

2025 SENATE INDUSTRY AND BUSINESS

SCR 4021

2025 SENATE STANDING COMMITTEE MINUTES

Industry and Business Committee Fort Union Room, State Capitol

SCR 4021
2/10/2025

A concurrent resolution urging the United States Federal Government, Congress, and the Governor of North Dakota to end the disadvantaged business enterprise program.

3:00 p.m. Chairman Barta opened the hearing.

Members Present: Chairman Barta, Vice Chairman Boehm, Senators Enget, Kessel, Klein.

Discussion Topics:

- State spending
- Definition of discrimination and non-discrimination
- Disadvantaged Business Enterprise program (DBE) businesses and guidelines
- Competitive bidding
- Bid differential clause

3:03 p.m. Senator Justin Gerhardt, District 34, testified in favor and introduced the bill.

3:18 p.m. Carey Burke, representing the Associated General Contractors of ND, testified in favor and submitted testimony #36835

3:25 p.m. Amber Schoenborn, Vice President, CEO Officer and DBE contact for Northern Improvement Company, testified in favor and submitted testimony #36837

3:37 p.m. Russell Hansen, Executive Vice President of Associated General Contractors of ND, testified in favor.

3:40 p.m. Chairman Barta closed the hearing.

3:40 p.m. Senator Klein moved a Do Pass.

3:41 p.m. Senator Kessel seconded the motion.

Senators	Vote
Senator Jeff Barta	Y
Senator Keith Boehm	Y
Senator Mark Enget	Y
Senator Greg Kessel	Y
Senator Jerry Klein	Y

Motion passed 5-0-0.

Senator Enget will carry the bill.

3:42 p.m. Chairman Barta closed the hearing.

Audrey Oswald, Committee Clerk

REPORT OF STANDING COMMITTEE
SCR 4021 ([25.3092.02000](#))

Industry and Business Committee (Sen. Barta, Chairman) recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT OR EXCUSED AND NOT VOTING). SCR 4021 was placed on the Eleventh order on the calendar. This resolution does not affect workforce development.

February 10, 2025

**Senate Industry & Business
SCR 4021**

Mr. Chairman and members of the Senate Industry & Business Committee, my name is Carey Burke, and I am with the Associated General Contractors of North Dakota (AGC of ND). The AGC is the largest construction trade association in North Dakota representing more than 400 member companies performing commercial construction in the state. Our association is comprised of contractors, subcontractors, and suppliers – most of whom are affected by the Disadvantaged Business Enterprise (DBE) program.

The AGC of ND is here today in support of SCR 4021. Before I turn the podium over to our members who are the current experts on the program and who will give specific examples of the cost of the DBE program to ND, I will share a couple personal experiences.

I have been an employee of the AGC of ND since 2018. Prior to that, I was an active AGC member for 22 years. As the third generation in our family-owned construction company I wore many hats – accountant, janitor, and DBE officer to name a few. It was my job to make sure our company was following the DBE rules as they were applied then.

As a member, I participated in a meeting between AGC contractors and the NDDOT about 12 years ago. Civils Rights representatives were in attendance, as well as the NDDOT Director. The contractors' main concern was the application of the DBE Bid Differential clause. This clause allows the prime contractor not to use a DBE quote due to Bid Differential – either another quote was lower or the contractor could self-perform the work at a lower cost. For Good Faith Efforts, the prime contractors had to prove they considered the DBE quote but had a valid reason for not using it – in this case, cost. It was around this time that the application of that clause changed and, while Bid Differential is still included in the DBE program, it has basically become non-applicable in North Dakota. The message contractors have received is there is no valid excuse not to use the DBE quote no matter how much higher it is. We must meet our DBE participation goal. It was a long and

somewhat contentious meeting but, I will never forget, the Director at the time told the room, "we do not have a discrimination problem in construction in North Dakota." But it's the game we must play.

And it has become a game. For example, it's easy to become a DBE supplier. On bid night, a non-DBE culvert supplier quotes the prime contractors. The DBE culvert supplier gets the same quote from the non-DBE culvert supplier, puts it on DBE supplier letterhead, marks it up, and quotes the same prime contractors. The contractors have to use the marked-up DBE quote if they want to be awarded the project. It's a paperwork magic trick costing North Dakota taxpayers money.

The intention of this well-meaning program was to level the playing field, but the results of the program today are an uneven, costly set-aside.

