

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1122

Introduced by

Representative Nelson

1 A BILL for an Act to create and enact two new sections to chapter 54-44.4 of the North Dakota
2 Century Code, relating to purchases by state officials and employees and multiple award vendor
3 pool contracts; and to amend and reenact subsection 6 of section 44-04-18.4, sections
4 54-44.4-01, 54-44.4-02, 54-44.4-05, subsection 1 of section 54-44.4-07, subsection 1 of section
5 54-44.4-09, sections 54-44.4-09.1, 54-44.4-12, 54-44.4-13, and 54-44.4-14 of the North Dakota
6 Century Code, relating to state purchasing practices.

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

8 **SECTION 1. AMENDMENT.** Subsection 6 of section 44-04-18.4 of the North Dakota
9 Century Code is amended and reenacted as follows:

10 6. Unless made confidential under subsection 1 or made exempt under subsection 5:

11 a. Bids received by a public entity in response to an invitation for bids by the public
12 entity are exempt until all of the bids have been received and opened by the
13 public entity.

14 b. Proposals received by a public entity in response to a request for proposals are
15 exempt records until a notice of intent to award is issued.

16 ~~e. Records included with any bid or proposal naming and generally describing the~~
17 ~~entity submitting the proposal are open.~~

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

20 **54-44.4-01. Declaration of policy - Definitions.**

21 It is state policy to provide comprehensive purchasing services based upon sound
22 procurement practices and principles wherein, through full competition with fair and equal

1 opportunity to all qualified persons to sell to the state, each state agency and institution shall
2 obtain its necessary commodities and services at competitive cost, consistent with quality, time,
3 and performance requirements, except as otherwise provided by law. As used in this chapter,
4 unless the context requires otherwise:

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

7 2. "Information technology" has the same meaning as provided in section 54-59-01.

8 3. "Procurement officer" means an individual duly authorized to enter and administer
9 purchasing contracts and make written determinations with respect thereto and also
10 includes an authorized representative acting within the limits of authority.

11 ~~3.4.~~ "Professional services" means those services requiring special knowledge, education,
12 or skills when the qualifications and experience of the individual rendering the services
13 are of primary importance and the individual is required to exercise professional
14 judgment. Professional services providers include appraisers, attorneys, accountants,
15 psychologists, physicians, dentists, planners, analysts, and consultants. The term
16 includes human services under which a person provides direct health or social welfare
17 services to the citizens on behalf of the state. The term does not include services
18 defined in section 54-44.7-01.

19 ~~4.5.~~ "Purchasing agency" means a governmental entity in the executive branch of
20 government other than the office of management and budget which is authorized by
21 this chapter, rules adopted under this chapter, written policy of the office of
22 management and budget, or by way of delegation from the office of management and
23 budget to enter purchasing contracts for commodities and services.

24 ~~5.6.~~ "Services" means the furnishing of labor, time, or effort by a contractor, not involving
25 the delivery of a specific end product other than reports that are merely incidental to
26 the required performance. The term includes professional services.

27 **SECTION 3. AMENDMENT.** Section 54-44.4-02 of the North Dakota Century Code is
28 amended and reenacted as follows:

29 **54-44.4-02. Office of management and budget purchasing services.**

30 The office of management and budget shall purchase or lease or otherwise arrange for the
31 procurement, for all state agencies and institutions in the executive branch of state government,

1 all materials, furniture, fixtures, printing, insurance, services, and other commodities. The-
2 International Peace Garden may participate in the procurement authorized by this-
3 ~~section~~Contracts for use by multiple state agencies and institutions, including purchases under
4 this section, must be established as a state contract by the office of management and budget or
5 as a cooperative purchasing contract under section 54-44.4-13. Information technology
6 procurements, including purchases under this section, are subject to the requirements of
7 chapter 54-59 and policies, standards, and guidelines established pursuant to section 54-59-09.

