

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
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ROLL NUMBER

DESCRIPTION

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10/3/03  
Date

2003 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1387

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Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1387

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1/27/03

Tape Number	Side A	Side B	Meter #
4	x		28.02-end
4		x	0.0-9.6
Committee Clerk Signature <i>Judith Hammer</i>			

Minutes: **Chairman Keiser** opened the hearing on HB 1387.

**Rep. Carlson**, District 41, introduced HB 1387 which relates to the use of a construction manager on public improvement projects. He is also a contractor. The Association of General Contractors requested further clarification on this proposed legislation which impacts public improvement projects such as schools, courthouses etc. It would not affect shopping malls and centers. The AIA opposed this last session. The intent of this legislation is to ensure that the entire project is covered by a single bond.

**Curt Peterson**, representing the Associated General Contractors of ND, testified in support of this language. He said that the changes in HB 1387 would clarify their mission. The construction manager will obtain 100% of the bonding for the project to protect public funds.

**Rep. Boe**: Will subcontractors also require bonds? Isn't this double bonding?

**Peterson**: The construction manager would request bonds from his subcontractors for their portion of the project, he would be responsible to make sure that his subs comply. The governing

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House Industry, Business and Labor Committee  
Bill/Resolution Number HB 1387  
Hearing Date 1/27/03

body (a school or political subdivision) would have to make sure that all times that the project is bonded 100%.

**Rep. Johnson:** Who pays for the bonding? What will this cost?

**Peterson:** The contractor and the subcontractors pay their own bond. This increases the opportunity to the owner of the project that the project is bonded 100%.

**Rep. Ekstrom:** By extension, won't the cost of the bond become part of the project?

**Peterson:** Yes.

**Chairman Kelser:** To summarize the objective, this bill would assure the political subdivision that 100% of the project is bonded. I'm referring to line 9.

**Peterson:** Exactly. We don't want a repeat of what happened at the Fargodome.

**Rep. Klein:** How is the bond handled if there isn't a construction manager?

**Peterson:** The same, except that the general contractor would get bonding through subcontractor bids that come to the owner. It's a little different.

**Rep. Klein:** So one single bond covers the whole project?

**Peterson:** The construction manager much like a general contractor should have the ability to bond the entire project, whatever agreement they have. Typically on a multifaceted project, the general will have their subs be able to put up the bond for their part of the project.

**Rep. Klein:** So a general can have his subs bond to him? But a construction manager is supposed to finance the entire project?

**Peterson:** Correct.

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Bill/Resolution Number HB 1387  
Hearing Date 1/27/03

**Rep. Kasper:** Can a construction manager subrogate the cost of his bond among his subcontractors and require that as part of their bid they have to buy down his bond so they wouldn't have to be paying for a double bond? Is that right?

**Peterson:** Correct.

**Rep. Thorpe:** Aren't we going to reduce the number of contractors who have ability to take on big projects?

**Peterson:** Small companies pay more for their bonds when they start out because they don't have a track record. Financial ability is what determines what the bond will cost.

**Rep. Kelser:** Will this deter small operators to move up and increase their business?

**Peterson:** Don't think this will deter them. Opportunity and a good track record will let them move up the ladder to larger projects.

**Rep. Kasper:** This bill says "if a governing body uses a construction manager". So the public body can choose a construction manager bidding out subs, the general contractor or all of the above, in getting bids from all those sources including the small ones and then they could choose the one that's best for the project? Is that correct?

**Peterson:** Yes, that's exactly right.

**Bonnie Staiger**, representing the AIA, appeared to testify in opposition to HB 1387. Originally, the AIA hasn't taken an official stance on this legislation but she spoke to clarify some points. This legislation is designed to cut off the little guy, no matter how it is worded. If this bill passes, I think that the next two years will prove whether or not it is workable. Because the point about double bonding is going to play itself out. Whether or not a bonding company will allow two bonds on the same project or the same work, whether or not a construction manager can

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House Industry, Business and Labor Committee

Bill/Resolution Number HB 1387

Hearing Date 1/27/03

legitimately even purchase a bond if it's been bonded by someone else. I think it's a matter of giving it a shot. We'll do our best to make it work and we'll be back in two years with trial and error experience and we'll be able to say what works, what doesn't and we'll try to correct it.

**Rep. Klein:** What's the approximate cost on a \$5 million dollar project?

**Staiger:** I don't have the information.

**Tom Tupa**, representing the National Electrical Contractor's Association, Dakotas Chapter, appeared in opposition to HB 1387. Prior to the session, we worked out some compromise language relative to this whole issue. The final product isn't quite what we thought we'd agreed to it. I have to stand in opposition. The very last line that talks about "contract the project in bid packages acceptable to the governing body" we're not sure if that means a single bid or if we're talking about multiple kinds bids that allows for a more competitive spirit. We'd like to suggest that at a minimum that this committee consider deleting the language in lines 11-14. That would be more acceptable to us.

**Gerhard Bockness**, appeared in opposition to HB 1387. He's a previous resident hoping to establish a small construction business and remain in his home state. He elaborated how this bill will make it impossible for him to establish a viable business here. He referenced statute 48-01.105 pertaining to Contracts for Advertising.

**Rep. Keiser:** You'll be building a business that will grow over time and establish a history that the bonding companies will support.

