale of, any materials, supply or other things kept by the contractor or sold, under the provisions of this clause, and not otherwise recovered by or credited to the Commission.
- h. If the termination is partial, prior to the settlement of the terminated portion of this contract, the contractor may file with the Commission a request in writing for an equitable adjustment of the price specified in the contract on the continued portion of the contract (the portion not terminated by the notice of termination), and equitable adjustment as may be agreed upon will be made in the price; however, nothing will limit the right of the Commission and the contractor to agree upon the amount to be paid to the contractor for

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the completion of the continued portion of the contract when the contract does not contain an established contract price for the continued portion.

4. Termination for Lack of Funding or Authority. The Commission may terminate this contract effective upon delivery of written notice to the contractor, or on any later date stated in the notice, under any of the following conditions:
 - a. If funding from federal, state or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term. The contract may be modified by agreement of the parties in writing to accommodate a reduction in funds.
 - b. If federal or state laws or rules are modified or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
 - c. If any license, permit or certificate required by law or rule, or by the terms of this contract, is for any reason denied, revoked, suspended or not renewed.

Any termination of this contract under this subsection shall be without prejudice to any obligations or liabilities of either party already accrued prior to termination

5. Labor Standards. In any contract awarded in excess of \$10,000 and in any subcontract awarded in excess of \$10,000, the contractor and its subcontractors agree to comply with Executive Order 11246 entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).
6. Audit; Access to Records.

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- a. The contractor will maintain books, records, documents and other evidence directly pertinent to performance of work under this contract in accordance with generally accepted accounting principles and practices consistently applied. The federal grantor agency, the Comptroller General of the United States, the United States Department of Labor, and the Commission or any of their authorized representatives will have access to books, records, documents and other evidence for the purpose of inspection, audit and copying. The contractor will provide reasonable facilities and assistance for access and inspection.
- b. If this contract is a formally advertised, competitively awarded, fixed price contract, the contractor agrees to make paragraphs a through f of this clause applicable to all negotiated change orders and contract amendments affecting the contract price. In the case of all other types of prime contracts, the contractor agrees to include paragraphs a through f of this clause in all its contracts in excess of \$10,000 and all tier subcontracts in excess of \$10,000 and to make paragraphs a through f of this clause applicable to all change orders under the contract directly related to project performance.
- c. Audits conducted under this provision will be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or auditing agency(ies).
- d. The contractor agrees to the disclosure of all information and reports resulting from access to records under paragraphs a and b above, to any of the agencies referred to in paragraph a above, provided that the contractor is afforded the opportunity for an audit exit conference and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report and that the final federal grantor agency or Commission audit report will include written comments of reasonable length, if any, of the contractor.

- e. Records under paragraphs a and b above will be maintained and made available during performance on work under this contract and until three years from the date of final payment for the project. In addition, those records which relate to any dispute appeal under federal grant agreement, or litigation, or the settlement of claims arising out of such performance, or costs or items to which an audit exception has been taken, will be maintained and made available until three years after the date of resolution of the appeal, litigation, claim or exception.
- f. The right of access conferred by this clause will generally be exercised (with respect to financial records) under the following:
- 1) Negotiated prime contracts,
 - 2) Negotiated change orders or contract amendments in excess of \$10,000 affecting the price of any formally advertised, competitively awarded, fixed price contract, and
 - 3) Subcontracts or purchase orders under any contract other than a formally advertised, competitively awarded, fixed price contract. However, this right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective price competition. However, the right of access may be exercised under any contract or subcontract:
 - a) With respect to records pertaining directly to contract performance, including any financial records of the contractor;
 - b) If there is any indication that fraud, gross abuse, or corrupt practices may be involved; or
 - c) If the contract is terminated for default or for convenience.
7. Covenant Against Contingent Fees. The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for Commission, percentage, brokerage, or contingent fee excepting bona

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fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty, the Commission will have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of the Commission, percentage, brokerage or contingent fee.

8. Copyrights and Rights In Data. The contractor agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with federal grant or state funds), technical reports, operation manuals and other work submitted with a proposal or grant application or which are specified to be delivered under this contract or which are developed or produced and paid for under this contract (referred to in this clause as "subject data") are subject to the rights of the Commission to use, duplicate and disclose the subject data, in whole or in part, in any manner for any purpose whatsoever, and have others do so. If the material is copyrightable, the contractor may copyright the material, subject to the rights in the government but the Commission and the federal government reserve a royalty-free, non-exclusive and irrevocable license to reproduce, publish and use the materials, in whole or in part, and to authorize others to do so. The contractor will include provisions appropriate to effectuate the purposes of this condition in all subcontracts expected to produce copyrightable "subject data."
9. Prohibition Against Listed Violating Facilities. (Applicable only to contracts and subcontracts in excess of \$100,000) The contractor agrees to comply with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h)), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738 and Environmental Protection Agency regulations (40 CFR Part 15), which prohibit the use under non exempt federal contracts, grants or loans of facilities included on the EPA list of Violating Facilities. This

provision requires reporting violations to the federal grantor agency and to the U.S.E.P.A. Assistant Administrator for Enforcement (EN-329).

10. Policies Relating to Energy Efficiency. The contractor agrees to follow mandatory standards and policies related to energy efficiency contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

11. Changes.

- a. The Commission may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any changes in the work within the general scope of the contract, including changes:
 - 1) In the specifications (including drawings and designs);
 - 2) In the method or manner of performance of the work;
 - 3) In the Commission furnished facilities, equipment, materials, services or site; or
 - 4) Director acceleration in the performance of the work.
- b. Any other written order or an oral order (which in terms as used in this paragraph b will include direction, instruction, interpretation or determination) from the Commission which causes any change, will be treated as a change order under this clause, provided that the contractor gives the Commission written notice stating the date, circumstances and source of the order and that the contractor regards the order as a change order.
- c. Except as provided under the "Changes" clause, no order, statement or conduct of the Commission will be treated as a change or entitle the contractor to an equitable adjustment under the "Changes" clause.
- 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 order, an equitable adjustment will be made and the contract

modified in writing accordingly; provided, however, that except for claims based on defective specifications, no claim for any change under paragraph b above will be allowed for any costs incurred more than 20 days before the contractor gives written notice as required; and provided further that in the case of defective specifications for which the Commission is responsible, the equitable adjustment will include any increased cost reasonably incurred by the contractor in attempting to comply with the defective specifications.

- e. If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under paragraph a above or the furnishing of a written notice under paragraph b above, submit to the Commission a written statement setting forth the general nature and monetary extent of the claim, unless this period is extended by the Commission. The statement of claim may be included in the notice under paragraph b above.
- f. No claim by the contractor for an equitable adjustment under the "Changes" clause will be allowed if asserted after final payment under this contract.

12. Equitable Adjustments.

- a. Equitable adjustments will be measured by the cost impact on the contractor. The cost must be allowable, i.e., reasonable, allocable, in accordance with generally accepted accounting principles and cost accounting standards if applicable, and not limited or excluded by contract or procurement provisions.
- b. The basis pricing formula for an equitable adjustment is the difference between the reasonable cost of performing without the change or deletion and the reasonable cost of performing with the change or deletion. The equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor's profit or loss, or for converting a loss to a profit or vice versa, for reasons

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unrelated to a change or a differing site condition. A contractor who has underestimated his bid or encountered unanticipated expense or inefficiencies may not properly use a change order or differing site conditions as an excuse to reform the contract or to shift his own risks or losses to the Commission. Similarly, the Commission cannot use an equitable adjustment to avoid the impact of a contractor's unbalanced bid.

13. Suspension of Work.

- a. The Commission may order the contractor in writing to suspend all or any part of the work for a period of time as determined to be appropriate for the convenience of the Commission.
- b. If the performance of all or any part of the work is, for an unreasonable period of time, suspended by an act of the Commission in administration of this contract, or by its failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment will be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension and the contract modified in writing accordingly. However, no adjustment will be made under this clause for any suspension to the extent:
 - 1) That performance would have been suspended by any other cause, including the fault or negligence of the contractor, or
 - 2) For which an equitable adjustment is provided for or excluded under any other provision of this contract.
- c. No claim under this clause will be allowed:
 - 1) For any costs incurred more than 20 days before the contractor notified the Commission in writing of the new act or failure to act involved (but this requirement will not apply to a claim resulting from a suspension order); and

- 2) Unless the claim in an amount stated, is asserted in writing as soon as practicable after the termination of suspension, but not later than the date of final payment under the contract.

14. Invoices and Payment. Unless otherwise specified by the procurement officer or project manager:

- a. Invoices or estimate of project completion will be submitted monthly in a reasonable and detailed form.
- b. Based on the monthly invoice or estimate of project completion, payment will be made monthly to the contractor for services rendered, work done or material furnished as follows. At least once each calendar month during the continuance of a project, the project manager, contract officer and procurement officer will meet and receive and consider the invoice or estimates of project completion furnished by the contractor. Payment will be made for such invoice or estimate in an amount of the estimated value of the services, labor and material furnished upon the contract, and of the material upon the site, if any, for use in construction, subject to retentions as follows: ten (10) percent of each estimate presented until the project is fifty (50) percent completed, with no further retainage on estimates during the continuance of the contract. However, any deliverable items will be submitted prior to payment for the period during which the item is deliverable.
- c. The procurement officer, contract officer and project manager will pay the amount retained in such amounts and such times as are approved by the Commission, with final payment immediately following completion, close-out and acceptance of the project.

15. Right of Entry. The Commission will obtain for the contractor and his appropriate subcontractors any right of entry necessary for performance of the contract. In such cases, the contractor and subcontractors will not enter without right of entry. When exercising the right of entry, the

contractor and subcontractors will take reasonable steps to explain their presence to landowners and land occupiers.

16. Insurance and Indemnity. The contractor and subcontractors will obtain and keep in force sufficient insurance coverage to protect the state, local political subdivision, all their officers, agents and employees and all landowners to the project area. The contractor and subcontractor agree to hold the Commission harmless from and against loss, damage, injury or liability arising directly or indirectly from the negligent acts or omissions of the contractor, contractor's employees, agents, subcontractors, and their employees and agents. However, the procurement officer may require any offeror, contractor or subcontractor to carry various types of insurance in amounts as specified in the invitation for bid or request for proposal. If a suit is initiated or judgment entered against the Commission, the contractor and subcontractors will indemnify the Commission for any settlements made or judgment satisfied.

17. Personnel.

- a. The contractor represents that he has, or will secure at his own expense, all personnel required in performing the services under the contract. Such personnel will not be employees of the Commission.
- b. All of the services required under the contract will be performed by the contractor or under his supervision, and all personnel engaged in the work will be fully qualified and will be authorized or permitted under state and local law to perform such services.

18. Assignability. The contractor will not assign or transfer any interest in the contract without the prior written consent of the Commission; provided, however, that claims for money due or to become due to the contractor from the Commission may be assigned without such approval. Written notice of any assignment or transfer will be furnished promptly to the Commission.