8 The following commodities and services, ~~however,~~ are not subject to the competitive
9 procurement requirements of this chapter:

- 10 1. Land, buildings, space, or the rental thereof, in accordance with sections 54-21-24.1
11 and 54-44.1-16.
- 12 2. Telephone and telegraph service and electrical light and power services.
- 13 3. Public books, maps, periodicals, resource materials, and technical pamphlets.
- 14 4. Department of transportation materials, equipment, and supplies in accordance with
15 section 24-02-16.
- 16 5. ~~Procurements~~Energy-related procurements by the industrial commission for
17 ~~energy-related~~ programs under chapters 17-05, 54-17.5, 54-17.6, 54-17.7, 54-63, and
18 54-63.1 and under those statutes in title 38 authorizing the industrial commission to
19 perform well and hole pluggings, reclamation work, equipment removal, leak
20 prevention, and similar work.
- 21 6. Services for the maintenance or servicing of equipment by the manufacturer or
22 authorized servicing agent of that equipment when the maintenance or servicing can
23 best be performed by the manufacturer or authorized service agent, or when such a
24 contract would otherwise be advantageous to the state.
- 25 7. Emergency purchases the office of management and budget or a purchasing agency
26 cannot make within the required time and which involve public health or public safety,
27 or when immediate expenditures are necessary for repairs of state property to protect
28 it against further loss or damage, or to prevent or minimize serious disruption in state
29 services.
 - 30 a. Emergency purchases made under this subsection must treat all bidders fairly
31 and promote competition as is practicable under the circumstances;

- 1 b. The procurement file must contain a written determination of:
 - 2 (1) The basis for the emergency; and
 - 3 (2) The basis for the selection of the particular contractor.
 - 4 c. If the emergency circumstances warrant a noncompetitive purchase, the office of
 - 5 management and budget or the purchasing agency shall document within the
 - 6 procurement file a written determination of the basis for the noncompetitive
 - 7 purchase, including the circumstances that justified the noncompetitive purchase.
 - 8 d. If the emergency purchase is subject to federal funding reimbursement, the office
 - 9 of management and budget or the purchasing agency shall ensure the
 - 10 procurement procedures and documentation are adequate to satisfy
 - 11 requirements for federal reimbursement.
 - 12 e. If time allows, emergency purchases for commodities under this subsection may
 - 13 require a sample for use in determining whether an offered product meets
 - 14 specifications.
- 15 8. Commodities and services costing less than a specified amount as determined by
 - 16 written directive by the director of the office of management and budget.
 - 17 9. Specified commodities and services as determined by written directive by the director
 - 18 of the office of management and budget.
 - 19 10. Employee benefit services, trust-related services, and investment management
 - 20 services obtained by an agency with a fiduciary responsibility regarding those
 - 21 services. Nothing in this subsection may be construed to allow an agency to create or
 - 22 renew a contract perpetually and without limitation.
 - 23 11. Services to extract, tow, store, and dispose of abandoned or submerged vehicles as
 - 24 defined in chapter 23.1-15.
 - 25 12. Contracts by the agriculture commissioner for agricultural market news services under
 - 26 cooperative agreements with the United States department of agriculture, ombudsmen
 - 27 for pipeline restoration under section 4.1-01-17, environmental impact mitigation
 - 28 services under section 4.1-01-21.1, ombudsmen for wind property issues under
 - 29 section 4.1-01-23, weed control inspection agents under section 4.1-14-02, and hemp
 - 30 testing under section 4.1-18.1-04.2.
 - 31 13. Contracts by the state auditor for audits of computer systems under section 54-10-29.

