

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1033

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1033

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1033

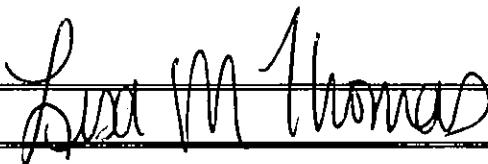
House Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: 01-23-2007

Recorder Job Number: 1727

Committee Clerk Signature



Minutes:

Chairman Keiser opened the hearing on HB 1033. HB 1033 relates to public improvements, bidding, construction management, and public improvement contracts.

Senator Krebsbach introduced the bill.

Sen. Krebsbach: This is a bill that deserves great scrutiny on your part. It was a work that was done during the interim and I am very proud of the accomplishments. Different associations came together on this. Have you ever been in a situation where you see people at odds over legislation? Well, for so long that you think they will never come together and agree on anything. I have to tell you that I observed these various people coming to us and giving us their side and so on. So each session we would leave not accomplishing anything. I am here to tell you today that that changed in this interim and to say that I was extremely proud of these folks. They are here today to give you the results of that labor and they will fully explain this to you.

John Bjornson, Legislative Council, walked the committee through the bill.

Rep. Johnson: In this selection committee that meets, it is not the governing board but it's a committee made up of architects, contractors, engineers? Are those meetings considered open meetings?

Bjornson: It is not addressed in the bill, but they have been appointed by the governing body under our open records, open meetings, they would be open.

Rep. Keiser: Is there an appeal process?

Bjornson: There is no appeal process. There is a ranking and scoring process.

Bonnie Staiger, Executive Vice President of AIA ND, spoke in support of the bill. *See attached written testimony.*

There were no questions from the committee.

Jerald Backes, ACEC/ND and Industry Key Leaders Coalition, spoke in support of the bill. *See written testimony.*

There were no questions from the committee.

Eric Johnson, **Meinecke Johnson Construction**, spoke in support of the bill. *See written testimony.*

At this time John Bjornson presents the committee with proposed amendments prepared by LC for Rep. Keiser. See attached.

Bob Fransfog, ND League of Cities, testified in support of this bill.

Bob: Last Friday we had an opportunity to discuss this bill and a number of others with our member cities. The suggestion they gave is that on page ten, number thirteen, beginning on line twenty-one, there is a definition called emergency situation. Our request to you is that beginning on line twenty-four, the second sentence, we would like that sentence eliminated. The reason for it is that it would be relatively easy for someone to come up to a political subdivision and state to us that "you ought to have known that the water mains were weak and it should have been a part of your planning process".

Rep. Keiser: Is there anything that involves an immediate threat to public health safety of property until services are restored?

Bob: The last meeting we had, my career with political subdivisions and finance, I recall, all the time people coming in and saying things needed to be replaced and my response was to tell them that they have got to plan ahead for these things.

Russ Hanson, North Dakota General Contractors Association, spoke in support of the bill.

Hanson: We had heard there was some concern about that terminology and if you do so wish to delete that second sentence, we believe it would still accomplish what we are seeking.

Opposition was allowed at this time.

Rep. Johnson: We had some testimony handed out to us and it says discussion on page fourteen about offices must not be in contact.

Jerry Backes: As I recall, that was a carryover from previous language.

Rep. Kasper: Is there a conflict of interest with an owner of a construction company?

Rep. Keiser: It's not the same conflict.

Testimony from Greg Sund was distributed to the committee, but having not signed the roster, it appears he was not present at the hearing. See attached testimony.

The hearing was closed. No action was taken at this time.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1033

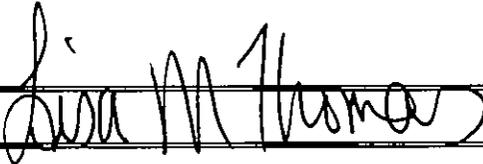
House Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: 01-29-2007

Recorder Job Number: 2119

Committee Clerk Signature



Minutes:

Chairman Keiser allowed committee discussion on HB 1033. HB 1033 relates to public improvements, bidding, construction management, and public improvement contracts.

Rep. Dosch was absent.