19. **Officials Not to Benefit.** No members of or delegates to the Congress of the United States of America or federal, state and local officials or employees will be admitted to any share or part or to any benefit to arise under the contract.
20. **Interest of Contractor.** The contractor covenants that he presently has no interest and will not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under the contract. The contractor further covenants that in the performance of the contract, no person having any such interest will be employed.
21. **Contractor Reports.** For the duration of the contract period, the contractor will file a monthly report with the Commission. Unless otherwise requested by the project manager, the report will be no longer than two typewritten letter-size pages and will describe work progress, problems encountered and other pertinent information.
- B. Construction Contracts.**
1. **Labor Standards.** The contractor agrees that "construction" work (as defined by the U.S. Secretary of Labor) will be subject to the following labor standards to the extent applicable:
- a. In any construction contract and subcontract, the contractor or subcontractor will agree to comply with the Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in the U.S. Department of Labor regulations (29 CFR Part 3). This Act provides that each contractor or subcontractor will be prohibited from inducing by any means any person employed in the construction, completion or repair of public work, to give up any part of the compensation to which he is otherwise entitled.
 - b. Provisions of the Fair Labor Standards Act of 1938 as amended apply.
2. **Differing Site Conditions.**

2-19

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Operator's Signature

10/2/03
Date

- a. The contractor will promptly, and before such conditions are disturbed, notify the Commission in writing of:
 - 1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or
 - 2) Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract. The Commission will promptly investigate the conditions; and if it finds that the conditions do materially differ and cause an increase or decrease in the contractor's cost of or the time required for performance of any part of the work under the contract, whether or not changed as a result of such conditions, an equitable adjustment will be made and the contract modified in writing accordingly.
- b. No claim of the contractor under this clause will be allowed unless the contractor has given the notice required in paragraph a above; provided, however, the time prescribed may be extended by the Commission.
- c. No claim by the contractor for an equitable adjustment under the "Differing Site Conditions" clause will be allowed if asserted after final payment under the contract.

C. Professional Services.

- 1. Warranty. The professional services will be performed, findings obtained and reports and maps prepared according to the contract and the generally and currently accepted principles and practices.
- 2. Reimbursable Expenses. Unless otherwise specified, photocopies of receipts will accompany monthly invoices for all reimbursable expenses. Reimbursable expenses will be no more than as follows:
 - a. Actual travel expense not to exceed current state rates and only expenses necessary for the execution of the project including:

- 1) Air fares;
- 2) Rental vehicles,
- 3) Highway mileage in company or personal vehicles.
- b. Actual shipping charges for samples, field test equipment, etc.
- c. Subsistence (food) and lodging when overnight travel is required at current state rates. Receipts for subsistence are not required.
- d. Expendable items required for field work.
- e. Actual telephone, telex, photocopying, postage, printing, photographs, or reproduction of reports and drawings.
- f. Actual subcontracted work and special consulting services by others. Employees loaned from affiliate organizations will be involved at rates consistent with equivalent level contractor personnel.
- g. Actual analyses performed by biological, water quality, agronomic, geochemical and other laboratories will be performed on a unit cost basis.
- h. Actual rental of specialized testing or monitoring equipment required for project execution.
- i. Additional specialized equipment purchased for the project to become the Commission's property upon completion is cost reimbursable. However, such equipment will not be purchased without written Commission approval.

IV. CONTRACT ADMINISTRATION

The procurement officer with the project manager and contract officer maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders.

V. CONTRACTOR CLAIMS

- A. Definition. A claim is the contractor's written demand to the Commission seeking, as a matter of right, payment, adjustment or interpretation of contract terms or other relief arising under the contract. A claim must

Donna H. Ball
Operator's Signature

10/2/03
Date

unequivocally state that the contractor demands a decision, not merely advice, discussion or comment. An invoice is not a claim.

B. Statement of the Claim.

1. The statement of the claim will contain elements:
 - a. A declaration: "this is a claim by contractor "X" against the North Dakota Public Service Commission."
 - b. A summary paragraph explaining the claim.
 - c. Identification of the relevant contract and contract terms.
 - d. A statement of facts, i.e., events or occurrences that give rise to the claim.
 - e. How the factual events or occurrences adversely affected the contractor's performance. The contractor must prove causation. The contractor will state the extent to which he was at fault.
 - f. Application of the law to the facts.
 - g. Express statement of the relief sought and the calculations used to determine the specific dollar amount or time sought.
 - h. Conclusion with a summary of the major elements of the claim and a legal demand for a) appropriate relief and b) a decision from the Commission.
 - i. Contractor certification by sworn affidavit that the claim is filed in good faith and is an accurate and complete statement of fact.
2. If the claim is for more than \$10,000, the contractor will provide all actual project costs categorized as follows:
 - a. Labor. Each employee will be listed by name along with his responsibilities, hours and wages;
 - b. Bond, insurance and taxes. Premiums paid on bonds and property damage, liability, workmen's compensation and unemployment insurance will be listed. Social security taxes paid will be listed.
 - c. Materials. All materials and all actual material costs for all materials accepted by the project manager and permanently installed in the work will be listed. Transportation charges will be included.

Dennis G. Ball
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10/2/03
Date

- d. **Equipment.** All equipment will be identified by manufacturer, model number, capacity, age, date of purchase, and purchase price or actual rental cost. Depreciation, fuel and maintenance costs for each identified piece of equipment will also be provided. The actual cost of each equipment item used in the project will be provided.
- e. **Subcontracts.** All subcontracts and subcontractors and actual costs of the subcontracted work to the contractor on the project will be provided.
- f. **Overhead.** All overhead costs attributable to the project will be listed. Calculations will be shown.
- g. **Miscellaneous.** All other actual costs of the project not covered above will be listed.

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Dorena Ballach
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Date

VIII. APPENDIX

- A. Sample Close-Out Letter to Contractor**
- B. Sample Contract Transmittal Letter**
- C. Sample Detailed Budget Sheet for Cost Reimbursable Contracts**
- D. Check List for Negotiating Contracts**
- E. Public Service Commission Contract Numbering System**
- F. Conflict of Interest Disclaimer**
- G. Checklist for Work Statement (Specific Provisions) Contracts and Requests for Proposals**
- H. Certification of Payment to Employees, Suppliers, Subcontractors**

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Deanna G. Galt
Operator's Signature

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APPENDIX A

Sample Close-Out Letter to Contractor

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Danina Hall
Operator's Signature

10/2/03
Date

PUBLIC SERVICE COMMISSION

CERTIFICATION OF PAYMENT TO EMPLOYEES, SUPPLIERS, SUB-CONTRACTORS

The undersigned hereby certifies to the Public Service Commission that all of our employees engaged in work on the following project have been paid their full wages in accordance with the Fair Labor Standards Act. It is further certified that all of our suppliers and or sub-contractors engaged for the purpose of fulfilling the terms of the contract on the subject project have been paid in full for their services.

Project Name: _____

Signature of authorized official

Date

Title of position

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Operator's Signature

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APPENDIX B

Sample Contract Transmittal Letter

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Diana Hall
Operator's Signature

10/2/03
Date

**SAMPLE CLOSE-OUT
LETTER TO CONTRACTOR**

December 15, 2001

Mr. Jim Miles
Performance Results Associates
Management Consultants
2915 Kavanaugh Blvd. #386
Little Rock, AK 72205

Dear Mr. Miles:

The Public Service Commission entered into a contract with you/your firm on June 23, 2001. The contract #219, case PU 400-92-399 was for the purpose of providing professional services to the Public Service Commission.

Our records indicate that all services required under the terms of the contract have been performed. Accordingly, we are preparing to close out the contract. If you disagree with this decision or have any outstanding claims for service against this contract, please notify us within ten (10) days of the date of this letter.

Once the contract is closed no further payments for claims will be made by the Commission.

Since the Commission paid for the Geographic Wage/COL Differential Analysis produced by the Economic Research Institute, please send it to the Commission.

Please notify us immediately if you have any questions.

Sincerely,

Ron R. Dietz
Grants and Contract Officer

cc: Illona Jeffcoat-Sacco

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Dan R. Dietz
Operator's Signature

12/103
Date

APPENDIX C

Sample Detailed Budget Sheet for Cost Reimbursable Contracts

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Deanna Bell
Operator's Signature

10/2/03
Date

SAMPLE CONTRACT TRANSMITTAL LETTER

May 20, 2001

**Dr. Larry Dobesh
Department of Economics
University of North Dakota
Box 8255
Grand Forks ND 58202-8255**

RE: Case No. PU-400-92-399

Dear Dr. Dobesh:

Enclosed are two original contracts for the consulting services in the above referenced case. Please execute both copies, retain one and return one for the Commission files.

If you have any questions please contact this office at 701-328-4096.

Sincerely,

**Ron R. Dietz
Grants & Contract Officer**

Enclosures

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Deanna Holbrook
Operator's Signature

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APPENDIX D

Check List for Negotiating Contracts

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Operator's Signature

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Date

**SAMPLE DETAILED BUDGET SHEET
FOR COST REIMBURSABLE CONTRACTS**

Contract No. _____
Page _____

BUDGET SHEET

PERSONNEL COSTS _____ \$

Salary _____ \$

Fringe Benefits _____ \$

REIMBURSABLE EXPENSES _____ \$

Travel _____ \$

Postage _____ \$

Print & Repro. _____ \$

Supplies _____ \$

Telephone _____ \$

Other (explain) _____ \$

TOTAL _____ \$

Detailed budget information

Budget modifications will only be made in writing and approved by both parties to the contract. Reimbursable expense line items within the reimbursable expenses category may exceed the amount specified as long as the total for reimbursable expenses does not exceed the reimbursable contract amount. Records for all expenses claimed (including personnel costs) must be maintained and made available for audit to the administrator.

Personnel costs must be stated in cost per unit (hours worked or items completed) or flat fee for services. If employees of the contractor are going to be engaged in the work under this contract the hourly wage for those employees of the contractor must be listed above and all actual charges must be backed by daily time distribution records.

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APPENDIX E

Public Service Commission Contract Numbering System

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Operator's Signature

10/2/03
Date

**CHECK LIST
FOR
NEGOTIATING CONTRACTS**

1. Is there a clear and accurate description (in unambiguous terms) of the services to be performed?
2. When will the work begin? When will it be completed? The dates should be specified in the contract.
3. Will periodic progress reports be submitted (weekly, monthly, quarterly)?
4. What are the deliverables (written reports, statistical tables, oral testimony, etc.)? Draft form or final?
5. Who has ownership in the materials produced or purchased under the contract?
6. Is there a cost/price analysis to determine if the cost is fair and reasonable?
7. What is the method of compensation (cash advance, fixed fee, unit price, cost reimbursable)?
8. What expenses other than compensation for services will be allowed?
9. Will the contractor be allowed to contract out (sub-contract) part of the work? If so, identify all of the above that will be allowable under sub-contracting?

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Dannan Hall
Operator's Signature

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APPENDIX F

Conflict of Interest Disclaimer

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Deanna Hall
Operator's Signature

10/2/03
Date

**PUBLIC SERVICE COMMISSION
CONTRACT NUMBERING SYSTEM**

EFFECTIVE DATE APRIL 11, 2001

The numbering system for future contracts of the Public Service Commission will follow the following sequence:

1. The first two characters will be in alphabetic division identifiers (i.e. a Public Utilities Division contract would have a PU identifier).
2. The next three characters will be numeric digits that are assigned in ascending sequential order (i.e. the 418th contract would bear the number 418, the following contract would be 419).
3. The last two characters will be numeric digits that represent the calendar year in which the contract is executed (i.e. the last two digits in the contract number of a contract awarded in calendar year 2001 would be 01).

The contract number assigned in the preceding example would be PU-418-01.

The Accounting Division will issue all contract numbers. The number assigned should be included in all correspondence with the contractor and be a part of all motions and other internal actions involving the contract.

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Dennis J. Bell
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APPENDIX G

Checklist for Work Statement (Specific Provisions) Contracts and Requests for Proposals

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Operator's Signature

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Date

CONFLICT OF INTEREST

DISCLAIMER

PUBLIC SERVICE COMMISSION

The undersigned does hereby certify there is no financial substantive interest in the utilities which are or may be parties in this proceeding. It is also certified that no business officer, partner, employee, agent, or any immediate family member has a substantive financial interest in the utilities which are or may be parties in this proceeding. It is further certified that, should such a financial interest occur during the period of active involvement in the proceedings, the Commission will be immediately notified and shall have the right to terminate the contract.