- 1 14. Contracts by the attorney general with experts under section 10-33-145.
- 2 15. Contracts by the department of health and human services for ~~online-virtual~~ mental
- 3 health and suicide prevention ~~simulation-based~~ training programs, ~~under~~
- 4 ~~subsection 28 of section 50-06-05.1~~ and brain injury informal supports, and other
- 5 under section 50-06-4-07 training and related materials for individuals receiving
- 6 assistance or services and employees, contractors, or professionals providing
- 7 assistance or services under programs administered by or under the supervision and
- 8 direction of the department of health and human services.
- 9 16. Expenditures by a state agency or institution for direct media placement, including a
- 10 billboard or signage, with a newspaper or newspaper industry association, magazine
- 11 or other publication, radio or television station, digital media provider, or venue.

12 All purchases made by the office of management and budget or a state agency or institution to

13 which authority to purchase has been delegated by the office of management and budget must

14 be made in accordance with this chapter, rules adopted under this chapter, and written policies

15 of the office of management and budget.

16 **SECTION 4. AMENDMENT.** Section 54-44.4-05 of the North Dakota Century Code is

17 amended and reenacted as follows:

18 **54-44.4-05. Competitive, limited competitive, noncompetitive, and negotiated**

19 **purchases - Exempt records.**

- 20 1. Except as otherwise provided in sections 12-48-03.1 and 44-08-01, chapter 25-16.2,
- 21 and this chapter, purchasing contracts must be awarded through a competitive bidding
- 22 process to the lowest responsible bidder considering conformity with specifications,~~–~~
- 23 and terms of delivery, and quality and serviceability, unless it is ~~determined to be~~
- 24 advantageous to the state to select a contractor through a request for a competitive
- 25 proposal process pursuant to section 54-44.4-10 ~~using other or additional criteria.~~
- 26 Notwithstanding this section, the director of the office of management and budget or
- 27 the director's designee may determine a different procurement process is in the best
- 28 interest of the state and shall document the circumstances, procurement process, and
- 29 basis for contract award in the procurement file.
- 30 2. The procurement officer may reject any or all bids or proposals or negotiate for a lower
- 31 price with a successful bidder or offeror. Each bid or proposal received, with the name

1 of the bidder or offeror, must be recorded. The office of management and budget may
2 enter into term contracts for the acquisition of commodities or services and may make
3 multiple awards for term commodity or service contracts when it deems a multiple
4 award to be in the best interests of the state.

5 3. All bids and proposals received under this chapter pursuant to a competitive sealed-
6 ~~bidsolicitation~~ are exempt records under subsection 5 of section 44-04-17.1 ~~until the~~
7 ~~date and time the bids are opened~~except as otherwise provided under subsection 6 of
8 section 44-04-18.4.

9 4. The office of management and budget shall adopt rules specifying the circumstances
10 under which competition may be waived or limited, when negotiation may be used,
11 and specifying the required justifications and procedures for using those methods of
12 purchasing. The office of management and budget shall adopt rules related to sending
13 notice of intent to make limited competitive, noncompetitive, and negotiated purchases
14 in accordance with this chapter. The notice must describe the needed commodity or
15 service and the intended procurement method and must state that persons are
16 permitted to submit bids or proposals for contracts to be awarded under this section.
17 The circumstances that may permit limited competitive, noncompetitive, or negotiated
18 purchases include:

- 19 a. The commodity or service is available from only one source.
20 b. The commodity or service is to be purchased for experimentation or trial.
21 c. No acceptable bid or proposal was received pursuant to a competitive bidding or
22 competitive proposal process.
23 d. Commodities are being purchased for over-the-counter resale.
24 e. Acceptable commodities or services are produced or provided by ~~correctional-~~
25 ~~institutions or prison industries under section 12-48-03.1,~~ other government
26 agencies, or a work activity center as defined in section 25-16.2-01.
27 f. The anticipated cost of purchasing specified commodities or services is less than
28 an amount determined by the office of management and budget which would
29 justify the expense of a competitive bidding or competitive proposal process.
30 g. A used commodity is advantageous to the state and the commodity is available
31 only on short notice.