Rep. Johnson: At the end of the hearing we had on it, there had been some testimony handed out from the city administrator in Dickinson that had some questions and I think all of you got an email back with the response from the organization that had the meetings and their recommendation was that we would ignore all of his suggestions. We did get amendments handed out that day for some corrections, they are 70202.0201 and that just clarifies what construction manager at risk identifying the common ownership and then the compensation for the governing body of the selection committee. I looked through the questions that Mr. Sund had and agreed with the industry that this is probably a little late to be changing things and give it a chance to work. My only concern about the bill is it gets very complicated and specific and I'm not sure how that is all going to work if you are doing a public improvement project. Since the organization thought it would be workable then maybe we would give it a try and if it doesn't work, we can always be back here in two years listening to the horror stories.

Rep. Clark moved to adopt the amendments. Rep. Johnson seconded.

Page 2

House Industry, Business and Labor Committee

Bill/Resolution No. HB 1033

Hearing Date: 01-29-2007

Voice vote: Unanimous. Amendments were adopted.

Rep. Amerman moved a DO PASS AS AMENDED. Rep. Johnson seconded.

Roll call vote: 13 yes. 0 no. 1 absent.

Carrier: Rep. Johnson

**House Amendments to HB 1033 (70202.0201) - Industry, Business and Labor
Committee 01/30/2007**

Page 9, line 9, replace "any entity owned by a construction manager or" with "a shared management or ownership interest in two or more entities."

Page 9, remove lines 10 and 11

**House Amendments to HB 1033 (70202.0201) - Industry, Business and Labor
Committee 01/30/2007**

Page 13, line 9, replace "authorized for funding" with "using funds provided"

Page 13, line 11, replace "section" with "sections", after "43-07-05" insert "and 43-07-12", and replace "authorized for funding" with "using funds provided"

**House Amendments to HB 1033 (70202.0201) - Industry, Business and Labor
Committee 01/30/2007**

Page 17, line 19, replace "to ensure" with "in determining", replace "compliance" with "accordance", and after "with" insert "the intent of"

**House Amendments to HB 1033 (70202.0201) - Industry, Business and Labor
Committee 01/30/2007**

Page 18, line 9, replace "the" with ":

a. The agency"

Page 18, line 11, replace the third "the" with "any person engaged in the construction of"

Page 18, line 12, remove "contractor constructing" and replace "The governing body shall require" with:

"b. The construction manager at-risk has no common ownership or conflict of interest with the architect, landscape architect, or engineer involved in the planning and design of the public improvement."

Page 18, remove lines 13 and 14

**House Amendments to HB 1033 (70202.0201) - Industry, Business and Labor
Committee 01/30/2007**

Page 21, line 18, after "2." insert "The governing body may compensate members of the selection committee. A member of the selection committee is not eligible to submit a proposal for the construction management at-risk contract under consideration."

3."

**House Amendments to HB 1033 (70202.0201) - Industry, Business and Labor
Committee 01/30/2007**

Page 22, line 14, replace "3." with "4."

Page 22, line 18, replace "4." with "5."

Page 22, line 28, replace "5." with "6."

Page 22, line 29, replace "4" with "5"

**House Amendments to HB 1033 (70202.0201) - Industry, Business and Labor
Committee 01/30/2007**

Page 23, line 3, replace "6." with "7."

Renumber accordingly

Date: 1-29-07
Roll Call Vote #: _____

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1033

House Industry Business & Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do pass, as amended

Motion Made By Rep. Amerman Seconded By Rep. Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep. Amerman	X	
Vice Chairman Johnson	X		Rep. Boe	X	
Rep. Clark	X		Rep. Gruchalla	X	
Rep. Dietrich	X		Rep. Thorpe	X	
Rep. Dosch			Rep. Zaiser	X	
Rep. Kasper	X				
Rep. Nottestad	X				
Rep. Ruby	X				
Rep. Vigesaa	X				

Total Yes 13 No 0

Absent 1

Floor Assignment Rep. Johnson

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

REPORT OF STANDING COMMITTEE

HB 1033: Industry, Business and Labor Committee (Rep. Kelsner, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1033 was placed on the Sixth order on the calendar.

