

TESTIMONY OF

Sherry Neas, Central Services Division Director

Chairman Vedaa and members of the Senate Government and Veterans Affairs Committee. I am Sherry Neas, Director of the Office of Management and Budget (OMB) Central Services Division. I am here to testify regarding Senate Bill No. 2162 related to emergency purchases and state purchasing practices.

OMB appreciates the opportunity to discuss our concerns with the bill's sponsors and collaborate on an amendment to the bill. OMB supports the bill as amended.

Section 1

As introduced, Section 1 prevented OMB from restricting communications between bidders and state officials or members of the legislative assembly.

OMB would like to explain that we have never specifically prohibited communication between a potential or actual bidder and state officials or members of the legislative assembly. However, after discussion with the bill's sponsors, we do understand the concerns that prompted the legislation.

OMB has existing ND Century Code ("Laws"), ND Administrative Code ("Rules"), and standard language related to vendor communications during the procurement process to ensure fair treatment of vendors and prevent unfair practices such as: one vendor gaining an advantage over others through insider information; or a vendor attempting to influence the award of a public contract. In order to ensure fair and equitable treatment for all vendors, certain control measures have been adopted as standard procedures in procurements. Every procurement has a procurement officer as the point of contact for communications. Questions about solicitations must be directed to the procurement officer. This ensures the answers are provided to all vendors at the same time. Under current Rules, vendors who engage in unauthorized communication regarding an open solicitation can be suspended or debarred from the state bidders list. There are also Laws and Rules related to protests and appeals, which are administrative processes available to vendors who have concerns related to solicitations and awards.

OMB has no objection to a new statute clarifying that actual and potential bidders may communicate with state officials and members of the legislative assembly. As introduced, the language in the bill may inadvertently undermine the existing Laws and Rules related to vendor communications because the language does not reference the established practices and

vendors may be mistakenly encouraged to contact elected officials instead of the procurement officer. OMB offers the proposed amendments to this bill and we are satisfied that the amended language addresses our concerns while accomplishing the original intent of the bill's sponsors.

Section 2

Section 2 amends the existing emergency purchase laws that are under the section of law related to exemptions from the procurement process.

As introduced, the bill included a new subparagraph requiring samples for emergency purchases of commodities. OMB has two concerns with this new language.

- **Limitations:** This language could limit emergency purchases to commodities. Currently, the emergency purchase law allows for the procurement of commodities or services.
- **Sample Requirements:** Under existing procurement Laws, Rules and procedures, a purchasing agency may require samples as part of any procurement, including an emergency purchase. Samples are required to ensure that the offered product meets specifications. While requiring samples as part of a standard procurement process may be effective and doable, making samples a mandatory requirement for an emergency purchase of commodities may actually be a hindrance to an emergency purchase.

In addition, OMB recommends deleting the language, as introduced, that states, "a bidder may not change the bid proposal for forty-eight hours after submission." OMB is concerned that changing emergency purchasing laws to freeze bids and proposals for forty-eight hours could limit the state's ability to respond to emergency situations that impact lives, public safety and disruption of state services. The proposed amendment removes this limiting language.

Currently, in standard procurements, OMB does not encounter situations in which bidders attempt to change pricing. Existing Laws, Rules, and procedures govern changes to bids and proposals. No changes are allowed to bids after the closing date. The Request for Proposal (RFP) process allows the procurement officer to request Best and Final Offers which give all vendors the same opportunity to submit revised proposals.

OMB offers the proposed amendment addressing our concerns with the bill's language as introduced, offering additional language clarifying the emergency purchase section, and specifically addressing noncompetitive emergency purchases.

Section 3

Section 3 creates a new section of law related to payments. As introduced, the language of the bill conflicts with existing statute, N.D.C.C. § 13-01.1-01, requiring prompt payment "for each complete delivered item of property or service on the date required by contract" between a business and "[e]very state agency, political subdivision, or school district, which acquires property or services pursuant to a contract with a business..." The existing statute requires, "if no date for payment is specified by contract, [payment shall be made] within forty-five days after receipt of the invoice covering the delivered items or services."

Because this new section, as introduced, conflicts with existing law, it is the preference of OMB that it be struck from the bill. Existing contract and obligations laws and debtor and creditor laws already provide authority for the negotiation of payment terms and conditions in procurement contracts.

However, OMB recognizes the legislative assembly may want to address this issue within N.D.C.C. chapter 54-44.4 and offers the proposed amendment with the caveat that further amendments to Section 3 may create unintentional conflicts or ambiguities between this new law and existing laws governing contracts and obligations or debtor and creditor relationships.

The proposed amendment simply specifies that the purchasing agency and vendor may negotiate payment terms and it references the existing law that will apply in instances where a contract fails to specify payment terms.

Section 4

Section 4 amends the existing law related to the procurement information website. As introduced, the language seeks to require OMB post standard terms and conditions on this website, so the solicitation only contains the specifications.

OMB understands the concern regarding overly lengthy solicitation documents. However, the state purchases a wide variety of goods, services, information technology and printing. OMB and purchasing agencies need the flexibility to customize solicitation documents and contracts for specific commodity or service being purchased. It is important that vendors know the specific terms and conditions that will apply to the contract when they submit a bid or proposal.

OMB works regularly with stakeholders to refine and revise existing template documents. We understand at times some documents may seem lengthy or overly burdensome to some vendors, but I assure you we are committed to creating procurement documents that balance the need for the state to purchase needed commodities and services for the best value as a good steward of the taxpayers' dollar while attracting competitive, competent and responsible vendors in just about every professional and technical field imaginable.

We appreciate the concerns addressed in the bill and offer the proposed amendment seeking to achieve the desired outcome of encouraging standardization of procurement documents and encouraging brevity, while retaining the ability and best practice of customizing the template to fit the commodity or service being purchased.

Mr. Chairman and committee members, this concludes my testimony. Again, I thank the bill's sponsors for the opportunity to discuss concerns prior to this hearing. I ask your support for Senate Bill 2162 as amended. I would be happy to answer any questions.