**Bockness:** I am required to provide a certificate of insurance to the Secretary of State. That ought to cover that portion for the awarding body. The contracts, no matter what the amount, should total up to the total project value.

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House Industry, Business and Labor Committee

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Hearing Date 1/27/03

**Rep. Kasper:** On line 9, if we added "or multiple bonds from subcontractors equal to 100% of the value of the construction project", would that work for you?

**Bockness:** There would be none because then the primary contractors would be directly bonded directly to the agency and the cost of that would be covered in the total cost of the project. Your construction management firm would not have to provide total project bond. There shouldn't be a gap.

**Chairman Kelser:** If you were a sub, and there was a construction manager, and they bonded 100% of the project, how would your relationship to that CM or General change?

**Bockness:** I'd want to perform so that my bonding company would not be notified.

**Tom Wolfe,** Skeel's Electric, appeared in opposition to HB 1387. We have more control of our contract when working for the general contractor.

**Rep. Klein:** What percentage of projects you bid do you provide your own bonding for?

**Tom Wolfe:** Private negotiated work you don't need bonding, the general does. But for work through architects and engineers, 100%.

As no one else was present to testify in opposition to HB 1387, the hearing was closed.

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# 2003 HOUSE STANDING COMMITTEE MINUTES

## BILL/RESOLUTION NO. HB 1387

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1/29/03

Tape Number	Side A	Side B	Meter #
3	X		27.4-36.4
Committee Clerk Signature <i>Judith Hammer</i>			

Minutes: **Chairman Keiser** called for committee work on HB 1387.

**Rep. Froseth** moved a Do Pass. **Rep. Kasper** seconded the motion.

**Rep. Klein:** I can't support the bill as it is. I think we'd be loading costs on the public with the double bonding. It doesn't reduce costs.

**Rep. Ruby:** I agree with Rep. Klein. If we removed lines 11-14, I'd be able to support it.

**Rep. Nottestad:** I cannot support this. The current method of bonding works well for school construction in Grand Forks.

**Rep. Kasper:** I think this came up because of the fiasco at the Fargo Dome. The whole project plus construction manager fees have to be bonded.

**Chairman Keiser:** Be careful and read the struck language in these bills. The existing law required complete bondage. Fargo's problem is Fargo's fault. Double bonding is expensive and it's not free.

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House Industry, Business and Labor Committee

Bill/Resolution Number HB 1387

Hearing Date 1/29/03

**Rep. Ruby:** If we make this change and require double bonding and nobody checks it, we still have the same problem.

**Rep. Froseth:** It's the responsibility of the construction manager.

**Rep. Klein:** The construction manager can't get bonding on a multi-million dollar project. It's not possible. A major contractor can, he has the resources. This is stifling new enterprise.

**Rep. Froseth** I withdraw my motion for a Do Pass.

**Rep. Kasper:** I withdraw my seconding of that motion.

**Rep. Klein:** I move a Do Pass.

**Rep. Ekstrom:** I second.

The results of the roll call vote were: 12-1-1.

**Rep. Severson** will carry this bill on the floor.

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1387

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 10, 2003

Tape Number	Side A	Side B	Meter #
1	X		0-1163
Committee Clerk Signature <i>Elizabeth R. Feier</i>			

Minutes: **Chair Keiser:** Opened discussion on 1387. Passed out amendment.

**Rep. Ekstrom:** Does this deter small companies from getting in? Rep. Keiser said that it could.

**Mark Daugherty (AGC of ND):** Wants to make sure the project is bonded at all times

**Rep. Kasper:** Does this amendment cover construction managers' fees, overhead, and mark up?

Rep. Keiser said that it should cover the entire bond.

**Chair Keiser:** After some discussion concerning confusion in the committee, it was decided the amendment is not acceptable to the committee.

Rep. Ruby moved to reconsider HB 1387. Seconded by Rep. Severson. Motion passed.

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1387

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 10, 2003

Tape Number	Side A	Side B	Meter #
2	X		1080-1824
Committee Clerk Signature <i>Ben Leier</i>			

Minutes: **Chair Keiser** reopened discussion on HB 1387

**Rep. Froseth:** Met with proponents of the amendment and everything is covered with the amendment. They are more overall secure on total cost on bonds. There are various opinions on if managers can get bonds or not.

**Rep. Klein:** Feels they are still leaving out smaller operators because they still can not get a bond.

**Rep. Johnson:** Has trouble measuring "complexity" or "considerable."

**Rep. Kasper:** Does not feel this is a concern because if a person does not have the capital to get a bond, perhaps they should not be getting one anyway.

**Rep. Froseth:** Feels this protects the public money for public projects.

**Rep. Keiser:** Want 100% of the project bonded and if a decision maker is added, that decision maker is also accountable. If there is a manager, they have to bond too. It is double bonding, but holding decision makers accountable.

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House Industry, Business and Labor Committee

Bill/Resolution Number 1387

Hearing Date February 10, 2003

**Rep. Klein:** Felt \$5M is too low. Rep. Ekstrom proposed \$15M and the committee agreed.

**Chair Keiser:** Felt there were still questions and the committee will take up the bill tomorrow.

Discussion closed.

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1387

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 11, 2003

Tape Number	Side A	Side B	Meter #
1	X		1881-2983
Committee Clerk Signature <i>Elizabeth R. Feier</i>			

Minutes: **Chair Keiser:** Opened discussion on 1387.