Page 9, line 9, replace "any entity owned by a construction manager or" with "a shared management or ownership interest in two or more entities."

Page 9, remove lines 10 and 11

Page 13, line 9, replace "authorized for funding" with "using funds provided"

Page 13, line 11, replace "section" with "sections", after "43-07-05" insert "and 43-07-12", and replace "authorized for funding" with "using funds provided"

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Page 22, line 28, replace "5." with "6."

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Page 23, line 3, replace "6." with "7."

Renumber accordingly

2007 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1033

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1033**

Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: **February 28, 2007**

Recorder Job Number: **4085**

Committee Clerk Signature

Public Improvements bidding contract:

Senator Karen Krebsbach –In Favor

Stated for the "North Dakota Roller Coaster"

Comment:" In the 80's and 90's North Dakota lost people because there were no jobs.

In the 2000's, ND is losing jobs because there are no people."

It was like the Hatfields and the McCoys, but am pleased to say that In the interim there was a gathering of engineers, contractors, local and state governments, came together and worked diligently throughout the interim in the process for public improvement process on a public improvement study and taxes involved. To find consensus to get along. They agreed in all areas but the design-build section. The final meeting was so great to see what happened. IN the final area, they presented the bill as before you.

S Klein: You said we had all parties involved, you said "governments," were the counties, the cities; everyone was invited in?

Karen K: I don't think there was anyone excluded in this portion of law.

S Klein: All opportunities for them to attend?

Karen K: We cleaned up the chapter making it easy to read and follow.

John Bjornson, Legislative Staff Council - Neutral

TESTIMONY # 1 (used the bill itself)

Gave the background. Counsel for the Interim committee. This has been going on for over 20 years been bickering on state and local government. 48-01.2-02 Came to the consensus to clean up the law. This repeals 2 existing laws. The bill itself, pgs. 1-8, all sections, corrected new cross-referencing. New from page 9 to 26 to the end of the bill.

Public bidding 9-26 – already in law, put into one chapter.

Definitions refers to page 9 *Wend over several definitions.*

Changes begin on page 18 – Can't be common ownership.

Refers Page 18, line 16

Must present written documentation.

Covered bill testimony and the changes in information.

S Heitkamp: So you put them in a room and said, "work it out," how does this compare with other states is you expect to come in and do business in this state versus states around us?

John B: The industry groups felt it was a fair process, not a study, need to go further for the design-build process. They are comfortable with current bill.

S Heitkamp: It seems ok, what's going to bring it back?

John B: I don't see anything. If everybody didn't agree on it, it didn't go into the bill.

S Heitkamp: If someone's not happy, they weren't there?

John B: Yes

S Hacker: So subsection 1848 ____-18 The "beginning of significant changes"...Up until subsection 24.

John B: In my opinion is on page 18 with the management procedures. There were new delivery methods that have guidelines in the law. Ends on page 25.

S Hacker: You see John, someone has to carry this bill. *Laughter*

S Behm: You don't have to take the lowest bid necessarily?

John B: Look at the definition on page 11, "Lowest *responsible* bidder." Existing law had different verbiage. May be the lowest bidder but not the best bidder.

S Andrist: Give us a view of the groups that were involved in this.

John B: Architects, AGC, home builders, engineers, mechanical, sub contractors, you'll get a full list.

S Andrist: How about the public entities?

John B: National Guard, higher education, cities, most schools.

S Potter: On page 22, in one section of the process, no waiting given to criteria, that's the agency... Is that the one that doesn't have waiting or does?

John B: See page 21.

S Potter: It can be as much as 20, or as less as 5. Is it willy-nilly?

John B: It can change from project to project and will use a national basis.

S Potter: Any changes, page 24, other than moving all to this chapter.

John B: There are bond requirements. Those at risk are not covered in the current law. They need to be protected under the current law.

S Hacker: Are there bonding requirements?

John B: Yes

Bonnie Staiger, Executive VP AIA , Chair of Industry Key Leaders Coalition - In Favor

TESTIMONY # 2 *Went over testimony 29:50 – 35:47M*

S Potter: Any amendments? Any opinions on it?

