

**Sixty-eighth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 3, 2023**

SENATE BILL NO. 2042
(State and Local Government Committee)
(At the request of the Office of Management and Budget)

AN ACT to create and enact sections 54-44.4-05.1 and 54-44.4-09.1 of the North Dakota Century Code, relating to resolution of identical bids or proposals in procurement and secretary of state registration; and to amend and reenact sections 44-08-01, 44-08-02, 54-44.4-02, 54-44.4-05, 54-44.4-09, and 54-44.4-13 of the North Dakota Century Code, relating to reciprocal preference requirements in procurement, resident North Dakota bidder, seller, vendor, offeror, or contractor, exemptions from procurement, procurement solicitation methods, bidder registration requirements, approved vendors, and public notices.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 44-08-01 of the North Dakota Century Code is amended and reenacted as follows:

44-08-01. Preference to North Dakota bidders, sellers, and contractorsCompetitive purchasing required.

- ~~1. The office of management and budget, any other state entity, and the governing body of any political subdivision of the state in purchasing any goods, merchandise, supplies, or equipment of any kind, or contracting to build or repair any building, structure, road, or other real property, shall give preference to bidders, sellers, or contractors resident in North Dakota. The preference must be equal to the preference given or required by the state of the nonresident bidder, seller, or contractor.~~
- ~~2. A state entity authorized to accept bids shall give preference to a resident North Dakota bidder when accepting bids for the provision of professional services, including research and consulting services. The preference must be equal to the preference given or required by the state of the nonresident bidder.~~
3. The office of management and budget, any other state entity, and the governing body of any political subdivision of the state in specifying or purchasing any goods, merchandise, supplies, or equipment, may not specify any trademarked or copyrighted brand or name, nor the product of any one manufacturer, nor any patented product, apparatus, device, or equipment, when the same will prevent proper competition, unless bidders also are asked for bids or offers upon other articles of like nature, utility, and merit. When it is advantageous that the purchase be of a particular brand of product or products of a particular manufacturer to the exclusion of competitive brands or manufacturers, the purchasing board or entity must document those circumstances and provide written justification for the proprietary specification or purchase. The purchasing board or entity shall procure the proprietary product through a competitive process unless the needed product is available exclusively from one source of supply or other circumstances exist under which competition can be waived.

SECTION 2. AMENDMENT. Section 44-08-02 of the North Dakota Century Code is amended and reenacted as follows:

44-08-02. Resident North Dakota bidder, seller, vendor, offeror, and contractor defined.

The term "a resident North Dakota bidder, seller, vendor, offeror, or contractor" ~~when used in section 44-08-01,~~ unless the context thereof clearly provides otherwise, means a bidder, seller, vendor, offeror, or contractor who has maintained a bona fide place of business within this state for at least one year prior to the date on which a contract was awarded.

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

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

The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, services, and other commodities. The International Peace Garden may participate in the procurement authorized by this section. The following commodities and services, however, are not subject to the procurement requirements of this chapter:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.
3. Public books, maps, periodicals, resource materials, and technical pamphlets.
4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. Procurements by the industrial commission for energy-related programs under chapters 17-05, 54-17.5, 54-17.6, 54-17.7, 54-63, and 54-63.1 and under those statutes in title 38 authorizing the industrial commission to perform well and hole pluggings, reclamation work, equipment removal, leak prevention, and similar work.
6. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.
7. Emergency purchases the office of management and budget or a purchasing agency cannot make within the required time and which involve public health or public safety, or when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services.
 - a. Emergency purchases made under this subsection must treat all bidders fairly and promote competition as is practicable under the circumstances;
 - b. The procurement file must contain a written determination of:
 - (1) The basis for the emergency; and
 - (2) The basis for the selection of the particular contractor.
 - c. If the emergency circumstances warrant a noncompetitive purchase, the office of management and budget or the purchasing agency shall document within the procurement file a written determination of the basis for the noncompetitive purchase, including the circumstances that justified the noncompetitive purchase.
 - d. If the emergency purchase is subject to federal funding reimbursement, the office of management and budget or the purchasing agency shall ensure the procurement procedures and documentation are adequate to satisfy requirements for federal reimbursement.
 - e. If time allows, emergency purchases for commodities under this subsection may require a sample for use in determining whether an offered product meets specifications.
8. Commodities and services costing less than a specified amount as determined by written directive by the director of the office of management and budget.

9. Specified commodities and services as determined by written directive by the director of the office of management and budget.
10. Employee benefit services, trust-related services, and investment management services obtained by an agency with a fiduciary responsibility regarding those services.
11. Services to extract, tow, store, and dispose of abandoned or submerged vehicles as defined in chapter 23.1-15.
12. Contracts by the agriculture commissioner for agricultural market news services under cooperative agreements with the United States department of agriculture, ombudsmen for pipeline restoration under section 4.1-01-17, environmental impact mitigation services under section 4.1-01-21.1, ombudsmen for wind property issues under section 4.1-01-23, weed control inspection agents under section 4.1-14-02, and hemp testing under section 4.1-18.1-04.2.
13. Contracts by the state auditor for audits of computer systems under section 54-10-29.
14. Contracts by the attorney general with experts under section 10-33-145.
15. Contracts by the department of health and human services for online virtual mental health and suicide prevention simulation-based training programs under subsection 28 of section 50-06-05.1 and brain injury informal supports under section 50-06.4-07.