**Rep. Froseth:** Passed out and explained amendments. Rep. Keiser asked if there is a \$15M cap and Rep. Froseth said that all projects would have to be bonded.

**Rep. Keiser:** Explained to the committee that the limit is arbitrary. If you have a small contract, you are adding unnecessary costs by hiring a construction manager. Mostly large projects need a manager. When considering the amendment, they looked at the severity of exposure and liability.

**Rep. Ruby:** Concerning the amendment, Rep. Ruby wanted to know if the construction managers need to pay 110% of the bond. Rep. Keiser said that if the subcontractors bids add up to 100%, then they only pay the additional 10%. If the subcontractors bids do not add up to the full 100%, the construction managers bond for the remaining bonds, plus 10% of the project.

**Rep. Boe:** Asked how they are addressing the risk. Rep. Keiser said the liability is decided in the courts.

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House Industry, Business and Labor Committee

Bill/Resolution Number 1387

Hearing Date February 11, 2003

Rep. Ruby moved to adopt the amendment. Rep. Froseth seconded the motion.

Voice vote: Amendment adopted.

Rep. Froseth moved DP as amended. Seconded by Rep. Severson

Vote: 13 Yes 1 No 0 Absent and not voting Carrier: Severson

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# FISCAL NOTE STATEMENT

House Bill or Resolution No. 1387

This bill or resolution appears to affect revenues, expenditures, or fiscal liability of counties, cities, or school districts. However, no state agency has primary responsibility for compiling and maintaining the information necessary for the proper preparation of a fiscal note regarding this bill or resolution. Pursuant to Joint Rule 502, this statement meets the fiscal note requirement.

John Walstad  
Code Revisor

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Date: 1/22/03  
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1387

House Industry, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Do Not Pass

Motion Made By

Klein

Seconded By

Ekstrom

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Rep.Boe	✓	
Rep.Severson, Vice-Chair	✓		Rep.Ekstrom	✓	
Rep.Dosch		✓	Rep.Thorpe	✓	
Rep. Froseth	✓		Rep. Zaiser	✓	
Rep. Johnson	✓				
Rep.Kasper	✓				
Rep. Klein	✓				
Rep. Nottlestad	✓				
Rep. Ruby	✓				
Rep.Tieman	✓				

Total (Yes)

12

No

1

Absent

1

Floor Assignment

~~Severson~~

Severson

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

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Donna Hall Smith

Date

10/3/03



30643.0101  
Title.

Prepared by the Legislative Council staff for  
Representative Froseth  
February 10, 2003

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1387

Page 1, line 6, after the third boldfaced period insert "A governing body shall use a construction manager on a public improvement project if the project construction cost estimate is greater than five million dollars and the project is of a complexity so as to require considerable management and coordination skill to assure a successfully completed project."

Page 1, line 8, after "improvement" insert "initially"

Page 1, line 11, remove ". The governing"

Page 1, line 12, remove "body shall contract the entire project to the construction manager, and" and overstrike "the" and insert immediately thereafter "and thereafter may reduce the size of the original bond by the amounts of the bonds required of individual contractors that are successful low bidders for each separate bid package. The"

Renumber accordingly

30643.0103  
Title.0200

Prepared by the Legislative Council staff for  
Representative Froseth  
February 10, 2003

VK  
2/11/03

HOUSE AMENDMENTS TO HOUSE BILL NO. 1387

IBL 2-12-03

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 48-01.1-09 of the North Dakota Century Code, relating to bonds by construction managers on public improvement projects.

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

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

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

Renumber accordingly

Page No. 1

30643.0103

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Date: 2/11/03  
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1387

House INDUSTRY BUSINESS & LABOR Committee

☐ Check here for Conference Committee

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

Action Taken DP as amended

Motion Made By Froseth Seconded By Severson

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Boe	✓	
Vice-Chair Severson	✓		Ekstrom	✓	
Dosch	✓		Thorpe		✓
Froseth	✓		Zaiser	✓	
Johnson	✓				
Kasper	✓				
Klein	✓				
Nottestad	✓				
Ruby	✓				
Tieman	✓				

Total (Yes) 13 No 1

Absent 0

Floor Assignment Severson

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

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REPORT OF STANDING COMMITTEE (410)  
February 12, 2003 8:39 a.m.

Module No: HR-27-2363  
Carrier: Severson  
Insert LC: 30643.0103 Title: .0200

**REPORT OF STANDING COMMITTEE**

**HB 1387: Industry, Business and Labor Committee (Rep. Kelsner, Chairman)**  
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends  
**DO PASS** (13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1387 was placed on  
the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and  
reenact section 48-01.1-09 of the North Dakota Century Code, relating to bonds by  
construction managers on public improvement projects.

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

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licensed contractor. The construction manager awarded the contract for construction  
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or through bonds provided by all bid packages and the construction manager's bond for  
the full amount of the construction manager's services. If the total of the bonds is less  
than the total project bid, the construction manager shall bond the difference between  
the total of the bonds and the total project bid. The construction manager shall provide  
an additional bond of an amount equal to ten percent of the total project bid."