Bonnie S: Yes We have not had time to vote as a coalition prior to the House bill. We want to support the bill without amendments. We want to support the bill as presented.

S Klein: Was is brought forth at the meeting? What was missed? Why was it late for an amendment?

Bonnie S: The amendment being forwarded was presented by a constituency that was invited to be a part of this was not present and did not show.

Jerold Backes – ACEC/ND & Industry Key Leaders Coalition In Favor

TESTIMONY # 3 *Went over testimony 38:00-41:36m*

S Klein: How do we compare with other states as the law would apply.

Jerold B: Fairly similar, don't have much difference. We had contentious discussions on other issues, need to spend time to get things done right. We had enough problems even on things in the books. Nice to see the animosity stopped. Nice to get things ironed out for future.

S Hacker: We appreciate that you laid out the problem in your testimony and your goal, anyone going to testify that's going to walk through these sections and say, "these sections address this problem," and on to the next.

Jerold B: No

S Hacker: Unfortunately there is nobody that sits on this committee that's a contractor or an engineer and doesn't really know what these sections are really addressing, and this is what they'll do. I think that's what we're missing right now.

Jerold B: We've had a lot of problems with construction management in the last two sessions partially because we can get people in the same profession and can't get an agreement on what construction management is. Part of the key was to have the representatives of the industry groups involved with the industry itself, sit down, pass out the issues. There may be an individual somewhere that thinks there is a separate problem, we can't control that. We told all our members that you can do whatever you want individually, but as an association group, we feel this is better for ND and addresses all the issues.

S Hacker: You have construction management and it's causing problems among all the industry players and what you developed is parallel tracks, one being management and the other being construction management at risk.

Jerold B: We better defined what construction management was and how it should be treated. It is important to lay out the construction management IS so there is no question, same with construction management "at risk" and how it needs to be handled.

Design – Bid – Build – the traditional approach, there were a lot of piecemeal in the law that to figure out how you were to handle the variants, you had to look around the code to see what you needed to do. Now it's clear, the definitions are clear. We had "whos the low bids" and had 3 different definitions, "which one do I use?"

S Hacker: So you blended them all, with two concepts: Construction management and construction management at risk.

S Potter: In your compromise, you've been fighting over something, usually money, is this not about money, only confusion?

Jerold B: I don't know that it was about money. It was in the approach. These were more principal issues.

S Potter: I want to be assured that we didn't get the industry together to figure out how to get more money out of public entities.

Jerold B: No

S Heitkamp: We were changing everybody in the morning was used to doing business.

Jerold B: Yes. We defined the change, when you change with a poorly defined method, you get a mess. Now we are subject to influence of surrounding states and whatever is happening in the industry. We don't want to make the same mistakes other states have made.

We tried to view other states as a model and make it work in ND. Let's try to get it right the first time.

Eric Johnson – 4th Generation of Meinecke Johnson Construction - In Favor

TESTMONY # 4 *Covered testimony 51:18 – 54:23 M*

S Andrist: Will this be a full-time professional company that just does this or a separate division of construction companies, who will they be?

Eric J: The way it is set up that several companies that can do Construction Management at risk. Architects will be able to do it, contractors, engineers, the way it is set up right now, we have been doing Construction Management Risk right now, with the bonding capability.

S Hacker: CMR is the difference is large projects? Where as a local entity could likely take care of some of the agency CM, or when you talk about the AG stations, is that who's going to use that type, will they have some knowledge and expertise so they contract out their own pieces of the project? Is there a problem when bonding mechanisms between the two and understanding how new, start-up young companies have a very tough time with public contracts because they cannot get large enough bonds. If there's a larger project, and if they use agency CM, are we going to build fences with this?

Eric J: We had an issue with the construction management project in ND where an architect was a construction manager, was a contractor, was a mechanical contractor and an electrical contractor all in the same public project. In our eyes there was a severe conflict of interest. So that's where it got started here. We broke it out into the two most common versions of construction management that's used throughout the US which is agency and at risk. This enables owners make the decision if they want to go with an agency for a smaller project, they can do that, but if it's for a small mechanical project or whatnot, but mechanical contractor, if

they're applying to be construction manger, they still have to get the bond. CMR is used for larger projects which is used for maybe larger school projects.