Applicant Organization

Date

Signature of Certifying Official

Title

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APPENDIX H

Certification of Payment to Employees, Suppliers, Sub-Contractors

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**CHECKLIST FOR
WORK STATEMENT (SPECIFIC PROVISIONS)
CONTRACTS AND REQUESTS FOR PROPOSALS**

The following checklist is designed to aid in the development of a good statement of work for the request for proposal or the specific provisions in any contract. This is the most important and vital part of a Request for Proposal or a Contract.

1. Does the work statement contain only essential requirements?
2. Are the specific goods or services to be delivered stated in clear unambiguous terms?
3. Are directions readily distinguishable from general information?
4. If there are any limitations or constraints on the contractor, are they identified in the statement?
5. What standards will be used to measure performance? Are they objective?
6. Are time-frames for deliverables identified? Are amounts identified?
7. Are reporting requirements (technical and progress/compliance) clear? Have timing, content, and level of detail been specified?
8. Is payment to be periodic or based upon final completion? If periodic payments, at what point (time, percent of completion, phases of completion, weighted based on importance or level of difficulty, amount of product delivered)?
9. Does the statement clearly indicate that the administrator (owner) will make the determination of what is acceptable quality of the goods or services?

**"If you don't know what you're buying,
you shouldn't be soliciting or contracting"**

or

"stay out of the melon patch"

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**NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

PROCUREMENT PROCEDURES

Adopted: January 12, 1981

8th Revision December, 2002

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Operator's Signature

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Date

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PROCUREMENT PROCEDURES
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NORTH DAKOTA
PUBLIC SERVICE COMMISSION
PROCUREMENT PROCEDURES

Adopted: January 12, 1981

7th Revision: April, 2001

I. GENERAL STATEMENT

- A.** The purchase of goods and services through full and fair competition is Commission policy. All procurement will be conducted in a manner that provides maximum open and free competition. Unacceptable restrictions on competition include: (1) unreasonable qualification requirements placed on firms, (2) non-competitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience requirements.
- B.** Whenever required, purchases will be made in accordance with statutes and rules through the Office of Management and Budget. N.D.C.C., Chapter 54-44.4-01.
- C.** The Commission will take affirmative steps to use small and minority businesses when possible as sources of supplies, equipment, construction, and services. Affirmative steps may include:
 - 1. Placing qualified small, minority and women's businesses on solicitation lists.
 - 2. Solicitation of small and minority businesses whenever they are potential sources.
 - 3. When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.
 - 4. Where possible, establishing delivery schedules which will encourage participation by small and minority business.
 - 5. Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of

Commerce and the Community Services Administration as required by the Federal Government.

6. If any subcontracts are to be let, the prime contractor will take the affirmative steps in 1 through 5 above.

D. Except as otherwise provided by state law, the procurement policy will apply to the Commission, its contractors and subcontractors.

E. Procurement policy provisions will be followed in procurements involving use of federal grant funds. However, in procurements involving uses of state funds, Commission compliance with procurement policy provisions is discretionary.

F. Standard contract provisions will be incorporated into relevant Commission contracts. However, in any contract, the Commission may agree to change, add, or delete contract provisions to the extent that such changes, additions, or deletions are not inconsistent with federal and state law.

II. DEFINITIONS AND MISCELLANEOUS POLICY PROVISION

A. **Audit Trail.** An audit trail is a series of records that makes it possible for an auditor to easily trace transactions. All procurement and contract administration actions should be documented to establish an audit trail.

B. **Commission.** The Commission is the North Dakota Public Service Commission.

C. **Construction Maintenance.** Repair of previously reclaimed abandoned mine land sites.

D. **Contract.** A contract is a written agreement between the Commission and the contractor setting forth obligations, including: performance of work, furnishing of labor and materials, and the basis of payment. A Commission contract usually includes specified standard provisions and any other provisions and documents designated as part of the contract.

E. **Contract Administration.** Contract administration is the process of monitoring a contractor's performance under a contract, insuring that all the terms and provisions of the contract are satisfied, and paying contract

Invoices. The contract administration function is jointly assigned to the procurement officer, the project manager, and contract officer.

- F. Contract Execution.** A contractor may not begin work until a contract has been executed. The Commissioners or a designated representative, as provided for in Policy No. 5-01-93(0), are the only persons authorized to execute contracts to which the Commission is a party.
- G. Contractor.** The contractor is the individual, partnership, firm, corporation, company, or any acceptable combination or joint venture contracting with the Commission for performance of prescribed work.
- H. Contractor Selection.** Contractor selection is the process of choosing a contractor from all those that submitted a bid or proposal to provide goods or services sought by the Commission. Among factors which may be considered when selecting a contractor are:
1. Whether the offeror's bid, proposal, or statement is responsive to the invitation to bid or request for proposal or standards for unsolicited proposals.
 2. Whether the offeror has the technical ability and resources to perform in the manner described in its bid or proposal.
 3. Whether the offeror has the financial ability and resources to complete the project.
 4. Whether the contractor is responsible as shown by its integrity, compliance with public policy, prior contracts with the Commission, and record of past performance with the State of North Dakota.
 5. For construction bids, whether the bidder is the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.
 6. The Commission reserves the right to waive minor irregularities in a bid or proposal and the right to reject any and all bids. The Commission has the authority to require literal and exact compliance with all requirements specified in its request for bids or proposals. These factors will be

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

- I. **Emergency.** Any catastrophic event to property or person that requires an immediate remedy.
- J. **Final Report.** Following project close-out and final payment, the project manager will submit, to the procurement office and the contract officer, a final report evaluating the quality of the contractor's performance, including: adequacy of communication, timeliness, reliability, attention to detail, interest in accomplishing quality project work, and interest in giving advice to produce the best value for the state. The final report may serve as a basis for subsequent procurement analysis. The procurement officer or the procurement officer's designee will present a report to the Commission when conditions may warrant removal of a contractor from a Commission Bidder List or Request For Proposal List.
- K. **Invitation for Bid Request for Proposal.** An invitation for bid (IFB) or a request for proposal (RFP) is a solicitation issued by the Commission with the intent of eventually procuring a contractor to perform a particular service or deliver a particular product. The IFB or RFP must contain the following: the scope of work required or product specifications; the date, time, and place of bid opening or proposal closing; and evaluation factors to be used. Bids and proposals will be solicited in a manner that is consistent with Commission policy and state and federal law.
- L. **Preference.** Preference will be given to a resident North Dakota bidder when accepting bids for the provision of professional services, including research and consulting services, goods, merchandise, supplies, equipment, structures, and reclamation services. Nonresident bidders will be given preference equal to the preference given or required by the state of the nonresident bidder, seller, or contractor (N.D.C.C. 44-08-01).
- M. **Procurement.** Procurement is the purchase of goods or services. There are four methods of procurement for goods or services: small purchase

procedures, competitive sealed bids (formal advertising), competitive negotiation, and non-competitive negotiation (sole-source procurement).

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

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

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

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

III. PSC EMPLOYEE AND PUBLIC CONTRACTOR CODE OF CONDUCT

A. General Rule

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

B. Gifts

1. Bidders and Commission contractors and subcontractors and their employees or agents will not directly or indirectly offer nor will Commissioners or employees directly or indirectly accept or solicit any gift, gratuity, entertainment, favor, loan, or any other thing of monetary value which might reasonably be interpreted as intended to secure a contract or favorable treatment in award, amendment, or administration of a contract.
2. During an audit or inspection, Commissioners, employees, or agents will neither solicit nor accept gratuities, food, favors, or anything of monetary value from a bidder, contractor, or party to a sub agreement.
3. As a general rule, project managers, inspectors, and any other employees of the Commission should refrain from engaging in after-hour socialization with contractors and their employees during the contract performance period.
4. No political contribution may be offered, solicited, or accepted for the purpose of affecting the award, amendment, or administration of a contract.

IV. Procurement Procedural Requirements

A. Proposed Procurement Action Review

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

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

B. Procurement Procedure

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

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

C. Method of Procurement

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

1. **Small Purchase Procedures.** Any procurement estimated by the procurement officer or the procurement officer's designee not to exceed ten thousand dollars (\$10,000) and not subject to Chapter 54-44.7, N.D.C.C., or the authority of the Office of Management and Budget may be made with small purchase procedures. Small purchase may be made when the item or service is available from more than one source, there is no public exigency or emergency, and time and expense does not justify competitive bidding. Small purchase procedure will include contact with an adequate number but not fewer than three qualified firms selected from the bidders list. The procurement officer or the procurement officer's designee will select the qualified firms. The selection of the qualified firms will be based on what the procurement officer or the procurement officer's designee knows about the experience, past performance, integrity, compliance with public policy, and financial and technical resources of the firm. Qualified firms will be selected fairly without unreasonable restrictions or procedures calculated to restrict competition. The procurement officer or the procurement officer's designee will write each firm to explain the supplies or services needed and request an offer from each firm for described supplies or services. After a reasonable time during which all potential offers have been made, the procurement officer or the procurement officer's designee will recommend to the Commission which offer to accept. Acceptance will be based on what the Commission believes will be the best use of public funds.

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

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

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

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

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

- 2) The invitation for bids, including specifications and pertinent attachments, will clearly define the items or services needed and state:
- a) When and where the plans, drawings, and specifications may be examined; and how copies may be obtained.
 - b) The place where and the time when the bids will be publicly opened.
 - c) That each bid will be accompanied by a bidder's bond, executed by a surety company authorized to do business in this state, a certified check or a cashier's check in the sum equal to five (5) percent of the bid. A certified check or a cashier's check must be drawn on the Bank of North Dakota or a federally insured, solvent bank. If, within ten days after notice of an award, the successful bidder should fail to execute a contract with the owner, then the surety will pay unto the owner for the use and benefit of the owner five (5) percent of the bid or bids on the contract on which there is a default or the certified check or cashier's check of the bidder will be forfeited to the owner. If the principal's bid is accepted and the contract is awarded, the principal, within 10 days after notice of award, will execute a contract consistent with the terms of the bid and performance and payment bonds as specified by the Commission.
 - d) That all public contractor bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
 - e) That the right of the Commission to reject any and all bids is reserved.
- 3) That inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.

- 4) Copies of all plans, drawings, and specifications will be filed in the Commission Abandoned Mine Lands' office. Upon written request, copies of all plans, drawings, and specifications will be mailed at cost to the office of any firm.
- 5) Bids will be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and other relevant information as may be necessary, together with the name of each bidder, will be recorded; the record and each bid will be open to public inspection.
- 6) Bids will be unconditionally accepted without alteration or correction except as authorized in this policy. Bids will be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award will be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids will set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.
- 7) Withdrawal of erroneous bids before award, or cancellation of awards or contracts based on such bid mistakes, will be permitted. After bid opening no changes in bid prices or other provisions of bids will be permitted. Except as otherwise provided, all decisions to permit the withdrawal of bids, or to cancel awards or contracts based on bid mistakes, will be supported by a written determination made by the procurement officer or procurement officer's designee.
- 8) Upon Commission approval, Commission will award a firm fixed or fixed unit price contract with reasonable promptness by

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

3. **Competitive Bidding - Construction Maintenance.** Competitive bids for construction maintenance on abandoned coal mine reclamation sites will be solicited by mail, FAX or through the Internet and a firm-fixed-price contract (lump sum or unit price) will be awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.
 - a. A complete and realistic specification or purchase description will be available.
 - b. Three or more responsible suppliers must be willing and able to compete effectively for the Commission's business.
 - c. The procurement lends itself to a firm fixed or fixed unit price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.
 - d. At a minimum, five (5) days prior to the date set to receive bids, bids will be solicited from an adequate number of known suppliers or firms. This solicitation will be in written form and provided to prospective bidders.