Renumber accordingly

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2003 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1387

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1387

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 03-11-03

Tape Number	Side A	Side B	Meter #
1		xxxxxx	0-4322
Committee Clerk Signature <i>Lisa VanBerkom</i>			

Minutes: Chairman Mutch opened the hearing on HB 1387. Senator Krebsbach was absent.

HB 1387 relates to bonds by construction managers on public improvement projects.

**Testimony in support of HB 1387**

**Representative Al Carlson** introduced the bill. We are talking about buildings that are buildings owned and operated by the state, such as schools, federal and state buildings. There has been a real growth in the market of construction managers. They are basically architects who have a second job and that is running a project. They coordinate and make sure the project gets completed. The difference between them and a contractor is that a general contractor needs to bond the entire project. A construction manager collects bonds from the different entities on the project, such as electrician, concrete guys, etc. Then he will also have a bond. The problem is all of the bonds don't always total up to the total price of the project. Then there is a gap on the project. Whereas the general contractor is required to cover the full contract. We are trying to ensure that no matter who is in charge of the project, it is completely bonded.

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Senate Industry, Business and Labor Committee  
Bill/Resolution Number 1387  
Hearing Date 03-11-03

We feel that the requirements for bonding should all be the same.

**Senator Espgaard:** One of the words that the amount should be 10% of the contract, OR that if the construction manager doesn't pick up enough bonds, then he should have to make up the difference so the entire project is bonded. I am not against construction management, but the public should be protected. Ten percent doesn't really cover it.

**Senator Every:** Aren't we really double bonding here?

**Rep. Carlson:** If there is a construction manager, there is no general contractor.

**Senator Every:** Would the architect and the others be required to bond as well?

**Rep. Carlson:** Yes.

**Senator Heitkamp:** What I am struggling with here is, who is the contractor is then. You got the construction manager, but their roll is to over see the project. Are you saying that the owner/buyer is responsible?

**Rep. Carlson:** Each one is responsible for a bond on their own, but it never meets the cost of the project.

**Senator Espgaard:** Not all of these guys are bonded, like sheet rockers and pain contractor, because they can't get one. So they are not bonded and the whole project is not covered.

**Senator Mutch:** Is there constructions managers in the private sector?

**Rep. Carlson:** Yes there are quite a few.

**Curt Peterson,** General Contractors, proposed amendments.

**Mark Dougherty,** General Contractors explained the amendments. See attached.

**Senator Nething:** Wouldn't the construction manager ask the other companies to give him a bond? Why wouldn't they just do that?

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*Donna Hall*  
Operator's Signature

10/3/03  
Date

Page 3

Senate Industry, Business and Labor Committee

Bill/Resolution Number 1387

Hearing Date 03-11-03

**Senator Espegard:** The smaller businesses might be asked to go to the bank and get a letter of credit and the construction manager could then gather them and take them to a bondsman to get a bond with the combined letters of credit.

**Senator Heitkamp:** What are these contractors afraid of? You are putting this burden to bond on the construction manager. This is shifting responsibility.

**Mark:** Yes, we bond our projects when we get them.

**Senator Every:** This is how it works for me as a mayor. When we hired an engineering firm to oversee the whole project in Minnewauken. Would they be considered the construction manager in this case? They required the subcontractors to put up a bond as well. Now do they have to put up a 2.2 million dollar bond as well? (Double bonding)

**Mark:** That falls under a different section of construction administration which a bond is not required. Licensing is required and liability.

**Senator Mutch:** How easy is it to get bonded?

**Senator Espegard:** It depends on the financial condition.

**Testimony in opposition to HB 1387**

**Bonnie Staiger,** American Institute of Architects of North Dakota, spoke in opposition to the bill. She states that this has put her in a difficult position. We thought we worked with the AGC and came to an understanding, but not. This amendment is going back to the battle that we fought last session. The architects are going to come through the woodwork on this. I am going to have to go back to my office and start cranking the phones because small construction firms cannot meet the bonding requirements. They cannot get a bond for work that they don't do. Bonding companies will not double bond. Also it comes back to the issue of bonding v. insurance. A bond

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Date



Page 4  
Senate Industry, Business and Labor Committee  
Bill/Resolution Number 1387  
Hearing Date 03-11-03

is based on performance. If you don't perform, you forfeit your bond. If it is the roof falling apart, that is an insurance issue. This is an attempt by the AGC to eliminate small time construction management firms. If the small time managers new that this bill was being heard, this room would be full and I would have lots of people standing behind me. So I hope that you will keep this hearing open because you are going to get a lot of phone calls.

**Senator Espgaard:** Are there a lot of construction management firms in the state or mostly architects?

**Bonnie:** My sense is there are not a lot of construction management firms, a handful of architect firms who like to do it and chose to do it in a very big way. I would like to clarify the statement about architects having a "second job". That is implying that they don't make enough money and they have to go to K-Mart and be a checker to pay their bills. That is not the case.

**Senator Espgaard:** I didn't say that; it is just added income on the job. It is a free country to do that.

**Senator Nething:** How do you comply with statute that states that you must meet the bond with the cost of the project?

**Bonnie:** My understanding is that the construction management firm provides the bonding in a cumulative manner.

**Senator Nething:** You could ease our minds by having one of your architects go and try to get a bond for 10% over the coverage.