S Hacker: What's the capability to do that?

Eric J: The contractors doing CM an the architects, 75 – 85% will still be able to do that.

The little guys might not be able to. The way it's set up right now, they're still able to do, their pieces. They still have to carry their bond if they're little. Change a bit, but not that much.

S Klein: So the little guys could do it before and now they won't be able to?

Eric J: You'd see one try it every now and then. In Fargo had a homebuilder trying to bid on Carl-Ben Eilsen, great work, but the school district could say, "you're not really suitable for this job."

S Behm: They used to do everything.

Bill Wilken, City of Bismarck - In Favor – Brought an Amendment

TESTIMONY # 5 – *Passed out Amendment*

We respect the work and concepts. This is a 13-word amendment. We feel this amendment will clarify the language. Take the language "lack of planning" and fix the problem of emergency situations. *See attached amendment for suggestion..* If we had to wait for bids, we would take too long..... *Continues and is stopped by S Klein*

S Klein: Have we had any real life situations or struggles? Why now? After all this interim work and all these guys and struggle over the years, why now?

Bill W: The League of Cities and Associations of Counties invited us to sit in on the interim committee. I sat with S Krebsbach with a number of city officials in a cities convention and went through this bill with pretty good depth at that point, taking it back to my organization and recognizing that it was difficult for all of us to come together at one time.

S Klein: So this is just a City of Bismarck amendment?

Bill W: This is a City of Bismarck amendment, there were other concerns. It is the City of Bismarck introducing the amendment.

S Heitkamp: The League of Cities was invited to the room, you didn't attend. We have a product in front of us that has cleared the House, the product that took a lot of work because I was in this room, and I saw how contentious this was. Why now? I don't think we got a really good answer for why we should interject the opinion or an amendment from the League of Cities or the City of Bismarck NOW, when you didn't go to the meetings, and you had the ample opportunity to do it.

Bill W: We worked through a number of issues with this bill, it's a major concern, we didn't have the legislation right away. We've been trying to keep up with it. Some of the definitions caused concern. Glad to see the industry coming together.

S Andrist: I see a definition for an emergency situation, but don't see essential services defined, does the City of Bismarck perform any services that aren't essential? *Laughter*
I'm wondering if this open the barn door.

Bill W: Essential services would be the services that the Government needs to provide like water, sewer, public utilities and those things were intended.

S Andrist: Did you research the bill well enough to think it would hamper you if you had a huge water main break or water tower fall over or something like that.

Bill W: We have had two of those situations in the recent past. A sewer main underneath near 9th street near a fire station. The sewer main was taking on sand apparently and dug it up and found the problem by creating a hollow or a cavern under the Bismarck Expressway and at some point Bismarck Expressway just fell in the ground. That was a couple \$100,000 fix. We had to get at it immediately because there were folks out of sewer, the driveway to the fire station.

S Klein: You believe this bill will hamper you to do that?

Bill W: Yes They could say there was a lack of planning that we didn't find the solution.

S Klein: Who would be saying that because, whose ever digging that up is automatically working on the problem immediately.

Bill W: That's the "lack of planning." We suggest the emergency clause be added.

S Hacker: I read this over and over and still, you didn't PLAN for the problem because you didn't know there was a problem there. It becomes a sudden, generally unexpected occurrence which required immediate action, I think you're covered under the emergency situation, I don't think there's a problem. You can fix that problem. I think you qualify for the emergency situation.

Bill W: That's why we would like to add an amendment, we looked at the bill and deleted the second sentence. *Continues on explanation*

S Hacker: You can't plan for something you can prepare for.

Bill W: Depends on who is defining that planning.

S Potter: What was the 2nd example?

Bill W: Memorial Bridge in the last year. It could happen to anyone. All of a sudden we're finding out in regular inspections.

S Potter: What you're concern is not that you won't deal with the emergency situation, because you will, you're worried about getting sued later by someone who didn't get the bid and said, it wasn't an emergency situation.