- e. All bidders must be licensed for the highest amount of their bids as provided by Section 43-07-05 of the North Dakota Century Code.
 - f. The right of the Commission personnel to reject any and all bids is reserved.
 - g. The inadvertent Commission failure to meet all procurement policy requirements will not invalidate letting.
 - h. Contract award, based on the lowest responsive bid, may be made by Commission personnel or through formal Commission action.
 - i. Provisions of this section do not apply to abandoned mine land emergencies.
4. **Competitive Negotiation.** In competitive negotiation, qualification statements or proposals are requested from a number of sources and the request is publicized. Negotiations may be conducted with sources submitting statements or proposals. Either a fixed price or cost reimbursable not-to-exceed contract will be awarded. Under some circumstances, competitive negotiation may be required. Under other circumstances, competitive negotiation is discretionary and may be used if conditions are not appropriate for the use of formal advertising or small purchase.
- a. When purchasing architect, engineering, or land surveying, research or professional services, the Commission will follow the competitive negotiation procedures specified in Chapter 54-44.7, N.D.C.C. The Commission may use the procedures described in Chapter 54-44.7, N.D.C.C., to procure other professional services including lawyers, accountants, economists, and real estate appraisers. When using the procedures described in Chapter 54.44.7, N.D.C.C., the following apply:
 - 1) Notice of invitation may be published in newspapers of general circulation and in trade or professional publications of general circulation calculated to reach the type of firms needed. Adequate public notice includes mailing of the invitation to a

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

- 2) The invitation will state the relative importance of evaluation criteria used to select and rank the most qualified firms. No other factors or criteria will be used in the evaluation.
- b. An alternative to the procedures prescribed by Chapter 54-44.7 may be used to procure services other than architect's, engineer's, and surveyor's professional services, e.g., lawyers, accountants, and real estate appraisers.
 - 1) Proposals will be solicited through a request for proposal (RFP).

The request for proposal will state:

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

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- a) Project title
 - b) Scope of work
 - c) Description of professional services required
 - d) Submittal of a flat rate or line item price quote
 - e) Resume of personnel providing the services
 - f) Documentation of related work experiences
 - g) Scheduled performance period
 - h) Rating system used in evaluating proposals
 - i) Provide at least three client references
 - j) Conflict of interest disclaimer
- 4) Proposals will be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals will be prepared and will be open for public inspection after contract award.
- 5) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors will be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there will be no disclosure of information derived from proposals submitted by competing offerors.
- 6) Upon recommendation by the procurement officer or the procurement officer's designee, award will be made to the responsible offeror whose proposal is determined by the Commission to be the most advantageous to the state taking into consideration price and the evaluation factors set forth in the request proposal. No other factors or criteria will be used in the

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evaluation. The contract file will contain the basis on which the award is made and contract negotiation minutes.

5. Noncompetitive Negotiation (Sole-Source Procurement)

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

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

- a. The proposed item or service is available only from a single source.
- b. The person or organization has the unique product or the special skills, knowledge, abilities to provide the required services (at the exclusion of others) and is considered the preeminent deliverer of that product or service at the time of selection.
- c. Emergency or severe time constraints preclude issuing a formal Request for Proposals.
- d. The service is available within the existing structure of state or local government. The following steps should be followed to secure a sole-source contract:
 - 1) Draft a written justification for sole-source procurement and present it to the Commission or the designated authority for approval.
 - 2) If approved, contact the proposed provider and proceed to negotiate the contract. Minutes of the negotiation session will be taken and the prepared minutes sent to the other party for concurrence.

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

6. Emergency

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

- a. Right-of-Entry documentation will be obtained from the landowner, or at a minimum, permission will be received from the landowner to begin the emergency work, and a completed Right-of-Entry form will be obtained when possible.
- b. An OSM Emergency Investigation Report will be completed prior to beginning work if time permits, and then faxed to OSM. A letter of eligibility is required to be completed by the Commission Commerce Counsel.
- c. Attempt to receive bids from at least two contractors. Interested contractors will receive a faxed copy of the emergency bid sheet documents, detailing plans and specifications of the proposed work, or contractors will be handed the bid documents to be completed on-site if a pre-bid meeting is scheduled.
- d. A contractor that is currently under contract to the PSC may be utilized, providing they offer a bid that is considered reasonable by a PSC Project Manager. Commission personnel have the authority to reject any and all bids.
- e. An emergency contract will be issued (SFN 19716 Rev. 05-2000) to the contractor selected for emergency reclamation work.
- f. The successful bidder will provide a current North Dakota Contractor's license within the classification value of the project, and

be covered by a liability insurance policy of no less than \$500,000 per person and \$1,000,000 per occurrence.

D. Unsolicited Proposal.

1. General. An unsolicited proposal is a proposal submitted by a potential supplier which is not solicited by the Commission. The unsolicited proposal is an effective tool by which unique or innovative methods or approaches developed outside the Commission can be made available to the Commission. The offeror who submits an unsolicited proposal hopes the Commission will enter into a sole source contract with the offeror for further development of the innovative idea contained in the unsolicited proposal. If the Commission finds an offer sufficiently innovative, it will not become the subject of a competitive procurement.
2. Required Information.
 - a. Introduction. The introduction should identify the general subject matter of the proposal. It should explain the need for the work, study, or research. The need should be expressed in terms of past work or research and the manner in which the offeror believes that the proposed work study or research will support Commission activities or functions.
 - b. Objectives. The objectives must be stated as specifically as possible. The objectives are the foundation of the project and the basis of all work, study, or research plans. They may be described as hypotheses to be tested. Objectives or hypotheses may be changed, but only after a demonstration that the change is warranted. They must describe the direction of the work, study, or research to those not technically familiar as well as to those who are. If the project is contemplated to continue for more than one year, the proposal should state long-term objectives as well as short-term objectives. The stated short-term objectives, i.e., those to be accomplished within one year, should be presented in such a

manner as to show their relevance in meeting the long-term goals or objectives.

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

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

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

- c. Work, Study, or Research Plan. The work, study, or research plan should include statements regarding: methodology, a work schedule, and reports.
 - 1) Methodology. The statement of project methodology should explain how the objectives will be met or how hypotheses will be tested. The statement should specify a work plan or study or research design that describes the data to be collected and the methods to be used in collecting and analyzing the data. All elements of the methodology statement should be shown to be relevant in meeting the stated objectives or testing the stated hypotheses.
 - 2) Schedule. The schedule should be a statement that explains when each natural element (e.g. test, procedure, method, or other associated task) of the proposed methodology will start and finish. The schedule should indicate the time to be allocated for named individuals and institutions to accomplish defined tasks.
 - 3) Reports. The proposal should state when reports will be delivered to the Commission. The proposal should also state what the reports will cover. All reports should be written in a form acceptable to the relevant professional or scientific

community and the Commission. Each final report should stand alone as a finished product which meets the stated objectives of the proposal.

- d. **Personnel and Management.** All project staff, including the principal investigator, should be identified, their relevant qualifications described, and vitae attached. The skills and experience appropriate to the proposal should be stated. The project responsibilities of all staff should be stated.
- e. **Related Experience.** Proposals should include a brief description of previous experience relevant to the proposed project, including the identification of specific projects undertaken and completed and a bibliography of relevant resulting publications.
- f. **Facilities and Equipment.** A description of physical facilities and relevant, available project equipment to be used should be included.
- g. **Other Work.** The proposal should include a projection of other foreseeable workload for the period of the proposed work.
- h. **Budget.** The proposal must include a budget. The budget is a representation of the project expressed in dollars of estimated expenses. At minimum, where federal grant funds are involved, the budget must be submitted in a form that meets the standards of the federal grantor agency. The budgeted amounts must be realistic and well justified. Cost estimates must be in sufficient detail to enable the Commission to conduct an evaluation. Unless self-explanatory, the proposer should submit a separate explanation of how budget items were estimated. The budget must correspond to the proposer's narrative materials.
- i. **Contract Details.** The proposer should set forth the type of contract anticipated and the period the proposal is available for Commission acceptance. Clear statements should be included regarding the proposed duration of the effort together with any statements regarding cost sharing.

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3. Commission Review and Evaluation
 - a. Timely Proposal Submission. Unsolicited proposals should be submitted sufficiently in advance of the time work is to start.
 - b. Sufficiency Review. After receiving an unsolicited proposal, the Commission Executive Secretary and designated procurement officer or the procurement officer's designee will expeditiously review the proposal to see if it contains sufficient information to enable a meaningful evaluation. If the unsolicited proposal meets this criterion, it may be evaluated in detail.
 - c. Detailed Evaluation. For detailed evaluation the proposal will be circulated among and evaluated by Commission personnel and if necessary others. In the circulation process, a cover memorandum will be attached to the proposal clearly identifying it as unsolicited. This identification is to insure that a private, i.e. non-governmental proposal is treated as proprietary and unique to the proposer. The purpose of the evaluation is to identify whether the proposal in fact contains unique or innovative ideas or concepts which have not independently been conceived by the Commission or other government agencies. Additionally, the potential contribution to the Commission's function will be evaluated together with the capabilities and qualifications of the potential contractor.
4. Proposed Procurement Action Review. If after the detailed evaluation, a favorable finding is issued by the relevant designated procurement officer, the Commission Executive Secretary and designated procurement officer or the procurement officer's designee in consultation with the Commission will discuss and determine in written memorandum form if:
 - a. Funds are available;
 - b. The purchase must be processed by the Office of Management and Budget;

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- c. The purchase may be avoided because it is unnecessary or duplicative;
 - d. The substance of the proposal is available to the Commission from another source without restriction;
 - e. The proposal closely resembles a pending competitive solicitation or is otherwise not sufficiently unique to justify acceptance;
 - f. The purchase should be broken out to obtain a more economical purchase;
 - g. A lease versus a purchase or hourly rate versus fixed fee would be most economical;
 - h. Greater economy and efficiency would be fostered by entering into state cooperative agreements with other state agencies for procurements or use of common goods and services;
 - i. There are compelling reasons for non-competitive procurement; and
 - j. North Dakota law sets purchase procedures.
5. Method of Procurement. If in addition to receiving a favorable detailed evaluation the unsolicited proposal passes the proposed procurement action review, the Commission may direct the relevant procurement officer or the procurement officer's designee to conduct a negotiated non-competitive procurement.
6. Limited Commission Use of Data. Restrictive statements inserted by the private or non-governmental proposer that restrict the Commission's use of the submitted data to evaluation of the unsolicited proposal will be heeded. Even when the Commission receives an unsolicited proposal which does not contain such restrictive statements, if the Commission determines that detailed evaluation by personnel outside of state government is required, the Commission will obtain written permission from the prospective private or non-governmental contractor prior to release of the proposal for evaluation. When an unsolicited proposal is submitted to a non-governmental evaluator, the Commission will secure

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a written agreement from the evaluator not to disclose the information contained in the proposal.

E. Procurement Officer.

1. **Designation.** The procurement officer or the procurement officer's designee will be designated by motion of the Commission. Ordinarily, the procurement officer or the procurement officer's designee for a project may be the Commission division director of the division most closely connected with the project goals.
2. **Duties.** The procurement officer or the procurement officer's designee will:
 - a. Administer Commission procurement policy.
 - b. Cooperate with the Commission Executive Secretary and the Office of Management and Budget to ensure orderly procurement of goods and services.
 - c. With the approval of the Commission, appoint, when necessary, a sufficient number of evaluation committee members from Commission staff and other state agencies.
 - d. Establish and maintain programs for inspection, testing and acceptance of supplies, services, and construction.
 - e. Make written evaluation committee and other reports to the Commission recommending award.
 - f. After Commission approval, send a notification of Commission procurement decisions to all interested persons.
3. **Powers.** In addition to other powers prescribed, the procurement officer or the procurement officer's designee will have the power to:
 - a. Adopt operational procedures consistent with Commission procurement policy and sound procurement practices on such matters including but not limited to bid or proposal solicitation, evaluation, and contract negotiation, award, administration, and enforcement; and

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- b. Designate a project manager from within the Commission. If none is designated, the procurement officer or the procurement officer's designee may also be the project manager.