**Bonnie:** You just stated my case, thank you.

**Hearing was closed.**

**No action taken at this time.**

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10/3/03  
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1387

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 03-25-03

Tape Number	Side A	Side B	Meter #
1	xxx		2790-4220
Committee Clerk Signature <i>Lisa VanBerkorn</i>			

Minutes: Chairman Mutch opened the discussion on HB 1387. All Senators were present.

HB 1387 relates to bonds by construction managers on public improvement projects.

**Senator Klein:** The House amended the bill.

**Senator Heitkamp** moved a **DO NOT PASS**. Senator Every seconded.

**Senator Heitkamp:** The way I read the bill, you could actually force people to offer coverage in excess of 100%. Basically, the bill is trying to eliminate construction managers.

**Roll Call Vote:** 6 yes. 1 no. 0 absent.

**Carrier:** Senator Heitkamp

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Operator's Signature

10/3/03  
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1387

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 03-31-03

Tape Number	Side A	Side B	Meter #
1	XXXXX		739
Committee Clerk Signature <i>Lisa VanBerkum</i>			

Minutes: Chairman Mutch opened the discussion on HB 1387. Senator Nething was absent.

Senator Heitkamp moved to reconsider the action taken on 3-25-03.

Senator Espegard seconded.

Voice vote, motion carried.

Senator Espegard moved to amend. Senator Krebsbach seconded.

Roll Call Vote: 3 yes. 3 no. 1 absent.

Motion failed.

The committee decided to leave the bill as it was.

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*Deanna Heitkamp*  
Operator's Signature

10/3/03  
Date

Date: 3-25-03  
Roll Call Vote #: )

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

Senate 1387 Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Do Not Pass

Motion Made By

Heitkamp

Seconded By

Every

Senators	Yes	No	Senators	Yes	No
Mutch		X			
Klein	X				
Krebsbach	X				
Nothing	X				
Heitkamp	X				
Every	X				
Espegaard	X				

Total (Yes) 6 No 1

Absent

0

Floor Assignment

Heitkamp

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

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Operator's Signature

Dan Hall

Date

10/3/03

REPORT OF STANDING COMMITTEE (410)  
March 25, 2003 2:07 p.m.

Module No: SR-53-5695  
Carrier: Heitkamp  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

HB 1387, as engrossed: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO NOT PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1387 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

SR-53-5695

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Operator's Signature

10/3/03  
Date

Date: 3-31-03  
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1387

Senate \_\_\_\_\_ Committee \_\_\_\_\_

☐ Check here for Conference Committee

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

Action Taken Reconsider Action

Motion Made By Heitkamp Seconded By Espgaard

Senators	Yes	No	Senators	Yes	No
Mitch	X				
Klein	X				
Krebsbach	X				
Heitkamp	X				
Espgaard	X				
Eveng	X				

Total (Yes) 6 No 0

Absent 1

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

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

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Operator's Signature

10/3/03  
Date

Date: 3-31-03  
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1387

Senate \_\_\_\_\_ Committee \_\_\_\_\_

☐ Check here for Conference Committee

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

Action Taken move amendments

Motion Made By Espegard Seconded By Krebsbach

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Klein		X			
Senator Krebsbach	X				
Senator Nething	X				
Senator Heitkamp		X			
Senator Every		X			
Senator Espegard	X				

Total (Yes) Click here to type Yes Vote 3 No Click here to type No Vote 3

Absent 1

Floor Assignment Click here to type Floor Assignment motion fails

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

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10/3/03  
Date

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

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

Senate 1387 Committee

☐ Check here for Conference Committee

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

Action Taken Do Pass

Motion Made By Espesgard Seconded By Klein

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Klein	X				
Senator Krebsbach	X				
Senator Nething	A				
Senator Heitkamp		X			
Senator Every		X			
Senator Espesgard	X				

Total (Yes) ~~Click here to type Yes Vote~~ 4 No ~~Click here to type No Vote~~ 2

Absent 1

Floor Assignment ~~Click here to type Floor Assignment~~ Espesgard

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

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Operator's Signature

10/3/03  
Date



**REPORT OF STANDING COMMITTEE (410)**  
April 7, 2003 10:35 a.m.

Module No: SR-62-6929  
Carrier: Espegard  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**  
HB 1387, as engrossed: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO PASS** (4 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1387 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

SR-62-6929

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Deanna Hall  
Operator's Signature

10/3/03  
Date

2003 TESTIMONY

HB 1387

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10/3/03  
Date

Prepared by the AGC of North Dakota  
March 10, 2003

## PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL No. 1387

Page 1, line 9, after "bond" insert ", as provided for in Section 48-02-06.2 of the North Dakota Century Code".

Page 1, line 9 through 12, overstrike ", or through bonds provided by all bid packages and the construction manager's bond for the full amount of the construction manager's services. If the total of the bonds is less than the total project bid, the construction manager shall bond the difference between the total of the bonds and the total project bid."

Page 1, line 12 through 14, remove, "The construction manager shall provide an additional bond of an amount equal to ten percent of the total project bid."

Renumber accordingly

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10/3/03  
Date

Prepared by  
AGC of North Dakota  
March 10, 2003

**RE-WRITE WITH  
AMENDMENTS TO ENGROSSED HOUSE BILL No. 1387**

1 A BILL for an Act to amend and reenact section 48-01.1-09 of the North Dakota Century  
2 Code, relating to bonds by construction managers on public improvement projects.