Bill W: My concern is for the lack of planning.

Q? F? O?

CLOSE

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1033 B**

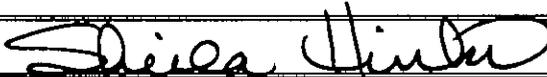
Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: **February 28, 2007**

Recorder Job Number: **4147**

Committee Clerk Signature



Public Improvements, bidding contracts:

S Klein: We'll look at the amendment that was brought forward and I'd like to have a spokesperson for that and, Bonnie, can you tell us how you feel about that amendment?

Bonnie Staiger, Executive VP of AIA, ND

Our industry coalition met over lunch and unanimously voted to not support an amendment

S Klein: So you think we have covered that issue? S Hacker made a point, where in the language we saw that those concerns were covered? You believe that they're covered?

Bonnie S: We feel very strongly that the needs of the emergency situations as described are clearly covered in the definition as provided and has provided safeguards for the safety of the public to ensure that the projects can be delivered.

S Andrist: You did say your coalition is going to meet during the next interim?

Bonnie S: That's correct. We are going to continue to meet.

S Andrist: You're going to be open to discussion with problems with the bill if they wanted to bring it to your table.

Bonnie S: If they wanted to bring it to the table and participate, of course. Maybe the reason I feel so strongly that this amendment should not be accepted at this time, that it really opens

the door for continued tweaking, misunderstanding, and ultimately a breakdown in the line of communication.

S Potter: I'd like to make a **MOTION to submit an amendment**, but it's not precisely the amendment that's been brought to you. If you have it in front of you, I'd like to remove from that, "essential services are threatened." And make it, after "contractor" insert "unless a utility infrastructure is placed at risk." You think that answers the questions of S Hacker?

S Heitkamp: I'll second it for discussion.

S Klein: You want to again explain.

S Potter: *Covers suggestion.*

S Andrist: Of itself, the amendment is not destructive to the bill, but it just seems to me that infrastructure is already covered.

S Klein: It seemed to me that there was ample time for opportunity and that problem has been addressed some time back and don't know that that's a problem. It got kicked out of those committees in early October and had certainly plenty of time to bring this forward. I would agree with S Andrist, but plan to support it.

S Potter: I understand a lot of work and planning, if we can improve the bill, it is our obligation, the remarks from the city of Bismarck have some merit and it seems like a minor change, I doubt if the House is going to plan a round with this again, that's why I made the motion.

Roll call vote for Senator Potter AMENDMENT on HB 1033 – 1-5-1 – Failed (yea – Potter)

Motion for a DO PASS by S Heitkamp

Second by Potter

Roll call vote DO PASS HB 1033 – 6-0-1 Passed

Carrier: S Hacker

Date: 2-28-07

Roll Call Vote: 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. HB 1033

Senate INDUSTRY BUSINESS & LABOR Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By Heitkamp Seconded By Potter

Senators	Yes	No	Senators	Yes	No
Chairman Klein, Jerry	✓		Senator Behm, Art	✓	
Senator Hacker, Nick, VC	✓		Senator Heitkamp, Joel	✓	
Senator Andrist, John	✓		Senator Potter, Tracy	✓	
Senator Wanzek, Terry					

Total Yes 6 No 0

Absent 1

Floor Assignment Hacker

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

REPORT OF STANDING COMMITTEE (410)
February 28, 2007 3:10 p.m.

Module No: SR-38-4125
Carrier: Hacker
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1033, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1033 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1033

**House Industry, Business and Labor
Testimony in Support
of HB 1033**

**Provided by Bonnie Staiger
AIA North Dakota &
Chair, Industry Key Leaders Coalition**

Chairman Keiser and members of the Committee

My name is Bonnie Staiger, Executive Vice President of AIA North Dakota (the American Institute of Architects). Today I appear representing both the AIA and also in my role as Chair of the Industry Key Leaders Coalition. My testimony in support of HB 1033 represents the support of each coalition partner.