- 1 h. The commodity is a component or replacement part for which there is no
2 commercially available substitute and which can be obtained only from the
3 manufacturer.
- 4 i. Compatibility with equipment currently owned by the state is essential to the
5 proper functioning of that equipment.
- 6 j. The agency provides documentation indicating that the services or the
7 circumstances are of such a nature that deviation from the procurement
8 procedure is appropriate.
- 9 k. Recurring support costs associated with implemented information technology
10 solutions, including licensing, service agreements, maintenance, and
11 subscriptions for software as a service, platform as a service, and infrastructure
12 as a service. This includes recurring costs for software or firmware required for
13 proper functioning of currently owned equipment.
- 14 l. Contracts for specialized equipment, machinery, and materials required for
15 manufacturing, production, and distribution by the North Dakota mill and elevator
16 association under section 54-18-02 or prison industries under section 12-48-03.1.
- 17 m. Purchases of copyrighted printed and electronic books, periodicals, subscriptions
18 to publications, subscriptions to information services, prerecorded audio and
19 video materials, state library materials, and state library online resources,
20 including purchases for libraries operated by state agencies, institutions of higher
21 education, and other public libraries.

22 **SECTION 5. AMENDMENT.** Subsection 1 of section 54-44.4-07 of the North Dakota
23 Century Code is amended and reenacted as follows:

- 24 1. The office of management and budget, the institutions of higher education, and any
25 other state agency or institution that has authority to purchase products are
26 encouraged to purchase environmentally preferable products.
- 27 a. When practicable, specifications for purchasing newsprint printing services
28 should specify the use of soybean-based ink. ~~The North Dakota soybean council~~
29 ~~and the agriculture commissioner shall assist the office of management and~~
30 ~~budget in locating suppliers of soybean-based inks and in collecting data on the~~
31 ~~purchase of soybean-based inks.~~

1 b. When practicable, biobased products should be specified.

2 **SECTION 6. AMENDMENT.** Subsection 1 of section 54-44.4-09 of the North Dakota
3 Century Code is amended and reenacted as follows:

4 1. The office of management and budget shall establish and maintain a bidders list of
5 persons that desire to be informed of government procurement opportunities. The
6 office of management and budget or the purchasing agency shall notify those on the
7 list when issuing invitation for bids or request for proposals over the amount
8 established for small purchases, except as otherwise provided in this section. The
9 office of management and budget or the purchasing agency shall notify those on the
10 list when sending notice of intent to make cooperative, limited competitive,
11 noncompetitive, and negotiated purchases. A person may be required to register for
12 the bidders list before the person may submit a response to a solicitation.

13 **SECTION 7. AMENDMENT.** Section 54-44.4-09.1 of the North Dakota Century Code is
14 amended and reenacted as follows:

15 **54-44.4-09.1. Secretary of state registration.**

16 A person that has a registration requirement with the secretary of state must be registered
17 before the contract awardexecution and the registration must remain active for the duration of
18 the contract period.

19 **SECTION 8. AMENDMENT.** Section 54-44.4-12 of the North Dakota Century Code is
20 amended and reenacted as follows:

21 **54-44.4-12. Resolution of protested solicitations and awards.**

22 1. An interested party may protest the award of a contract, the notice of intent to award a
23 contract, or a solicitation for commodities or services by the office of management and
24 budget or purchasing agency under this chapter. The protest must be submitted in
25 writing or electronic mail communication to the procurement officer responsible for the
26 contract or solicitation within seven calendar days after the protestor knows or should
27 have known of the facts giving rise to the protest.

28 2. If a contract has been awarded, the procurement officer immediately shall give notice
29 of a protest to the contractor. In the case of pending award, a stay of award may be
30 requested. A stay must be granted unless a written determination is made that the
31 award of the contract without delay is necessary to protect the interests of the state.