F. Executive Secretary.

1. The Commission Executive Secretary will supervise Commission procurement officers or the procurement officer's designees and cooperate with the Office of Management and Budget to establish and maintain Commission procurement in compliance with Commission policy and state law.
2. The Abandoned Mine Lands Division procurement officer or the procurement officer's designee may maintain bidder lists. The lists may be used as a basis for making future solicitations. A mailing list need not be limited to the firms on a bidder list and a mailing list need not include all firms on the bidder list. The procurement officer or the procurement officer's designee, may adopt procedures on bidder list use and bidder removal or suspension from bidder lists.

G. Evaluation Committee.

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

H. Notice and Appeal.

1. Those participating in a small purchase, competitive sealed bid, or competitive negotiation will receive by mail notice of the Commission's

intent to award or notice of the Commission's selection and ranking of firms. The notice will state:

- a. The interested person has the right to appeal the Commission's decision for cause;
 - b. The right must be exercised within a specified time;
 - c. The right must be exercised in writing; and
 - d. The reasons for appeal must be stated.
2. If there is an appeal a formal hearing will be scheduled and interested parties notified as the Commission deems just and reasonable.

I. Project Manager.

1. The key person in the state-contractor relationship is the state's project manager. This individual will control and monitor the contractor's activities and provide the proper level of leadership and coordination which will satisfy the Commission's obligations under the contract and which will be conducive to a healthy business relationship.
2. Since a professional service contract may contain only a limited description of the overall scope of the project of service to be performed by the contractor, the project manager must be able to distinguish between specific provisions in the contract and that which he desires from a professional point of view.
3. The project manager does not have unilateral authority to change the scope of work or specification under a contract. Should circumstances arise where the project manager deems immediate changes, suspensions or delays are necessary or prudent, the Commission Executive Secretary and the procurement officer or the procurement officer's designee will be notified. The project manager will write detailed contemporaneous memoranda regarding the change, suspension or delay, and report to the full Commission at the earliest opportunity. A change, suspension, or delay will not take effect without formal Commission action unless the Commission has otherwise formally authorized the project manager to effect changes, suspension, or delays.

Deanna Baller
Operator's Signature

10/2/03
Date

4. Among the many responsibilities assigned by the procurement officer or the procurement officer's designee to the project manager, the following tasks should be given serious consideration:
- a. The project manager should initiate a contract review with the contractor's team leader and prime assistants. This conference should include a detailed examination of the contract documents, project time schedules, and the establishment of procedures for submission of contract progress reports. Required interviews with Commission staff should be scheduled through the project manager to minimize disruption of the Commission operation.
 - b. The project manager should require frequent and periodic conferences with the contractor and staff, even though the quality and performance of the contractor has been excellent. Such conferences should be divided into two parts. The first part should address past performance and the second should address the future activities of the contractor. Matters of substance should be fully documented.
 - c. The project manager must recognize that indecision and procrastination will be two major problems in working with a professional service contractor. Time is money to a consultant, and he is prepared to demand payment for downtime and delays if the fault lies with the agency regardless of the contractual stipulations related to price. The project manager must comprehend that time does not normally cure or solve technical problems and may very well compound them beyond repair; timely decisions are crucial to the success of the project.
 - d. The project manager must establish himself as a leader in the state-contractor relationship. Experience has shown that where a vacuum exists in state leadership, professional service contractors tend to move forward and fill the void in order to complete and deliver the

end products. Consequently, quality control may not be maintained in the process.

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

The project manager should establish an internal accounting system for the contractor's invoices and supporting documentation and correspondence. This system is necessary if the contract is based upon a not-to-exceed price or contains any variables which may affect payment. A clear, precise audit trail of all activities related to payment of funds and acceptances of deliverables must be maintained and accessible to the contract officer at all times.

J. The Commission

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

K. Contract Officer

1. The procurement officer or the procurement officer's designee insures that terms of the contract are met. The procurement officer or the procurement officer's designee will:
 - a. Insure that all laws, executive orders, clearances, and approvals are met and that sufficient funds are available;
 - b. Insure that contractors receive impartial, fair, and equitable treatment.

V. BONDS

A. Bid Security

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

B. Contract Performance and Payment Bonds.

1. When a construction contract is awarded, the following bonds or security will be delivered to the Commission and will become binding on the parties upon execution of the contract:
 - a. A performance bond satisfactory to the Commission, executed by a surety company authorized to do business in this state in an amount equal to 100 percent of the price specified in the contract; and
 - b. A payment bond satisfactory to the Commission, executed by a surety company authorized to do business in this state and by the U.S. Treasury Department, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond will be in an amount equal to 100 percent of the price specified in the contract.

2. Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, for which a payment bond is furnished under this section and who has not been paid in full therefore before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, will have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractor furnishing said payment bond, will have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice will be personally served or served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.
3. Every suit instituted upon a payment bond will be brought in a North Dakota court, but no suit will be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

C. Bond Forms and Copies

1. The Commission will supply the form of the bonds required.
2. Any person may request and obtain from the Commission a certified copy of a bond upon payment of the cost of reproduction of the bond

Deanna Baller
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10/2/03
Date

and postage, if any. A certified copy of a bond will be prima facie evidence of the contents, execution and delivery of the original.

VI. CONTRACT PRICING

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

VII. PROCUREMENT RECORDS

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

VIII. APPENDIX

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

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APPENDIX A

Evaluation Criteria for Request for Proposals/Competitive Negotiations

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EXAMPLE EXAMPLE EXAMPLE EXAMPLE EXAMPLE
PUBLIC SERVICE COMMISSION
EVALUATION CRITERIA
FOR
REQUEST FOR PROPOSALS/COMPETITIVE NEGOTIATIONS
CASE NO. PU-314-92-1060

The following point system will be used in evaluating the proposals submitted. The individual criterion and point system was established in the written request for proposals. Each rater will use this form to score each proposal received and accepted. The total points of all raters will be added together and divided by the number of raters to establish the final score. All rating sheets will be kept as a part of the contract file.

Quality of written proposal - 0 to 5
Comments, if any?

_____ Points awarded

Capability including personnel qualifications, specialized experience, training, education, and performance record - 0 to 20
Comments, if any?

_____ Points awarded

Understanding of the project - 0 to 20
Comments, if any?

_____ Points awarded

Proposed work approach - 0 to 10
Comments, if any?

_____ Points awarded

Price

A. Lowest bid to 120%	45
B. 121 % to 130% =	44
C. 131 % to 140% =	42
D. 141 % to 150% =	38
E. 151 % to 160% =	32
F. 161 % to 170%	24
G. 171% to 180%	14
H. 181 % to 190%	2
I. 191 % and over	0

_____ Points awarded

TOTAL POINTS AWARDED _____

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APPENDIX B

Sample Scoring System for Competitive Negotiation Type Contracts

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**SAMPLE
SCORING SYSTEM
FOR COMPETITIVE NEGOTIATION TYPE CONTRACTS**

A. Lowest bid to 120% =	45	\$12,000 TO \$14,400
B. 121 % to 130% =	44	\$14,401 TO \$15,600
C. 131 % to 140% =	42	\$15,601 TO \$16,800
D. 141% to 150% =	38	\$16,801 TO \$18,000
E. 151 % to 160%	32	\$18,001 TO \$19,200
F. 161 % to 170%	24	\$19,201 TO \$20,400
G. 171% TO 180% =	14	\$20,401 TO \$21,600
H. 181 % TO 190% =	2	\$21,601 TO \$22,800
I. 191 % & OVER =	0	

This scoring sheet can be altered in terms of percentages and /or dollar amounts as long as it is done prior to sending out the invitation for proposals to a reasonable number of qualified applicants. All qualified responders to the request for proposal shall be rated using the same scoring criterion.

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APPENDIX C

Procedures for Competitive Contract Negotiations

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PUBLIC SERVICE COMMISSION
PROCEDURES FOR
COMPETITIVE CONTRACT NEGOTIATIONS

Effective date: April 24, 2001

"Competitive Negotiation" is a procurement process in which an agency selects a reasonable number of qualified Contractors to submit proposal(s) for deliverable goods or services.

The following steps are to be followed when utilizing this method of procurement;

1. Secure written approval from the Commission or the designated official for this method of procurement.
2. Develop a clear and accurate description of work to be performed.
3. Prepare a formal invitation to firms for their submission of a proposal.
The invitation should include the following;
 - a. Project title
 - b. Scope of work
 - c. Description of professional services required
 - d. Submittal of a flat rate or line item price quote
 - e. Resume of personnel providing the services
 - f. Documentation of related work experiences
 - g. Scheduled performance period
 - h. Rating system used in evaluating proposals
 - i. Provide at least three client references
 - j. Commission authority to reject any and all proposals
 - k. Conflict of interest disclaimer
4. The appropriate PSC Division shall establish a selection committee to review and rate the proposals utilizing the rating criteria identified in the solicitation notice.
5. The Commission approved policy shall be followed in the selection and award of the contract.

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APPENDIX D

Sample Contract Negotiation Minutes

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SAMPLE SAMPLE SAMPLE SAMPLE SAMPLE SAMPLE

**PUBLIC SERVICE COMMISSION
CONTRACT NEGOTIATION MINUTES**

October 2, 2001

Time: 3:40 p.m.

Case: PU 314-92-1060 U.S. West.

Members Present: John Kapsner, Bill Blnek, Pat Fahn, and Ilona Jeffcoat Sacco

The meeting began by discussing the time frame of this Contract. The consensus was that the contract would begin on October 5, 1992 subject to the approval of the Commission. Because of the magnitude of the case it would be very difficult to estimate when the case would be concluded. The estimated length would be up to one year subject to negotiation for an extension if the case cannot be settled within that time frame.

The estimated cost of the work was then discussed. It was agreed that Mr. Kapsner would charge a flat rate of \$90.00 hr. which includes all clerical fees of his firm. It was agreed that Mr. Kapsner would charge 50% of the \$90.00 per hour for all time expended before 8:00 a.m. and after 5:00 p.m. for hours worked on the case while engaged in travel. It was also agreed that this would be a cost reimbursable contract and that all expenses charged would be backed up by records available to the Commission for audit.

The estimated budget line items for expenses are as follows:

1. \$90.00 per hour times 350 hours for personnel costs \$31,500.
2. Documented reimbursable expenses at the estimated costs of:
 - a. Travel. \$2,500.
 - b. Hotel/Motel. 400.
 - c. Meals. 250.
 - d. Postage. 50.
 - e. Print/Reproduction 200.
 - f. Supplies. -0-
 - g. Telephone. 150.
 - h. Other. 1,800.

*Established at state rates based on up to four out of state trips.

** Based on court reporter, transcripts, and other related costs for 5 depositions at 3 hours each.

By signature, both parties agree that this is a true and accurate representation of the negotiation meeting.

For the PSC _____

For the Contractor _____

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APPENDIX E

Procedures for Sole Source Procurement

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**PUBLIC SERVICE COMMISSION
PROCEDURES FOR
SOLE SOURCE PROCUREMENT**

A sound procurement system should provide for full and open competition that is both fair and equitable to all potential bidders.

However, there are times when circumstances are such that the desired action cannot be accomplished through the lengthy process of solicitation of bids. Under those unique conditions sole-source contracting may be warranted.

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

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

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

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

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

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APPENDIX F

Checklist for Work Statement (Specific Provisions) Contracts and the Requests for Proposals

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**CHECKLIST FOR
WORK STATEMENT (SPECIFIC PROVISIONS)
CONTRACTS AND REQUESTS FOR PROPOSALS**

The following checklist is designed to aid in the development of a good statement of work for the request for proposal or the specific provisions in any contract. This is the most important and vital part of a Request for Proposal or a Contract.