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

4 **SECTION 1. AMENDMENT.** Section 48-01.1-09 of the North Dakota Century 555  
5 Code is amended and reenacted as follows:

6 **48-01.1-09. Use of construction manager.** If a governing body uses a  
7 construction manager on a public improvement, the construction manager must be a  
8 licensed contractor. The construction manager awarded the contract for construction of a  
9 public improvement shall bond the entire cost of the project through a single bond ~~as~~  
10 ~~provided for in Section 48-02-06.2 of the North Dakota Century Code, or through bonds~~  
11 ~~provided by all bid packages and the construction manager's bond for the full amount of~~  
12 ~~the construction manager's services. If the total of the bonds is less than the total project~~  
13 ~~bid, the construction manager shall bond the difference between the total of the bonds~~  
14 ~~and the total project bid. The construction manager shall provide an additional bond of an~~  
15 ~~amount equal to ten percent of the total project bid.~~

Page No. 1

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10/3/03  
Date

## **CHAPTER 48-02 CONSTRUCTION**

**48-02-01. Definition of governing board.** Repealed by S.L. 1995, ch. 443, § 29.

**48-02-02. Prerequisite to building and repair by contract - Exceptions.** Repealed by S.L. 1995, ch. 443, § 29.

**48-02-03. Method used in securing bids - Emergency waiver.** Repealed by S.L. 1995, ch. 443, § 29.

**48-02-04. Contents of advertisement.** Repealed by S.L. 1995, ch. 443, § 29.

**48-02-05. Plans and specifications - Place of filing.** Repealed by S.L. 1995, ch. 443, § 29.

**48-02-05.1. Bid requirements and acceptance.** Repealed by S.L. 1995, ch. 443, § 29.

**48-02-06. Opening bids - Award of contract - Bond required.** Repealed by S.L. 1995, ch. 443, § 29.

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

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

**48-02-07. Allowance and payment of estimates - Investment of retainage.** At least once in each calendar month during the continuance of work upon any public building or erection begun and carried on under the provisions of this chapter, the governing board, or a committee thereof duly authorized by the board for that purpose, shall meet and receive and consider estimates furnished by the supervising architect or the superintendent of construction of such building or erection, and shall allow such estimates in an amount of the estimated value of the labor and material furnished upon such contract, and of the material then upon the ground for use in the construction thereof, subject to retentions as follows: ten percent of each estimate presented until such time as the project is fifty percent completed, with no further retainage on estimates during the continuance of the contract. The governing board may, however, upon completion of ninety-five percent of the contract according to the estimates, pay to the contractor ninety-five percent of the amount retained from previous estimates. The remaining amount retained shall be paid to the contractor in such amounts and at such times as are approved by the supervising architect or superintendent of construction, with final payment of all moneys due to the contractor to be made immediately following completion and acceptance of the project. If no supervising architect and no superintendent of construction is employed upon such contract, the contractor, at the end of each calendar month during the continuance of work under any such

Page No. 1

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10/3/03  
Date

**CHAPTER 48-01.1  
PUBLIC IMPROVEMENT CONTRACT BIDS**

**48-01.1-01. Definitions.** In this chapter, unless the context otherwise requires:

- original statute*
1. "Construction" includes repair and alteration.
  2. "Construction administration" means administrative services provided on behalf of the governing body, either by the governing body or a registered design professional, and includes providing clarifications, submittal review, recommendations for payment, preparation of change orders, and other administrative services included in the agreement with the registered design professional. The term does not include supervision of the construction activities for the construction contracts.
  3. "Construction management" means the management and supervision of the construction of a public improvement, including the management and supervision of multiple prime contracts. The term does not include construction administration performed by a design professional under the terms of a professional services agreement with the governing body.
  4. "Contractor" means any person, duly licensed, that undertakes or enters a contract with a governing body for the construction or construction management of any public improvement, including multiple prime contracts.
  5. "Governing body" means the governing officer or board of any state entity or of any political subdivision.
  6. "Public Improvement" means any improvement the cost of which is payable from taxes or other funds under the control of a governing body including improvements for which special assessments are levied. The term does not include any county road construction and maintenance, state highway, or public service commission project governed by titles 11, 24, or 38.
  7. "Surety" means a bond or undertaking executed by a surety company authorized to do business in this state which is countersigned by an agent of that company.

**48-01.1-02. Contracts let to lowest bidder - Emergency waiver.** A governing body shall award a contract for the construction of a public improvement under this chapter to the lowest responsible bidder. The governing body may reject any bid and readvertise for proposals if no bid is satisfactory, or if it believes any agreement has been entered into by the bidders or others to prevent competition. If the governing body determines that an emergency situation exists, a contract may be made without seeking bids.

**48-01.1-03. Publication of advertisement for bids.** If a contract of a governing body for the construction of a public improvement is estimated to cost in excess of one hundred thousand dollars, the governing body shall advertise for bids by publishing for three consecutive weeks, the first publication to be at least twenty-one days before the date of the opening of bids. The advertisement must be published in the official newspaper of the political subdivision in which the public improvement is or will be located, and in a trade publication of general circulation among the contractors, building manufacturers, and dealers in this state, except the advertisement for a public improvement financed by special assessments need only be published once each week for two weeks in the official newspaper with the first publication being at least fourteen days before bid opening.