Thank you for the opportunity to testify in favor of this resolution. The AGC of ND urges you to vote DO Pass.

February 10, 2025
Senate Industry & Business Committee
SCR 4021

Mr. Chairman and members of the Industry and Business committee, I appreciate the opportunity to present this testimony in favor of SCR 4021. My name is Amber Schoenborn I work for Northern Improvement Company; I am a Vice President and for the last 15 years I have been the EEO Officer and DBE contact for the company.

North Dakota has several fantastic DBE companies that we work with on federally funded as well as non-federally funded projects. SCR 4021 does not imply anything negative toward DBE companies, it is strictly focused on the fact that our priority as a prime contractor should be to bring forward the most competitive bid possible.

If you could bear with me for a moment, I would like to give two of example of issues we have seen with the program.

In November of 24 we were the apparent low bidder for a federally funded Shared Use Path in Casselton with a bid of \$1.9M which was \$270K lower than the 2nd bidder, our bid was \$11K shy of the DBE goal. We used six DBEs on this project four of the DBE's we used were 33%, 35%, 45%, and 65% percent higher than their non-DBE competitors and the Good Faith Efforts committee recommended 'not award'. We did prevail in an Administrative Review and were awarded the contract, but not without additional time and effort. The DBE program is not only costing taxpayers additional money when we, as a contractor, are using quotes that are upwards of 65% higher but there is also a cost to the NDDOT, and employees of prime contractors being burdened with preparation for reconsideration meetings as well as the meetings themselves.

One final example was a project bid in November of 22 in which the Good Faith Efforts committee recommended 'not award' because we failed to send an email to 1st tier subs requesting that they utilize 2nd tier DBE's. We filed for an Administrative Reconsideration

Meeting in the meeting. I stated we are certainly not experts in the fields that our subcontractors supply quotes in, we do not feel that we should be expected to suggest how they conduct their business. In the end, the NDDOT agreed with the Good Faith Efforts committee that we didn't do enough to get adequate DBE participation. In this example all bids were rejected, the project was rebid the following year and resulted in \$400K of additional cost to taxpayers.

The DBE program costs taxpayers additional money by not allowing contractors to use the lowest quotes to put forth the most competitive bid.

Thank you for the opportunity to comment on SCR 4021, Northern Improvement Company asks that you issue a Do Pass Recommendation to this resolution in its entirety. I would stand for questions from the committee, if there are any.

2025 HOUSE FINANCE AND TAXATION

SCR 4021

2025 HOUSE STANDING COMMITTEE MINUTES

Finance and Taxation Committee Room JW327E, State Capitol

SCR 4021
3/5/2025

A concurrent resolution urging the United States Federal Government, Congress, and the Governor of North Dakota to end the disadvantaged business enterprise program.

9:28 a.m. Chairman Headland opened the hearing.

Members Present: Chairman Headland, Vice Chairman Hagert, Representatives D. Anderson, Dockter, Dressler, Foss, Grueneich, Ista, Motschenbacher, Nehring, J. Olson, Porter, Steiner
Members Absent: Representative Toman

Discussion Topics:

- Non-discrimination division
- Tax player dollars
- Bid differential
- Contractual goals

9:29 a.m. Senator Justin Gerhardt introduced the bill and submitted testimony #38845.

9:37 a.m. Carey Burke, Director of Marketing and Member Services, Associated General Contractors of ND, testified in favor and submitted testimony #38851.

9:43 a.m. Amber Schoenborn, Vice President, Northern Improvement Company, testified in favor and submitted testimony #38853.

9:53 a.m. Chairman Headland closed the hearing.

9:53 a.m. Representative Dockter moved a Do Pass.

9:53 a.m. Representative Steiner seconded the motion.

Representatives	Vote
Representative Craig Headland	Y
Representative Jared Hagert	Y
Representative Dick Anderson	Y
Representative Jason Dockter	Y
Representative Ty Dressler	Y
Representative Jim Grueneich	Y
Representative Mike Motschenbacher	Y
Representative Dennis Nehring	Y

Representative Jeremy Olson	Y
Representative Todd Porter	Y
Representative Vicky Steiner	Y
Representative Nathan Toman	AB
Representative Austin Foss	N
Representative Zachary Ista	N

9:54 a.m. Motion passed 11-2-1.

9:54 a.m. Representative Nehring will carry the bill.

9:54 a.m. Chairman Headland closed the meeting.