1. Does the work statement contain only essential requirements?
2. Are the specific goods or services to be delivered stated in clear unambiguous terms?
3. Are directions readily distinguishable from general information?
4. If there are any limitations or constraints on the contractor, are they identified in the statement?
5. What standards will be used to measure performance? Are they objective?
6. Are time-frames for deliverables identified? Are amounts identified?
7. Are reporting requirements (technical and progress/compliance) clear? Have timing, content, and level of detail been specified?
8. Is payment to be periodic or based upon final completion? If periodic payments, at what point (time, percent of completion, phases of completion, weighted based on importance or level of difficulty, amount of product delivered)?
9. Does the statement clearly indicate that the administrator (owner) will make the determination of what is acceptable quality of the goods or services?

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12/2/03
Date

Testimony
Engrossed HB 1180

Presented by: Linda Belisle, Director
OMB, Central Services Division

Before: Government and Veterans Affairs Committee
Karen Krebsbach, Chair

Date: March 6, 2003

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

Background: The Office of the State Auditor conducted a performance audit of contracts for services early in 2000. Some of the recommendations in the report that was issued in March of 2000 were that OMB develop policies related to the procurement of services and ensure that state agencies receive proper training. The Auditor's Office also recommended that OMB introduce legislation to allow OMB to establish these policies. A bill was introduced during the 2001 Legislative Session. Section 2 of the bill removed the exemption for agencies in the procurement of services.

Agencies vehemently opposed that section of the bill. As a result, the bill was amended to add a legislative intent. It reads as follows:

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

The State Procurement Office surveyed all state agencies and institutions and asked them to provide a copy of their existing guidelines for the procurement of services and also asked them to identify one contact person to work with the Procurement Office in developing the standards and guidelines. The State Procurement Office then contracted with the National Association of State Procurement Officials (NASPO) States Helping States Program to review existing agency guidelines and help develop a manual of standards and guidelines for the procurement of services based on best practices in public procurement.

The State Procurement Office met with agencies in October to discuss the development of these guidelines. Agencies were provided a copy of the draft guidelines. We met with the agencies again in November to discuss the guidelines as they had been written at that point. Concerns expressed at this meeting were addressed and incorporated into the manual. The

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revised manual was reviewed by our legal counsel and sent to the agencies on January 3, 2003.

The guidelines reflect best practice and are designed to serve as a desktop reference for all persons involved with the procurement of services. They were not intended to restrict the effectiveness of the individuals involved in procurement but to provide for legal, effective, consistent, and complete consideration of the procurement process while ensuring fair and professional treatment of vendors desiring to do business with the State.

Now I would like to talk about HB 1180. Although I've listed every change in my prepared testimony, I will only address the major ones in each section.

HB 1180

Section 1

- Updates the terminology from supplies and equipment to commodities and services. These terms are more descriptive of how business is conducted today. This is done throughout the bill.
- Adds definitions for commodities, procurement officer, professional services, purchasing agency, and services.

Section 2

- Continues the exemption for professional services but requires agencies to report each professional contract they enter into to OMB, describing the nature of the service procured, the process used, whether or not a competitive bidding or proposal process was used, and an explanation as to why neither process was used within 30 days of securing the professional service.
 - This section of the bill was amended by the House. The original version continued the exemption for professional services as does this bill, but it required agencies to follow the standards and guidelines established by OMB—the standards and guidelines that were distributed January 3, 2003. This bill continues the exemption but requires agencies to report their contracts for professional services to OMB. Our concerns with the House amendment are that (1) there is no minimum amount as to what needs to be reported. Reporting every service contract regardless of the amount may create an administrative burden for all agencies. (2) There is no directive as to what OMB is to do with the information. (3) We are concerned that if agencies don't report a professional service contract within 30 days, they are in violation of law. We would suggest that a reporting time period be specified such as monthly or quarterly.
- Updates terminology from items to commodities.
- Changes the word procurement card to purchasing card to be consistent with terminology in this section.
- Moves language from 54-44.4-06 to this section so it is more appropriately placed. (from Page 6, lines 6 through 10.)

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Section 3

- Requires contract awards be made through a competitive bidding process to the lowest responsible bidder.
- Allows for a competitive proposal process.
- Allows the procurement officer of an agency to reject bids or negotiate for a lower price with a successful bidder.
- Allows for competitive sealed bids to become subject to open records laws upon opening.
- Extends allowances for when competition may be waived or limited and when negotiations may be used to services, not just commodities.
- Rewrites #d, Line 12 on Page 5 for clarification.
- Updates goods to commodities or services.

Section 4

- Updates item to commodity or service.
- Removes language regarding delegation of authority to more appropriate section. (to Page 3, lines 28 through 31.)
- Updates supplies and equipment to commodities or services.
- Allows for a multistep sealed bidding process.

Section 5

- Allows for a competitive sealed proposal process.
- Exempts proposals from the open records laws until an award is made.

Section 6

- Adds a section regarding small purchases.


Section 7

- Establishes a protest and appeal process.

Section 8

- Requires OMB to establish and maintain a current list of persons who desire to do business with the State.
- Requires OMB and agencies to use that list when issuing solicitations over the amount established for small purchases or when otherwise waived.
- Removes unnecessary language and clarifies existing language regarding the vendor application.
- Allows for the use of electronic signature on the vendor application.
- Adds language which allows agencies to accept bids from vendors who are not on the approved vendor list if the agency determines it is in the best interest of the state to do so but requires that the successful bidder become approved within a specified period of time. It also allows the agency to waive the approval requirement if it is determined that registration with the Secretary of State and the appointment of an agent for service of process in this state are not required.
- In the event of a tie, the approved vendor must be given preference.

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Members of the committee, it is not OMB's intention to attempt to micromanage agencies by doing all of their buying, including contracting for their services. With a staff of 5 in the State Procurement Office, that just would not be possible to do. However, it is our intention to continue the development of the guidelines that provide for legal, effective, consistent, and complete consideration of the procurement process that reflect best and current practice in the profession of public procurement, develop and implement a comprehensive training program, and then delegate back to the agencies the procurement of commodities and services. These changes will allow state agencies and institutions to purchase more goods and services directly, thereby reducing the time required to obtain needed goods and services and reducing the administrative costs of purchasing. The State Procurement Office can then focus on providing value-added services to all agencies in the areas of training, consulting, and establishing multi-agency term contracts.

An effective central procurement program reduces the cost of government by eliminating inconsistent practices and procedures that confuse vendors and discourage them from competing. It inspires public confidence in government because it places someone in charge of the management of the system through which the State spends a significant amount of its budget. It promotes honesty and integrity throughout governmental operations by providing, among other things, support for the procurement officials in agencies with delegated authority. It is, indeed, a function that the State cannot afford to undervalue or compromise.

At this time, I would like to submit amendments to the Engrossed HB 1180. They are listed on the attachment to my testimony. After working with the House on their amendments, we discovered there is still some cleanup that needs to be done in this bill. The Attorney General's office and the Secretary of State's Office concur with these changes.

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

Donna Hall
Operator's Signature

10/2/03
Date

John Dwyer

3/5/03

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1180

Page 3, after line 27, insert:

"9. All contracts and all other instruments executed by the industrial commission
pursuant to chapter 54-17.5"

Renumber accordingly.

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Dwenna Hallmark
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10/2/03
Date

Todd Krandan

CHAPTER 54-44.7
ARCHITECT, ENGINEER, AND LAND SURVEYING SERVICES

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, 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.

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.

54-44.7-03. Procurement procedures.

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 that person's qualified, responsible designee shall sit as a member of the agency selection committee for the purpose of coordinating and accounting for the committee's work.
2. The agency selection committee is responsible for all of the following:
 - a. Developing a description of the proposed project.
 - b. Enumerating all required professional services for that project.
 - c. Preparing a formal invitation to firms for submission of information. The invitation must include, but not be limited to, the project title, the general scope of work, a description of all professional services required for that project, and the submission deadline. The invitation or notice thereof must be published. Upon written request, the agency shall also mail copies of the invitation to any interested party. The manner in which this must be published, the content of the publication, and the frequency of the publication, must be established by regulation of the agency selection committee.
3. The date for submission of information from interested persons or firms in response to an invitation must be not less than twenty-one days after publication of the invitation. Interested architect, engineer, and land surveying persons or firms must be required to respond to the invitation with the submission of the information required in general services administration forms SF 254 and SF 255, architect-engineer related services questionnaire for specific project, or such similar information as the agency selection committee may prescribe by rule.
4. Following receipt of information from all interested persons and firms, the agency selection committee shall hold interviews with at least three persons or firms who have responded to the committee's advertisement and who are deemed most qualified on the basis of information available prior to the interviews. If less than three persons or firms have responded to the advertisement, the committee shall

Page No. 1

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Deanna Hallmark
Operator's Signature

10/2/03
Date

readvertise or hold interviews with those who did respond. The agency selection committee's determination as to which will be interviewed must be in writing and must be based upon its review and evaluation of all submitted materials. The written report of the committee must specifically list the names of all persons and firms that responded to the advertisement and enumerate the reasons of the committee for selecting those to be interviewed. This written report must be available to the public upon written request. The purpose of the interviews must be to provide such further information as may be required by the agency selection committee to fully acquaint itself with the relative qualifications of the several interested persons or firms.

5. The agency selection committee shall evaluate each of the persons or firms interviewed on the basis of the following criteria:
 - a. Past performance.
 - b. The ability of professional personnel.
 - c. Willingness to meet time and budget requirements.
 - d. Location.
 - e. Recent, current, and projected workloads of the persons or firms.
 - f. Related experience on similar projects.
 - g. Recent and current work for the agency.

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

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

54-44.7-04. Exception.

1. All state agencies securing architect, engineer, 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:

Page No. 2

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- 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.

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

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

Page No. 3

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Todd Krandan

**PROPOSED AMENDMENT TO
ENGROSSED HOUSE BILL NO. 1180**

Page 2, line 7, after "54-44.7-01" insert "which are exempt from this chapter"

Renumber accordingly

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10/2/03
Date

Testimony on Engrossed House Bill #1180

Good morning Madam Chair and members of the committee. My name is Steve Cochrane and I serve as Executive Director of the Retirement and Investment Office (RIO). RIO is charged with the administration of the Teachers' Fund for Retirement (TFFR) and the State Investment Board (SIB). I am here today to testify not in opposition to the bill, but to request that the bill be amended to remove its effects on our fiduciarily grounded service procurement procedures. We are requesting this exemption for two reasons:

1. Because of the fiduciary responsibility of the TFFR and SIB Boards.
2. The statutory provisions relating to the Teachers' Fund for Retirement and the State Investment Board.

As you know, the Retirement and Investment Office enters into contracts with many investment managers, investment consultants and actuaries. We have approximately 30 such relationships in effect today. In our many years of experience, we have found the critical aspects for considering such entities for retention to be diverse and unique to each situation. Demonstrated skills, areas of expertise, personnel, relevant investment strategies, compatibility to the investment program and other important service relationship factors vary considerably from firm to firm. While fees are certainly considered before contracts are signed, they often have a low correlation to the selection of the service professional based on the most important considerations.

Authority to select and retain services is granted to our boards by state law. While recognizing the fiduciary responsibilities of the boards in discharging their duties, the law does not prescribe a detailed procedure for executing these fiduciary duties. Through collective wisdom, experience and astute advice, the boards have responded

to each hiring situation over the years as appropriate to the situation. Flexibility has been a key to the boards' success in efficiently executing their duties, understanding the key criteria for each selection process.