1 3. If the protest is resolved by mutual agreement, the procurement officer shall send
2 written notice to the protestor confirming the mutually agreed upon resolution. If the
3 protest is not resolved by mutual agreement, the procurement officer promptly shall,
4 within seven calendar days, send by certified mail to the protestor a written decision
5 containing the basis for the decision and inform the protestor of the protestor's right to
6 appeal under subsection 5 of this section. The procurement officer may extend the
7 protest review period by no more than seven calendar days and shall send written
8 notice to the protestor of the extension.

9 4. The procurement officer shall promptly provide the office of management and budget
10 with a copy of the protest and the procurement officer's decision.

11 4.5. The protestor may file an appeal of the decision rendered by the procurement officer
12 ~~with the director of the office of management and budget or designee. An appeal must~~
13 ~~be filed in writing within seven calendar days after the protestor receives the decision~~
14 ~~rendered by the procurement officer of the office of management and budget or the~~
15 ~~purchasing agency. The appeal must include a copy of the decision being appealed~~
16 and the basis for the appeal. An appeal of a decision rendered by a procurement
17 officer of a state agency or an institution that is not under the jurisdiction of the state
18 board of higher education, must be filed with the office of management and budget. An
19 appeal of a decision rendered by a procurement officer of an institution under the
20 jurisdiction of the state board of higher education must be filed in accordance with
21 policy established under subsection 5 of section 15-10-17. Within seven calendar days
22 ~~the director of the office of management and budget or the director's designee~~
23 ~~authority shall send by certified mail written notice of the appeal decision to the~~
24 protestor. The deciding authority may extend the appeal review period by no more
25 than seven calendar days. Notice of any extension shall be provided in writing to the
26 protestor.

27 6. Written notices required in this section may be accomplished by certified mail,
28 commercial delivery service with delivery confirmation, or by a delivery confirmation to
29 the electronic mail address used by the protestor to submit the protest.

30 **SECTION 9. AMENDMENT.** Section 54-44.4-13 of the North Dakota Century Code is
31 amended and reenacted as follows:

1 **54-44.4-13. Cooperative purchasing.**

2 1. The office of management and budget shall purchase commodities or services as
3 requested by agencies and institutions ~~under the jurisdiction of the state board of~~
4 higher education and the legislative and judicial branches of state government.

5 2. The office of management and budget and the agencies and institutions ~~under the~~
6 jurisdiction of the state board of higher education shall make joint purchases of like
7 commodities or services of high common usage when the office of management and
8 budget and the state board of higher education determine it is in the best interest of
9 the state.

10 3. An institution of higher education may establish a cooperative purchasing contract for
11 use limited to other institutions of higher education.

12 ~~3.4.~~ The director of the office of management and budget or the director's designee may
13 agree to purchase commodities or services under contracts entered into by the United
14 States general services administration or contracts of other government entities if it is
15 determined to be in the best interest of the state after consideration of price,
16 contractual terms and conditions, and the availability of competition.

17 ~~4.5.~~ The director of the office of management and budget or the director's designee may
18 participate in, sponsor, or administer a cooperative purchasing agreement with one or
19 more government entities or a nonprofit organization established on behalf of public
20 entities for the procurement of commodities or services in accordance with an
21 agreement entered into between the participants.

22 ~~5.6.~~ The director of the office of management and budget or the director's designee may
23 coordinate with the director of the department of transportation or the director's
24 designee to establish or participate in contracts which may be made available to
25 entities that have been determined by the department of transportation to be
26 transportation providers under chapter 39-04.2 eligible to receive state funds or federal
27 funds for public transportation.

28 ~~6.7.~~ Cooperative purchasing may include open-ended contracts that are available to other
29 government entities, nonprofit organizations established on behalf of public entities,
30 tribal agencies, ~~or~~ transportation providers determined to be eligible under this section,
31 or the International Peace Garden established under chapter 55-05.

1 ~~7.8.~~ Before entering into a cooperative purchasing agreement under this section, the office
2 of management and budget must determine that the contracts were awarded through
3 full and open competition or source selection methods specified in section 54-44.4-05
4 and shall send notice to the bidders list of the office's intent to make a cooperative
5 purchase in accordance with this chapter.