All purchases made by the office of management and budget or a state agency or institution to which authority to purchase has been delegated by the office of management and budget must be made in accordance with this chapter, rules adopted under this chapter, and written policies of the office of management and budget.

SECTION 4. AMENDMENT. Section 54-44.4-05 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-05. Competitive, limited competitive, noncompetitive, and negotiated purchases - Exempt records.

1. Except as otherwise provided in ~~section~~sections 12-48-03.1 and 44-08-01, chapter 25-16.2, and this chapter, purchasing contracts must be awarded through a competitive bidding process to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability, unless it is determined to be advantageous to the state to select a contractor through a competitive proposal process pursuant to section 54-44.4-10 using other or additional criteria. Notwithstanding this section, the director of the office of management and budget or the director's designee may determine a different procurement process is in the best interest of the state and shall document the circumstances, procurement process, and basis for contract award in the procurement file.
2. The procurement officer may reject any or all bids or proposals or negotiate for a lower price with a successful bidder or offeror. Each bid or proposal received, with the name of the bidder or offeror, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state.
3. All bids received under this chapter pursuant to a competitive sealed bid are exempt records under subsection 5 of section 44-04-17.1 until the date and time the bids are opened.
- ~~2.4.~~ The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The office of

management and budget shall adopt rules related to sending notice of intent to make limited competitive, noncompetitive, and negotiated purchases in accordance with this chapter. The notice must describe the needed commodity or service and the intended procurement method and must state that ~~vendors~~persons are permitted to submit bids or proposals for contracts to be awarded under this section. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:

- a. The commodity or service is available from only one source.
- b. The commodity or service is to be purchased for experimentation or trial.
- c. No acceptable bid or proposal was received pursuant to a competitive bidding or competitive proposal process.
- d. Commodities are being purchased for over-the-counter resale.
- e. Acceptable commodities or services are produced or provided by correctional institutions or other government agencies or a work activity center as defined in section 25-16.2-01.
- f. The anticipated cost of purchasing specified commodities or services is less than an amount determined by the office of management and budget which would justify the expense of a competitive bidding or competitive proposal process.
- g. A used commodity is advantageous to the state and the commodity is available only on short notice.
- h. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
- i. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
- j. The agency provides documentation indicating that the services or the circumstances are of such a nature that deviation from the procurement procedure is appropriate.
- k. Recurring support costs associated with implemented information technology solutions, including licensing, service agreements, maintenance, and subscriptions for software as a service, platform as a service, and infrastructure as a service.
- l. Contracts for specialized equipment, machinery, and materials required for manufacturing, production, and distribution by North Dakota mill and elevator association under section 54-18-02.
- m. Purchases of copyrighted printed and electronic books, periodicals, subscriptions to publications, subscriptions to information services, prerecorded audio and video materials, state library materials, and state library online resources.

SECTION 5. Section 54-44.4-05.1 of the North Dakota Century Code is created and enacted as follows:

54-44.4-05.1. Resolution of tie bids or proposals.

In the event that two or more bids or proposals contain identical pricing or receive identical evaluation scores, preference must be given to a resident North Dakota bidder, seller, vendor, offeror, or contractor as defined in section 44-08-02.

SECTION 6. AMENDMENT. Section 54-44.4-09 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-09. Approved vendors Bidders list.

1. ~~The office of management and budget shall establish and maintain current lists~~ a bidders list of persons that desire to provide commodities or services to the state. Every person that desires to bid or submit a proposal on contracts for commodities or services awarded under this chapter must be an approved vendor in order to be placed on the bidders list be informed of government procurement opportunities. The office of management and budget or the purchasing agency shall ~~use~~ notify those on the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section. The office of management and budget or the purchasing agency shall ~~use~~ notify those on the list when sending notice of intent to make cooperative, limited competitive, noncompetitive, and negotiated purchases.
2. ~~To become an approved vendor~~ be placed on the bidders list a person shall file an application with the office of management and budget. The application must contain information requested by the office of management and budget, including business and persons' names, telephone numbers, addresses, federal tax identification numbers, type of business organization, the types of commodities or services for which the applicant is interested in receiving solicitations, and other business information the office of management and budget determines relevant. The application must also contain a statement appointing the secretary of state as the applicant's agent for service of process pursuant to subsection 3. The application must be signed and certified by an owner, partner, or company officer authorized by company bylaws or other organizational document to bind the company. The signature requirement may include the use of an electronic signature as defined in section 9-16-01 when authorized under section 9-16-17. The office of management and budget may require proof of the signing person's authority by certified copy of appropriate company documents.
3. ~~At the time of filing the application to become an approved vendor, the applicant, if organized as a corporation, limited liability company, limited liability partnership, or limited partnership, must be properly and currently registered with the secretary of state according to its type of business organization as a corporation under chapter 10-19.1, a limited liability company under chapter 10-32.1, a limited liability partnership under chapter 45-22, or a limited partnership under chapter 45-10.2. Any exemptions to registration under the above chapters that would otherwise apply to those entities organized as such do not apply to this section and registration must be made for the applicant to become an approved vendor. Applicants for approved vendor status using a trade name or a fictitious partnership name must be in full compliance with chapter 47-25 or 45-11 at the time of making the application. Whenever any registration required by this section is canceled, revoked, or not renewed, the vendor ceases to be an approved vendor.~~