The fiduciary responsibilities of TFFR and the SIB are entrusted to the Boards of Directors who are the trustees under state statutes. As trustees, their sole responsibility is the programs that they administer. Therefore, in order to fulfill their responsibilities they must be assured that they have a level of independence sufficient to permit them to perform these duties and to do so effectively and efficiently. As trustees they are somewhat different from other state agencies in that they are subject to an extensive and stringent set of fiduciary obligations to the program participants and beneficiaries. These obligations both require and justify the need for independence.

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

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

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

In summary we believe that exempting the TFFR and SIB programs as administered by RIO from HB 1180 is justified in order to maintain the Boards' fiduciary responsibility for their programs and accountability to their members and program clients. Further, we believe it is consistent with the intent of prior legislatures in establishing the Boards as the fiduciary. Finally, we believe it is justified since the legislature has already established for TFFR and the SIB specific statutory requirements that grant authority in contracting.

We would respectfully request that an exemption be granted to the Retirement and Investment Office or that the procurement of investment management services, investment consulting services and actuarial services, be specifically exempted in this legislation.

Thank you.

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Deanna G. Ballantyne
Operator's Signature

10/2/03
Date

TechLink INC.

Data Center

Testimony of Jason Dockter
General Manager, TechLink, Inc.
On HB 1180
March 6, 2003

Madam Chair and members of the *Senate Government and Veterans Affairs Committee*:

My name is Jason Dockter and I am the General Manager of TechLink, Inc., and serve as the Director for Region VI, for the Information Technology Council of North Dakota. It is a pleasure to provide testimony to encourage more discussion and thought to HB 1180.

TechLink, Inc., a data center incorporated in 1997, is a professional data entry and web services provider located in Ashley, North Dakota. We currently employ 22 people as a small business in this states private sector. TechLink has and continues to aggressively pursue commercial and government opportunities, both state and federal.

Unfortunately, as a service provider in the State of North Dakota we have realized little, if any opportunity to bid on contracts within our state. Since registering with State Procurement, in August of 2001, we have not received one bid opportunity, other than an occasion where we pursued the agency and an opportunity happened to be available to bid on at the time of inquiry.

- Q: Why has TechLink, a registered company with this state's procurement office, not been afforded more opportunity to bid on service related contracts?
- A: 1) I would suggest that it is due to the fact that agencies are not required to solicit bid requests to a central posting system on service related projects, and 2) bidder lists and bidding requirements are not regulated to encourage more participation or competition from the private sector.

I ask this committee to consider why service providers in this state should receive different treatment than commodity providers. The principle of the matter directly equates to a present system that does not offer "fair and equal opportunity." The lack of agency procedures and requirements, within the service sector needs of the government, will forever equal little or no competition; and likely very slim private sector opportunity.

If members of this committee were in the private sector, providing a professional service you wish to sell to the state government, is it fair that you have to 'cold call' 90 state agencies instead of accessing a central posting system or receiving solicitations because you are listed on a bidders list offering core competencies in an area of need. If the state does not bring some legitimate processes to service related opportunities one can expect that the agencies will continue in an "as is" mode and refuse to change. There needs to be some authority that mandates agencies to use a bidders list and central posting site for appropriate service related opportunities.


The professional service providers in the private sector deserve an opportunity to grow there business by bidding and participating in our state government procurement arena. I ask you to consider that companies like TechLink offer professional services i.e. skills, knowledge and advice that could be utilized by our state government. Why are we not afforded a fair and equal opportunity to participate in service contract opportunities for the State of North Dakota? Would anyone on this committee wish to suggest that there has not been any projects in the last year and a half that TechLink could not have bid on in the area of data entry, web design or other service needs of the state?

I believe that professional service providers in the private sector have not been encouraged to participate in state government procurement opportunities due to the current lack

of direction and authority related to service procurement. Until the process edits and some direction and authority are in place I don't expect we will see this trend change and that is unfortunate. It is 2003 and time to secure better procurement process details so agencies will encourage more professional service provider participation and competition.

I appreciate the opportunity to provide this testimony and wish I could have been present to deliver this myself. Please consider the viewpoint of professional service providers in this state who wish to respectfully participate in state government procurement as a means of potential new business without tracking 90 different contracting offices.

Dockter Testimony in Support of Central Posting, Bidder Lists & Agency Requirements to augment new contracting methods for greater private sector participation in Professional Service Procurement Opportunities with the State of North Dakota.


Jason Dockter
General Manager

Roger Johnson
Agriculture Commissioner
www.agdepartment.com



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600 E Boulevard Ave., Dept. 602
Bismarck, ND 58505-0020

**Testimony of Judy Carlson,
Project Safe Send Coordinator
House Bill 1180
Senate Government and Veterans Affairs Committee
March 6, 2003**

Chairman Krebsbach, Committee members, I'm Judy Carlson, I coordinate several programs in the department of agriculture.

Last session, a similar bill was introduced. Many state agencies testified "neutral" on legislation putting the procurement of services under OMB but testified that guidelines would be a good idea. We are opposed to the legislation now before you for many reasons.

Contracting by our agency is done by persons responsible for the outcome of the services, with legal council and recommendations by an assistant attorney general.

This bill creates considerable more work for all agencies and OMB. We believe that the fiscal note does not accurately reflect the additional costs that our agency and other agencies will incur if this is enacted. It could also create more work for small businesses.

The language is confusing. Currently, I administer several contracts dealing with manual electronic soil digitizing; an advertising agency that creates print and radio ads, then places the advertisement; and hazardous waste contractors that accept waste as the generator, identify the waste, pack for shipping per EPA requirements and incinerate the waste at out of state facilities. Reading the definitions, I am assuming that all of these services would be "professional services" not "services". It appears that professional services are exempt from most of the requirements in this bill. Yet, in section 2, we would be required to file a report to OMB and in section 7, OMB has jurisdiction over professional service awards.

We support the section including sealed bids for services as closed records until the date and time the bids are opened. However, does this include bids for professional services?

If there are abuses of the current system, the auditor's office or OMB should deal with the specific cases in lieu of creating a confusing, non-funded mandate. Thank you.

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Dorinda G. Ball
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10/2/03
Date

HB 1180

Presented by: Illona A. Jeffcoat-Sacco
Director, Public Utilities Division
Public Service Commission

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

Date: 6 March 2003

TESTIMONY

Madam Chair and committee members, I am Illona Jeffcoat-Sacco, director of the Public Service Commission's Public Utilities Division. The Public Utilities Division administers the Commission's jurisdiction over telephone, gas and electric public utilities in North Dakota. The Commission asked me to appear here today to oppose Engrossed HB 1180 as it relates to procurement of services.

The Public Service Commission has several divisions that are involved in procurement of services. Our Abandoned Mine Lands Program is one hundred percent federally-funded with an annual budget between 1.5 and 2.0 million dollars. In AML, construction and professional services for the reclamation of abandoned mine sites are procured using procurement procedures patterned after the Federal Acquisition Regulations (FAR) and the Department of Transportation Standard

Specifications for Road and Bridge Construction. Competitive sealed bidding is the primary method by which services are procured, except in the case of emergencies or where only one contractor is available to provide a service. All procurement procedures, including sole source procurement, are handled in strict compliance with the Commission's procurement policy. (A copy of this policy is available for your review if you wish.) The procurement policy was initially adopted by the Commission in 1981 after extensive consultation with and approval of the Attorney General. The policy is updated as needed.

Our Reclamation Division is responsible for permitting active coal mining activities in the state and ensuring adequate reclamation of mined land. A reclamation bond is required to support this mandate, but if a company were to forfeit its bond, the Reclamation Division would be responsible for contracting with outside sources to reclaim the mined areas. This contracting would also be done according to the Commission's procurement policy.

Another area in which the Commission depends on and uses the guidance provided by its procurement policy is in the procurement of professional services by the Public Utilities Division. In this division, the professional services of attorneys, accountants, economists and others are

sometimes required to process utility cases. We procure these professional services by issuing a Request for Proposal (RFP), and we include in that request information on how we will judge the proposals we receive. Our RFPs conform to the Commission's procurement policy, as does any sole source procurement that we may use in special circumstances.

We are concerned with both the substantive and procedural impacts of Engrossed HB 1180. The revised language regarding professional services addresses some of our concerns, but it does not address all of them. The reporting requirement on professional services is not a problem for us. However, there is sufficient ambiguity in other provisions in the bill that may negatively affect our ability to procure professional services.

One of our main concerns relates to how the bill might impact our ability to carry out our reclamation responsibilities. The process envisioned by the bill could slow the procurement process for abandoned mine land construction. The period during which construction may occur in North Dakota is limited, and a timely procurement of services is critical. If emergency procurement is needed, these problems are exacerbated.

Another concern relates to accountability. We cannot emphasize enough how important it is to keep the authority and accountability for

statutory duties in the same place. The Public Service Commission has statutory authority and an obligation to reclaim abandoned mine lands. It carries out these duties by contracting with outside providers, rather than having additional personnel on staff. This is the most efficient way to fulfill the statutory obligation to reclaim abandoned mines, which pose threats to public health and safety. The process used to contract these jobs should and does meet high legal, ethical and risk management standards. But the process still rightly belongs with the Commission, not another agency that has no reclamation authority or expertise. It is the Commission that must answer to the public and legislature, and the Commission should have the full authority and responsibility for the procurement process used to implement its duties. We are concerned with a law that moves procurement decisions from an independently elected, constitutional, expert agency to a separate agency without the same responsibility and accountability to the public and legislature.

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

implementation of our programs, we do not believe that the amount of business we may provide those vendors will justify their registration time and expense. The House amendments to the original bill allow for a waiver of this requirement under certain conditions, but there is some question about the applicability of that provision to the Commission. This, combined with the potential implementation of more restrictive rules, policies or guidelines, and the need to justify a waiver on a case by case basis, will significantly affect our procurement process.

Finally, and perhaps most importantly, by mandating that service procurement be made in accordance with yet unwritten OMB guidelines, policies and rules, Engrossed HB 1180 will impose conditions on our procurement of services that neither we nor you even know about today. We cannot support legislation that imposes unknown conditions on how the Commission carries out its statutory responsibilities.

For all of these reasons, the Public Service Commission opposes Engrossed HB 1180 and urges the committee to recommend a do not pass. In the alternative, the Public Service Commission respectfully requests an exemption from the bill for the procurement of all professional services and for services procured under N.D.C.C. Chapters 38-14.1 and 38-14.2, or that the bill be amended to limit its applicability to commodities

only. I would be more than happy to work with the committee and other interested parties on amendments resolving these concerns.

Thank you. This completes my testimony. I would be happy to answer any questions you may have.

Prepared by Public Service Commission

PROPOSED AMENDMENT TO ENGROSSED HOUSE BILL NO. 1180

Page 2, line 22, overstrike the comma after "commodities" and insert an underscored period, overstrike "except" and insert immediately thereafter "The commodities and services listed in" and after "following" insert "subsections are not subject to the procurement requirements of this chapter other than as specifically provided in the applicable subsection"

Page 3, after line 27, insert the following:

"9. Services obtained by the public service commission."

Page 3, line 29, after "delegated" insert "by the office of management and budget"

Page 4, line 19, overstrike "section" and insert immediately thereafter "chapter"

Renumber accordingly

Proposed Amendments to Engrossed HB 1180
Page 1

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Dorinda Hall
Operator's Signature

10/2/03
Date

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Gary D. Preszler, Commissioner

TESTIMONY OF JEFF ENGLESON
Director, Investments
North Dakota State Land Department

IN OPPOSITION TO ENGROSSED HOUSE BILL 1180
Senate Government and Veterans Affairs Committee

March 6, 2003

Engrossed HB1180 requires executive branch agencies to procure services through procedures that are consistent with the procedures established in Chapter 54-44.4 and rules and policies adopted by the office of management and budget. The bill also contains language that codifies various aspects of the contracting for services process. Although we understand why the legislature is interested in having the state develop standards and guidelines for the procurement of contracts for services, we feel that Engrossed HB1180 conflicts with the Board's fiduciary responsibilities under the State Constitution and current North Dakota law.