6 **SECTION 10. AMENDMENT.** Section 54-44.4-14 of the North Dakota Century Code is
7 amended and reenacted as follows:

8 **54-44.4-14. Procurement information - Website.**

- 9 1. The office of management and budget shall establish and maintain a procurement
10 information website on the internet. This procurement information website must
11 provide current information regarding North Dakota government procurement
12 opportunities in order to inform potential vendors of the commodities and services
13 sought by state agencies and institutions. Notwithstanding section 54-44.4-09, for
14 each purchase of services or commodities over the amount established for small
15 purchases, the office of management and budget and every purchasing agency shall
16 provide procurement information on the website. The time period and manner of
17 providing procurement information on the website must be in accordance with rules
18 adopted by the office of management and budget. The office of management and
19 budget may contract with a third party to assist in providing or maintaining the
20 procurement information website.
- 21 2. Aln addition to other notice requirements provided by law, a state agency or institution
22 may elect to use the issu solicitation notices on the procurement information website
23 for the purchase of services and commodities that are not subject to the procurement
24 requirements of this chapter, including:
- 25 a. Commodities and services exempted under section 54-44.4-02;
26 b. Public improvements under title 48;
27 c. Architect, engineer, construction management, and land surveying services
28 under chapter 54-44.7; and
29 d. Concessions under chapter 48-09.
- 30 3. The office of management and budget shall establish and maintain a standardized
31 procedure for the submission of electronic bids and proposals through the

1 procurement information website. The office of management and budget, in
2 consultation with the office of the attorney general, shall develop standardized
3 solicitation documents. The documents must be made available on the procurement
4 information website. When drafting a solicitation, the office of management and budget
5 and purchasing agencies shall use their best efforts to minimize the length of the
6 solicitation by ensuring only those sections from the standardized solicitation
7 documents applicable to the procurement are included.

8 4. The office of management and budget may make the procurement information website
9 available to government entities, including political subdivisions of the state and public
10 schools, for the purpose of issuance of solicitation notices that are in addition to any
11 other notice requirements provided by law.

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

14 **Purchases from state contracts by state officials and employees.**

15 The office of management and budget, in consultation with the office of the attorney
16 general, shall adopt rules related to circumstances under which it is determined to be in the best
17 interest of the state to authorize state officials and employees to make personal purchases from
18 state contracts.

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

21 **Multiple award vendor pool contracts - Indefinite-delivery, indefinite-quantity -**
22 **Multistep competition.**

23 1. The office of management and budget, in coordination with the state board of higher
24 education and the information technology department, shall develop guidelines for
25 establishing multiple award vendor pool contracts, including cooperative purchasing
26 contracts under section 54-44.4-13. Multiple award vendor pool contracts establish
27 indefinite-delivery, indefinite-quantity primary contracts with service providers including
28 hourly rates for various services, unit prices for deliverable products, and provisions
29 for price adjustments. The guidelines must establish thresholds at which a purchasing
30 agency or institution may purchase directly from a service provider within the vendor
31 pool or must obtain secondary competition by soliciting bids or proposals limited to

- 1 service providers within the vendor pool. A purchasing agency or institution
2 establishing a multiple award vendor pool contract or making a purchase from a
3 vendor pool contract shall comply with guidelines established under this section.
- 4 2. A multiple award vendor pool primary contract term may not exceed a total contract
5 length of five years, including renewals and extensions, unless prior written approval is
6 obtained as set forth in the guidelines. The work performed under an awarded
7 secondary contract must be completed within the contract term of the primary vendor
8 pool contract.
- 9 3. The purchasing agency or institution making a purchase from a vendor pool contract
10 shall prepare a statement of work for the entire project describing the needed services
11 to determine the level of competition required. The purchasing agency or institution
12 may not artificially fragment requirements or make serial noncompetitive purchases
13 from service providers within the vendor pool to circumvent competition requirements.