Janae Pinks, Committee Clerk

REPORT OF STANDING COMMITTEE
SCR 4021 ([25.3092.02000](#))

Finance and Taxation Committee (Rep. Headland, Chairman) recommends **DO PASS** (11 YEAS, 2 NAYS, 1 ABSENT OR EXCUSED AND NOT VOTING). SCR 4021 was placed on the Fourteenth order on the calendar.



ELIGIBILITY REQUIREMENTS

Ownership and Control

An individual must own 51% or more of a "small business" and establish that they are socially and economically disadvantaged. A disadvantaged owner seeking certification must possess the power to direct or cause the direction of the management and policies of the firm. The owner must also have an overall understanding of managerial and technical competency and experience directly related to the type of business in which the firm is engaged.

Social and Economic Disadvantage

Certain groups are presumed socially disadvantaged by the U.S. Small Business Administration including women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian-Pacific Americans.

The Department sets financial limitations to an individual's personal net worth (PNW), and a firm's annual gross receipts to meet an economic disadvantage status. For the most recent limitations on eligibility, visit the NDDOT DBE page by visiting: <https://www.dot.nd.gov/about-nddot/civil-rights/>.

The Competitive Edge

NDDOT determines DBE goals on federally-aided highway construction projects. This then drives prime contractors to solicit DBEs directly for quote submissions and to participate in the prime contractor's proposal to the state. The more DBEs used on a project, the more competitive the proposal.

Being certified as a DBE creates new opportunities and give your company a competitive edge in government contracting.

March 5, 2025

House Finance & Taxation

SCR 4021

Mr. Chairman and members of the House Finance & Taxation Committee, my name is Carey Burke, and I am with the Associated General Contractors of North Dakota (AGC of ND). The AGC is the largest construction trade association in North Dakota representing more than 400 member companies. Our association is comprised of commercial contractors, subcontractors, and suppliers – most of whom are affected by the Disadvantaged Business Enterprise (DBE) program.

The AGC of ND is here today in support of SCR 4021. Before I turn the podium over to our members who are the current experts on the program and who will give specific examples of the cost of the DBE program to ND, I would like to share a couple thoughts.

I have been an AGC of ND employee since 2018. Prior to that, I was an active AGC member for 22 years. As the third generation in our family-owned construction company I wore many hats – accountant, janitor, and DBE representative to name a few. It was my job to make sure our company was following the DBE rules as they were applied at that time.

As a member, I participated in a meeting between AGC contractors and the NDDOT about 12 years ago. Civils Rights representatives were in attendance, as well as the NDDOT Director. The contractors' main concern was the application of the DBE Bid Differential clause. This clause allows the prime contractor not to use a DBE quote due to Bid Differential – either another quote was lower or the contractor could self-perform the work at a lower cost. For Good Faith Efforts, prime contractors had to prove they considered the DBE quote but had a valid reason for not using it. It was around this time that the application of that clause changed and, while Bid Differential is technically still included in the DBE program, it has basically become non-applicable in North Dakota. Projects with a DBE provision now require the prime contractor to use the DBE quote even if that price is higher than a non-DBE quote. We must meet our DBE participation goal. It was a long and

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somewhat contentious meeting but, I will never forget, the NDDOT Director at the time told the room, "we do not have a discrimination problem in construction in North Dakota." But, because we rely on federal funding, it's the game we must play.

And it has become a game. For example, it's easy to become a DBE supplier. On bid night, a non-DBE culvert supplier quotes the prime contractors. The DBE culvert supplier gets the same quote from the non-DBE culvert supplier, puts it on DBE supplier letterhead, marks it up, and quotes the same prime contractors. The contractors have to use the marked-up DBE quote if they want to be awarded the project. It's a paperwork magic trick.

There are a number of talented and driven DBE contractors and suppliers who perform admirably and can compete on their own merits. They don't need a Disadvantaged Business Enterprise program to succeed. So, the fact they can price their work higher is just a bonus to them and extra cost for taxpayers.

However, there are DBE contractors and suppliers who, because of their status, are given contracts but are simply unable to perform. If the DBE can't perform or abandons the project, the prime contractor must then find another DBE to do the work, almost always at a greater, unrecoverable cost.

The DBE program has been in existence for decades with dubious results and added costs for the taxpayer. While the intention of this well-meaning program was to level the playing field, the result is an uneven, discriminatory, costly set-aside.

The time for the DBE program has passed and it should be ended.

Thank you for the opportunity to testify in favor of this resolution. I urge you to vote DO PASS.