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

Contracting for investment services is not the same as contracting for the purchase of goods or the purchase of many other types of services. When purchasing investment services, many factors, both tangible and intangible, weigh into the decision to hire a specific firm. Although the bid price is important, other criteria weigh more heavily into determining which firm is most capable of providing the desired service. When searching for investment services, Land Department staff develop criteria that potential service providers must meet. Data is analyzed, RFPs are issued and reviewed, and meetings are held with only those companies that best meet the established criteria. The entire process is documented to ensure that a fair and impartial decision has been made.

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

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HB 1180
Testimony of Jeff Engleson
Senate Government and Veterans Affairs Committee
March 6, 2003

As currently proposed, Engrossed HB1180 essentially takes away the Board's authority to enter into service contracts, and gives control of the contracting process to OMB. Although the bill does exempt "professional services", other services contracted for by the Land Board would not be exempt. If the Land Board is required to follow rules and policies over which it has no control, decisions could be delayed or prevented, potentially resulting in lost revenues to the trusts.

As I stated earlier, we understand why the legislature is interested in having the state develop standards and guidelines to help the state better manage the many service contracts entered into by various agencies. We are more than willing to work with OMB, and other agencies, to develop standards and guidelines that would help us better manage how we contract for services. However, we believe that requiring the Land Board to follow standards and guidelines that it has no control over is not the answer. If guidelines are going to be developed they should be just that; guidelines, not requirements.

In addition to the broad concerns we have about giving OMB authority over the Land Board's contracting process, we have other concerns with Engrossed HB1180.

- We have concerns about a number of the definitions in Section 1. The definition of "Purchasing Agency" suggests that agencies don't have authority to enter into service contracts without getting OMB approval.
- We feel that most of the issues addressed in Sections 3 through 8 would be better addressed by policy or guidelines that allow for flexibility if circumstances warrant it.
- Section 7 establishes a process for interested parties to protest the awarding of a contract. This process gives OMB the ultimate control over the contracting process and could delay or prevent the implementation of decisions made by the Land Board.
- Section 8 requires that potential bidders for services be registered vendors in North Dakota. This requirement could potentially decrease competition for service contracts and increase the cost of contracting for services.

The fact is that this bill is poorly written and was drafted without the input of the agencies it impacts. Had OMB worked with agencies prior to proposing this bill, we probably could have reached an agreement as to concepts and language that would have satisfied everyone involved. Instead we are here today discussing a bill that satisfies almost no one. The testimony you will hear today from various agencies attests to the fact that this was not a well thought out bill or process.

For the reasons outlined above, we respectfully oppose Engrossed HB1180 and ask that the committee give a "do not pass" recommendation to the full Senate. In the alternative we would request that Engrossed HB1180 be amended to either:

- make following OMB's contracting for services rules and policies voluntary, rather than a requirement
- exempt the Board of University and School Lands from the provisions of Engrossed HB1180

I believe that other individuals will be proposing amendments today that address the two alternatives above. Because I have not seen the proposed amendments, I can not tell you whether or not we support those amendments. However, we would be happy to give you the Land Board's position on any proposed amendment once we have had a chance to review them.

STATE AUDITOR
ROBERT R. PETERSON



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**TESTIMONY BEFORE THE SENATE
GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
March 6, 2003**

House Bill No. 1180

Testimony - Presented by Gordy Smith, CPA
Audit Manger

Madam Chairman, members of the committee, my name is Gordy Smith. I'm here to testify in opposition to House Bill No. 1180. I testified in support of the bill when it was originally presented in the House, however the State Auditor's Office opposes it in its current form. Our opposition is based only on the House amendments to the sections of the bill that deal with issues brought forth in our performance audit on Contracts for Services. My testimony will address only those sections of this bill. We have not taken a position on other sections of the bill or the House amendments to those sections.

In the spring of 2000 the State Auditor's Office issued a performance audit on Contracts for Services. This performance audit focused on current practices surrounding procurement of services by state entitles and whether they were providing for an efficient and effective use of state resources.

The performance audit found that in fiscal year 1999, the State of North Dakota expended in excess of \$99 million on procurement of services. This figure would be much higher for 2002. The total for fiscal years 1997, 1998 and 1999 was over \$272 million. The total for fiscal years 2000, 2001 and 2002 would be significantly higher. A critical area the performance audit uncovered is the almost complete lack of any formally established laws, rules, regulations or policies governing the procurement of services by state entitles.

The performance audit found numerous problem areas which were grouped into 3 broad categories:

- a) processes to enter into contracts for services;
- b) contract terms and language and;
- c) contract monitoring/management.

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Examples of problems we encountered included: state entities procuring services without having a written contract; and state entities entering into contracts without following a bidding process.

The State Auditor's Office recently completed audit follow-up work on our performance audit of Contracts for Services. This report was presented to the Legislative Audit and Fiscal Review Committee during January, 2003. The results of our limited review indicate that the circumstances we found during our original performance audit continue to exist today. We believe the state is not utilizing its moneys efficiently or effectively to procure services.

In its original form, HB1180 authorized the Office of Management and Budget to establish policies relating to the procurement of services that must be followed by state entities. This is a critical first step to ensure the state is efficiently and effectively using its resources when procuring services. These policies could help ensure state entities follow a sound, logical process to procure services. I would like to note that the original bill provided OMB with the authority to establish policies. Contrary to what some agencies stated in their testimony in the House, it did not change the state entity's authority to bid the services or to select the vendor. However the amendments made to this bill by the House in Section 2 eliminated the requirement that state entities follow OMB policies established for the procurement of professional services. Instead, the state entities are merely required to file a report with OMB each time they procure professional services. This requirement does nothing to help ensure that state entities follow a sound, logical process to procure services nor does it do anything to help ensure the state is efficiently and effectively using its resources when it procures services. The House amendment does little more than require additional paperwork from state entities.

I would like to point out that those services included in the definition of "professional services" make up over 95% of the moneys expended by state entities for the procurement of services. The House amendments in Section 2 require state entities only to file paperwork surrounding each purchase of professional services. There has been a lot of discussion during this legislative session relating to how tight money is, and how efficiencies have to be found. We strongly feel the state could realize significant savings from the procurement of services if state entities were required to follow a sound, logical and consistent process when purchasing services.

I've been made aware that an amendment may be offered to simply exclude agencies that have a "fiduciary responsibility" from this legislation. One could argue that all state entities have a fiduciary responsibility to the state's citizens. Therefore it may be

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possible to construe such language to mean that all state entities would be excluded from following this legislation should such an amendment be introduced and passed.

I believe that changes to this bill should be made to provide OMB with the authority to establish policies and procedures for the procurement of all services, including professional services. If there are certain types of services the Legislature feels should be completely exempted (such as investment/actuarial services), then that could be written into an amendment and put into law. However I feel that providing OMB with the authority to exempt certain types of services or to delegate purchase of service authority to agencies (this is already done for purchases of goods/commodities) would resolve those problem areas and still provide some assurance the state's resources are being spent efficiently and effectively. In addition, there should be a process in place to allow OMB to exempt an agency from following the policies and procedures in emergency situations. This should be done on a case by case basis when the agency is able to demonstrate to OMB that an emergency exists.

State entity testimony in the House on this legislation included assertions by certain state agencies that they currently have a good system in place to procure services. I'm skeptical of those claims because during our original performance audit we asked state entities to provide us a listing of their contracts for services. We established parameters for those contracts that had to be provided to us. This should be an easy request to comply with if the state entity has a sound system in place. We visited 15 state entities after we received their listings and in every single case we found instances where contracts that met our parameters had been omitted. That hardly endorses the assertion that sound systems are already in place to procure services.

If any member of the committee would like a copy of our original performance audit or our audit follow-up report, I will gladly provide them to you.

Madam Chairman, this would conclude my testimony and I would urge that changes be made to the House amendments to Section 2 of HB1180. If the committee would like our assistance in making changes to this bill, we would gladly provide it. I'm willing to answer any questions the committee may have.

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**North Dakota University System
Engrossed HB1180
Laura Glatt, Vice Chancellor for Administrative Affairs**

The NDUS supports Engrossed HB1180, with the amendments offered by State Procurement.

NDUS purchasing practices have been governed by purchasing policies enacted by the State Board of Higher Education and implementing procedures adopted by the Chancellor. The amendment on page 3, lines 28 and 31 and page 4, line 1 will clarify that this practice continues. We have worked on this amendment with representatives of the Attorney General's Office and State Procurement.

In addition, the NDUS and OMB's Division of State Procurement share a rich working relationship. NDCC currently provides the State Board of Higher Education with broad authority over the purchasing activities of the NDUS, as well as the responsibility to work closely with State Procurement on joint activities. NDCC 15-10-17 (5) provides specific power to the SBHE to *"determine policy for purchasing by the university system in coordination with the office of management and budget as provided by law."* NDCC 54-44.4-02 also states: *"The office of management and budget shall purchase items as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government, The agencies and institutions under the jurisdiction of the state board of higher education, with the office of management and budget, shall make such joint purchases of like items of high common usage as determined jointly by the agencies and institutions under the jurisdiction of the state board of higher education and the office of management and budget as will result in less cost to the state."*

The NDUS and State Procurement officials meet jointly on a regular basis to discuss joint purchasing, joint training and other cooperative efforts. This approach allows us to recognize our unique differences, but also to work together where it makes sense for the best interest of both parties.

Thank you for your thoughtful consideration of the amendments.

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TESTIMONY
OF
SPARB COLLINS
ON
ENGROSSED HB 1180

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

I appear before you concerning House Bill 1180. We are concerned for three reasons:

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

The fiduciary responsibilities of PERS are entrusted to the Board of Directors who are the trustees of the system under the state statute. As trustees of PERS their sole responsibility is the benefit programs that they administer. Therefore, in order to fulfill their responsibilities they must be assured that they have a level of independence sufficient to permit them to perform these duties and to do so effectively and efficiently. As trustees they are somewhat different from other state agencies in that they are subject to an extensive and stringent set of fiduciary obligations to the program participants and beneficiaries. These obligations both require and justify the need for independence.

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

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

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

The statutes also do something for PERS that is unique in that the PERS Board is granted the powers and privileges of a corporation. This does make PERS somewhat distinct among other agencies and does suggest a prior legislative intent that the Board should be

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fulfilling its duties in a way that is consistent with the fiduciary obligation discussed above.

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

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

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

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Thirdly, PERS has two programs that allow participation by multiple vendors who meet minimum requirements which have been legislatively reviewed. These programs are the Deferred Comp Program and the EAP. The deferred comp program format was recently reviewed by the Legislative Employee Benefits Committee and after hearing extensive testimony from the employee organizations, members and vendors it was determined that the existing format should be maintained. Similarly for the EAP PERS offers a list of qualified vendors to our participating agencies who can select one that best meets their needs both in terms of capabilities and geographic accessibility. I am not sure how either of these program formats would work pursuant to guidelines that would be developed pursuant to this bill.

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

This concludes my testimony.

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OMB
amendments

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1180

Page 2, line 22, overstrike the comma after "commodities" and insert an underscored period, overstrike "except" and insert immediately thereafter "The commodities and services listed in", and after "following" insert "subsections are not subject to the procurement requirements of this chapter other than as specifically provided in the applicable subsection"

Page 3, after line 27, insert the following:

"9. Employee benefit services, trust-related services and any services obtained by an agency or board with a fiduciary responsibility regarding those services."

Page 3, line 29, after "delegated" insert "by the office of management and budget"

Page 4, line 19, overstrike "section" and insert immediately thereafter "chapter"

Page 8, line 5, overstrike the comma after "commodities" and insert "or", and remove ", or professional services"

Renumber accordingly

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