~~By signing and filing the application, the vendor applicant appoints the secretary of state as its true and lawful agent for service of process in this state upon whom may be served all lawful process in any action or proceeding against the vendor if the vendor or its registered agent cannot be found for service of process in this state. The signed application is written evidence of the applicant's consent that any process served against the applicant that is so served upon the secretary of state is of the same legal force and effect as if served upon the applicant personally within this state. Within ten days after service of the summons upon the secretary of state pursuant to this subsection, notice of the service with the summons and complaint in the action must be sent to the defendant vendor at the vendor's last known address by certified mail with return receipt requested and proof of mailing must be attached to the summons. The secretary of state shall keep a record of all process served upon the secretary of state under this section showing the day and hour of service. When service of process is made as provided in this subsection, the court, before entering a default judgment, or at any stage of the proceeding, may order a continuance as may be necessary to afford the defendant vendor reasonable opportunity to defend any action pending against the vendor.~~

4. ~~The procurement officer may authorize receipt of a bid or proposal from a vendor that is not on the list of approved vendors if the procurement officer makes a written determination that it is in the best interest of the state to receive the bid or proposal. The successful bidder or offeror must become approved before the award and the existence of this approval requirement must be stated in the solicitation. If an unapproved vendor is selected for award, the vendor's bid or proposal may be rejected if that vendor fails to become approved within sixty days or within a shorter period as specified in writing by the procurement officer. Before issuing a solicitation, the procurement officer may waive the approval requirement if the procurement officer determines, in consultation with the secretary of state, that registration with the secretary of state and appointment of an agent for service of process in this state are not required. The waiver of the approval requirement must be stated in the solicitation. In the event that two or more bids contain identical pricing or receive identical evaluation scores, preference must be given pursuant to section 44-08-01.1. If the application of section 44-08-01.1 does not result in the award of a contract, preference must be given to bids submitted by vendors approved under this section.~~The office of management and budget or purchasing agency may additionally send notice of procurement opportunities to persons that are not on the bidders list.

SECTION 7. Section 54-44.4-09.1 of the North Dakota Century Code is created and enacted as follows:

54-44.4-09.1. Secretary of state registration.

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

SECTION 8. AMENDMENT. Section 54-44.4-13 of the North Dakota Century Code is amended and reenacted as follows:

54-44.4-13. Cooperative purchasing.

1. The office of management and budget shall purchase commodities or services as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government.
2. The office of management and budget and the agencies and institutions under the jurisdiction of the state board of higher education shall make joint purchases of like commodities or services of high common usage when the office of management and budget and the state board of higher education determine it is in the best interest of the state.
3. The director of the office of management and budget or the director's designee may agree to purchase commodities or services under contracts entered into by the United States general services administration or contracts of other government entities if it is determined to be in the best interest of the state after consideration of price, contractual terms and conditions, and the availability of competition ~~from approved vendors under section 54-44.4-09.~~
4. The director of the office of management and budget or the director's designee may participate in, sponsor, or administer a cooperative purchasing agreement with one or more government entities or a nonprofit organization established on behalf of public entities for the procurement of commodities or services in accordance with an agreement entered into between the participants.
5. The director of the office of management and budget or the director's designee may coordinate with the director of the department of transportation or the director's designee to establish or participate in contracts which may be made available to entities that have been determined by the department of transportation to be transportation providers under chapter 39-04.2 eligible to receive state funds or federal funds for public transportation.

6. Cooperative purchasing may include open-ended contracts that are available to other government entities, nonprofit organizations established on behalf of public entities, tribal agencies, or transportation providers determined to be eligible under this section.
7. Before entering into a cooperative purchasing agreement under this section, the office of management and budget must determine that the contracts were awarded through full and open competition or source selection methods specified in section 54-44.4-05 and shall send notice to ~~approved vendors~~ the bidders list of the office's intent to make a cooperative purchase in accordance with this chapter.

Tammy Miller
President of the Senate

Dennis Johnson
Speaker of the House

Sharon Morgan
Secretary of the Senate

Bruce J. Reich
Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-eighth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2042.

Senate Vote: Yeas 47 Nays 0 Absent 0

House Vote: Yeas 90 Nays 3 Absent 1

Sharon Morgan
Secretary of the Senate

Received by the Governor at 2:16 PM. on March 21, 2023.

Approved at 10:27 AM. on March 23, 2023.

Doug Burgum
Governor

Filed in this office this 23rd day of March, 2023,

at 11:23 o'clock A. M.

Michael Howe
Secretary of State