March 5, 2025
Finance and Taxation Committee
SCR 4021

Mr. Chairman and members of the Finance and Taxation committee, thank you for your time, I appreciate the opportunity to present this testimony in favor of SCR 4021. My name is Amber Schoenborn I have worked for Northern Improvement Company for the last 22 years; I am a Vice President and for the last 15 years I have been the Equal Employment Opportunity Officer and DBE contact for the company.

First, I would like to say that North Dakota has several fantastic DBE companies that we work with on federally funded as well as non-federally funded projects. SCR 4021 does not imply anything negative toward any of the DBE companies, it is strictly focused on the fact that our priority as a prime contractor should be to bring forward the most competitive bid possible. That being said there are certainly DBE companies that are not doing an adequate job resulting in the prime stepping in and completing the work or in some cases the DBE being removed which results in replacement that requires a minimum five (5) day notice to the DBE, then the prime to contact all the other DBE's that do the same type of work to see if they are available which delays the work even further. We have also had issues with DBE's not paying proper wage rates resulting in the DOT not releasing payment to the prime, which then delays our payment to all of our subcontractors.

The current SP states "The fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for bidder's failure to meet the contract DBE goal, as long as such costs are reasonable." Unfortunately, reasonable does not come with any guidance, what I think is reasonable and what you think is reasonable might not be the same, and what the NDDOT Civil Rights thinks is reasonable changes based on the size of the job. We have been directly told it depends on the total prime contract amount. For example, a 50% difference might be unreasonable for a \$100,000 subcontract on a \$500,000 project, but the same quote that is 50% higher on a \$100,000 subcontract would NOT be unreasonable if the full contract was \$10M. I am sure you can understand how this

is not only confusing but also frustrating for prime contractors as they attempt to put together their bid.

If you could bear with me for a moment, I would like to give a couple additional examples of issues the program has caused.

In November of 2024 Northern Improvement was the apparent low bidder for a federally funded Shared Use Path in Casselton North Dakota with a bid of \$1.9M, we were \$75K less than the Engineers Estimate on the project and \$269K less than the 2nd bidder. We utilized six DBE's four of which were 33%, 35%, 45%, and 65% higher than their non-DBE competitors and the Good Faith Efforts committee still recommended to 'not award' the project to Northern Improvement Company, the DOT was prepared to award the project to the second bidder for an additional cost to taxpayers of \$269K. We filed for an administrative reconsideration meeting in which we did prevail and were awarded the contract, but not without additional time and effort. The DBE program is not only costing taxpayers additional money when we, as a contractor, are using quotes that are upwards of 65% higher but there is also a cost to the NDDOT, and employees of prime contractors being burdened with preparation for the meetings as well as the reconsideration meetings themselves.

Another example was a project bid in November of 2022 in which Civil Rights recommended 'not award' because we failed to send an email to 1st tier subcontractors requesting that they utilize 2nd tier DBE's when possible. We filed for an Administrative Reconsideration Meeting in the meeting I stated our job as a prime contractor is to put forth a competitive bid, using subcontractors qualified to do the work who are expected to use suppliers they are confident in. We are certainly not experts in the fields that our subcontractors supply quotes in, we do not feel that we should be expected to suggest how they conduct their business. The NDDOT unfortunately agreed with the Good Faith Efforts Committee in that we didn't do enough to get adequate DBE participation. In this example all bids were rejected the project was rebid the following year and resulted in \$400K of additional cost to taxpayers.

I would love to put a true fiscal cost to the program, but it is impossible to do. If two prime contractors receive a quote the price difference of what contractor A has for self-performing vs contractor B wouldn't be the same. Two primes might receive different non-DBE quotes that result in that price difference being higher for one or the other, these things are not tracked. It should be easy for the DOT to put a cost to the jobs that are not awarded to the apparent low bidder due to DBE goals when they are then awarded to a higher bidder, but that is just a fraction of the true calculated cost. Primes are only providing the DOT with bid differentials when they didn't meet the DBE project goal, and it is submitted as part of the good faith efforts. Unfortunately, we can't put a true value to this program, only that is a large cost.

The DBE program costs taxpayers additional money by not allowing contractors to use the lowest quotes to put forth the most competitive bid.

Thank you for the opportunity to comment on SCR 4021, Northern Improvement Company asks that you issue a Do Pass Recommendation to this resolution in its entirety. I would stand for questions from the committee, if there are any.