Page No. 1

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10/3/03  
Date

**48-01.1-04. Plans and specifications for public improvement contracts.** If a contract of a governing body for the construction of a public improvement is estimated to cost in excess of one hundred thousand dollars, the governing body shall procure plans, drawings, and specifications for the work from a licensed architect or registered professional engineer. For public buildings in use by or to be used by the North Dakota agricultural experiment stations in connection with farm or agricultural research operations, the plans, drawings, and specifications, with the approval of the state board of higher education, may be procured from a registered professional engineer if the engineer is in the regular employment of the agricultural experiment station. For public buildings in use by or to be used by the department of transportation for the storage and housing of road materials and road machinery, equipment, and tools, the plans, drawings, and specifications may be procured from a registered professional engineer employed by the department of transportation.

**48-01.1-05. Contents of advertisement.** The advertisement for bids required by section 48-01.1-03 must state:

1. When and where the plans, drawings, and specifications may be seen and examined.
2. The place, date, and time the bids will be opened.
3. That each bid must be accompanied by a separate envelope containing a bidder's bond in a sum equal to five percent of the full amount of the bid, executed by the bidder as principal and by a surety, conditioned that if the principal's bid is accepted and the contract awarded to the principal, the principal, within ten days after notice of award, shall execute a contract in accordance with the terms of the bid and a contractor's bond as required by law and the regulations and determinations of the governing body. Countersignature of a bid bond is not required under this section.
4. That a bidder, except a bidder on a municipal, rural, and industrial water supply project authorized for funding under Public Law No. 99-294 [100 Stat. 426; 43 U.S.C. 390a], must be licensed for the full amount of the bid, as required by section 43-07-05. For projects authorized for funding under Public Law No. 99-294 [100 Stat. 426; 43 U.S.C. 390a], the advertisement must state that, unless a bidder obtains a contractor's license for the full amount of its bid within twenty days after it is determined the bidder is the lowest and best bidder, the bid must be rejected and the contract awarded to the next lowest, best, and licensed bidder.
5. That no bid may be read or considered if it does not fully comply with the requirements of this section and that any deficient bid submitted must be resealed and returned to the bidder immediately.
6. That the right of the governing body to reject any bid is reserved.

**48-01.1-06. Bid requirements for public buildings.** Multiple prime bids for the general, electrical, and mechanical portions of a project are required when any individual general, electrical, or mechanical contract or any combination of individual contracts is in excess of one hundred thousand dollars. The governing body may also allow submission of single prime bids or bids for other portions of the project at its discretion. The governing body may not accept the single prime bid unless that bid is lower than the combined total of the lowest and best multiple bids for the project.

**48-01.1-07. Opening of bids - Award of contract.** At the time and place specified in the notice, the governing body shall open publicly and read aloud all bids received and thereafter award the contract to the lowest and best bidder or reject all bids. The governing body may advertise for new bids in accordance with this chapter until a satisfactory bid is received. The governing body shall require the contractor to whom the contract is awarded to post a bond in accordance with chapter 48-02.

Page No. 2

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*Dennis Hallmark*  
Operator's Signature

10/3/03  
Date

**48-01.1-08. Coordination of work under multiple prime bids.** After competitive bids for the general, electrical, and mechanical work are received as part of the multiple prime bids, the governing board may assign the electrical and mechanical contract and any other contracts to the general contractor for the project to facilitate the coordination and management of the work only.

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

Page No. 3

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10/3/03  
Date



*testimony  
handed in 3-24-03*

**Additional information in opposition to HB 1387  
(An attempt to eliminate small Construction Managers)**



Because we have had concerns about this bill and were unaware of the amendment offered in the Senate hearing, we respectfully ask your consideration of the following:

**BACKGROUND: BONDS VS INSURANCE**

The intent of a bond is to cover performance and default or delays but not to cover general liability. A performance bond means if someone does not do the work according to the contract they forfeit their bond.

Once the work is done, the bond disappears--although some bonds often cover 1 year warranty situations. After that claims are covered by professional liability insurance via mediation and arbitration. Future problems/claims with a building are legal issues from the owner/contractor agreement -- and claims are made to a general liability policy which covers those situations.

**CONSEQUENCES OF THIS BILL AND AMENDMENTS**

This bill is being promoted as additional protection for the owner. But requiring the CM to bond 100% of the project does not provide any extra protection to the owner and would increase that cost because of double bonding. Here is why: Because the CM would be required to bond work of the subcontractors and their own portion, his bond could be considered "higher risk" and potentially more expensive. Because the CM must pass that cost on to the owner, the CM's bid becomes less competitive.

The other loser with this bill is the political subdivisions in rural areas who are at a disadvantage because smaller CM's from the area would be cut out of the marketplace.--resulting in fewer bids and potential loss of local employment if these firms can't find enough work to stay in business.

419 East Brandon Drive  
Bismarck, North Dakota 58503-0410  
701.223.5560

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Operator's Signature

*10/3/03*  
Date

## LEGAL COUNSEL

The proposed amendment seeks to tie the bill to Section 48-02-06. Our legal counsel has advised us that this section of statute

- clearly refers only to performance bonds--not loss claims (such as the collapsed roof example)
- is ambiguous whether it applies to CMs. It's not a clean fit.

As a result, any litigation that comes from this bill (if passed) would cause legal confusion, result in further delays and costs for the political subdivision seeking remedy.

## CONCLUSION

Currently, the owner /political subdivision is protected under the statute which requires CM's to bond their portion and any shortfall between the total of the "subs" and the completed project. This is fair.

In addition, both parties must limit their exposure to claims through the initial contract documents and adequate insurance liability products.

## RECOMMENDATION

In the end, the purpose of this bill and the amendments are to eliminate the small construction managers from competition. If passed, the only firms that could compete are the large general contractors who have sizeable assets because the small CM's would no longer work on the same margins.

We ask for a defeat of the amendment and a DO NOT PASS recommendation on HB 1387.

Bonnie Larson Staiger  
Executive Director

Donna Halliwell  
Operator's Signature

10/3/03  
Date

Fifty-eighth  
Legislative Assembly  
of North Dakota

**PROPOSED AMENDMENTS**  
to  
**HOUSE BILL No. 1387**

Introduced by

Representatives Wald, Carlson

Page 1, line 6, after "manager." Insert "A governing body shall decide whether to use a construction manager on a particular project using the following criteria: 1. the project construction cost estimate is greater than \$5 million and 2. The project is of a complexity so as to require considerable management and coordination skill to assure a successfully completed project."

Page 1, line 8, after "shall" insert "initially"

Page 1, line 9, after "bond" insert "and may thereafter reduce the size of the original bond, by the amounts of the bonds required of individual contractors who are successful low bidders for each separate bid package."

Page 1, line 11, remove "The governing"

Page 1, line 12, remove "body shall contract the entire project to the construction manager, and"

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Deanna Hallmark  
Operator's Signature

10/3/03  
Date



Associated General Contractors of North Dakota  
Curt Peterson, Executive Vice President  
Phone: 223-2770, Cell: 391-2770, E-mail: cpeter@agcnd.org

## ENGROSSED HOUSE BILL No. 1387

Chairman Mutch and members of the Senate Industry, Business and Labor Committee for the record, my name is Mark Dougherty. I am the Membership Services Director for the Associated General Contractors of North Dakota. I propose the attached amendments to Engrossed House Bill No. 1387.

These amendments should clear up some of the confusion in the current bill and statute. As I look back on the workings of Chapter 48 of the North Dakota Century Code, I find that we try to use the term "Construction Manager" as if it's definition was all inclusive of all types of construction managers, when in fact it can apply to any number of situations, dependent on what the manager does on the project. In Section 1 and 2 of this hodgehouse amendment I have defined the two normally used types of "Construction Managers" and also amended the definition of "Contractor". This I hope will make for a clearer understanding of how the pieces fit together on public improvement projects.

Section 3 repeals subsection 3 of section 48-01.1-01 and section 48-01.1-09 of the North Dakota Century Code and along with that repeal removes what I feel were some conflicts in the existing statute.

Section 4 amends section 48-02-06.2 of the North Dakota Century Code to include bond requirements for all types of construction management individuals that may be used in the construction of a public improvement.

I hope this amendment to Engrossed House Bill No. 1387 will finally provide legislation which can serve the public's interest on improvement construction well into North Dakota's future.

I would be happy to answer any questions you may have.

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*Mark Dougherty*  
Operator's Signature

10/3/03  
Date

## PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL No. 1387

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact two new subsections to Section 48-01.1-01, amend and reenact Section 48-01.1-01, repeal Section 48-01.1-09 and amend and reenact Section 48-02-06.2 of the North Dakota Century Code relating to Public Improvement Contract Bids.

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

**SECTION 1.** Two new subsections to section 48-01.1-01 of the North Dakota Century Code are created and enacted as follows:

"Agency Construction Manager" means any person, duly licensed as a contractor in the State of North Dakota, that undertakes to act as an agent of the governing body to advise said governing on aspects of the proposed public improvement. The "Agency Construction Manager" does not guarantee the project cost, completion date or execute any contracts with prime contractors, subcontractors, service providers or suppliers. The "Agency Construction Manager" does not supervise and or control any aspect of the actual construction process.

"Construction Manager at Risk" means any person, duly licensed as a contractor in the State of North Dakota, that undertakes to deliver to a governing body a public improvement for a guaranteed maximum price and completion time. The "Construction Manager at Risk" contracts directly with prime contractors, subcontractors, service providers and suppliers. The "Construction Manager at Risk" does supervise and control of the actual construction process.

**SECTION 2. AMENDMENT.** Subsection 4 of section 48-01.1-01 of the North Dakota Century Code is amended and reenacted as follows:

4. "Contractor" means any person, duly licensed as a contractor in the State of North Dakota, that undertakes or enters a contract with a governing body or a construction manager at risk for the actual construction or construction management of any part of a public improvement, including multiple prime contracts whether as a prime contractor or subcontractor.

**SECTION 3. REPEAL.** Repeal subsection 3 of section 48-01.1-01 and section 48-01.1-09 of the North Dakota Century Code.

**SECTION 4. AMENDMENT.** Section 48-02-06.2 of the North Dakota Century Code  
is amended and reenacted as follows:

**48-02-06.2. Bonds from contractors requirements for public improvements.**

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

Renumber accordingly