The coalition is comprised of the following design and construction industry organizations:

- AIA North Dakota
- ACEC/ND (American Council of Engineering Companies)
- Associated General Contractors of ND
- National Electrical Contractors Association
- ND Builders Association
- ND Plumbing, Heating, and Mechanical Contractors Association
- ND Society of Professional Engineers

As many of you know, the Industry Key Leaders Coalition formed at the end of last legislative session with the passage of an interim study (sponsored by Rep. Dosch) to look at procurement and delivery options. That study encompassed such delivery methods as design/bid/build, construction management, and design build. In an effort to address and solve problems caused by industry fragmentation, lack of clear communication across professions, and old business models --all of the organizations listed here (and are represented in the room today) agreed to discuss these issues which have plagued the industry and professions for a decade.

This undertaking represents an unprecedented level of collaboration between us on issues which have pitted many in this room against one another--not unlike the Hatfields and McCoys. Unfortunately, most of you have witnessed prior skirmishes first-hand.

When this past interim IBL committee received the study, we came to them and told them that we would be a resource, partner with them, and maybe if we were really successful, help them craft a bill draft that collectively our member organizations could support and would be in the best interest of all of North Dakota.

That interim committee, chaired by Sen. Karen Krebsbach, was most relieved and as it turns out we did come up with a bill-- with the help of John Bjornson from Legislative Council who staffed the interim committee. This was no small feat because first we had to learn how to be in the same room together, then to work together, compromise, and turn out a work product that we could all live with. We are proud of what is now HB 1033.

Our charter has been—and will be going forward--to

- Bring together diverse membership and opinions
- Find common ground and
- Create a culture of collaboration and trust

Since July of 2005, we have met at least monthly and we have had 3 subcommittees at work. Many other groups representing owners such as the Association of Counties, Board of Higher Ed, Fargo Public Schools, Department of Transportation, Office of Facilities Management, and League of Cities have been invited to fully participate. Every step of the way, each of these groups has received every meeting notice and every stage of bill drafts.

Every participant came to the table in good-faith and knowing that each would have to compromise. As you can imagine, the process was profoundly labor intensive. Because of that, it became apparent that we only had time to address the traditional design/bid/build and construction management which, of course, has been the most contentious of the two. The amendments we present with the bill are simply the last installment of polishing which continued after the bill needed to be filed.

For a variety of reasons including time constraints and the fact that design build is the least known delivery method, we agreed that we would continue our pattern of success and take it up in the next interim. And we reported that commitment to the interim IBL committee. We don't want to see design build statutes go down the same path with cobbled-up and contentious amendments meant to fix (or impose) language written without a clear understanding of the implications.

We will continue our work and continue discussing issues. We all recognize that we won't agree all the time--and didn't during this effort. But the debate and input from others is beneficial to see the whole picture. We all have a better understanding and respect for one another's perspective. And, Mr. Chairman and members of the committee, we will continue our work out of respect for you—knowing that the legislative session and hearing room is not the first place to bring problems.

We urge a do pass on HB 1033 and I will be happy to answer questions from the committee on the process and collaborative efforts of the group however I request you save more technical questions for the practitioners with us today who will follow my testimony.

**Industry, Business, and Labor Committee
Testimony in Support
Of HB 1033**

**Provided by Jerold R. Backes
ACEC/ND &
Industry Key Leaders Coalition**

Chairman Keiser and members of the Committee

My name is Jerold R. Backes and I currently have the privilege of serving as the Legislative Chairman as well as the National Director for ACEC/ND (American Council of Engineering Companies/ND). In that role, I am appearing in support of HB 1033 and as a participant in the Industry Key Leaders Coalition that was instrumental in development of this legislation. As mentioned by Ms. Bonnie Staiger, the testimony being presented represents the unified support of the bill by each coalition partner. I believe it is important to recognize that the legislation developed was a result of a cooperative effort among those involved in the industry. It is equally important to note that nothing in the legislation was included unless each of the participants actively agreed with the wording selected and the approach to be outlined. As we agreed at the beginning of the process, a majority opinion was not sufficient; if wording were to be included, we wanted all parties to be in agreement to minimize future items of discussion.

I wish to commend all participants in developing the frankness and willingness to listen to opposing viewpoints that were necessary to be successful in the endeavor. I firmly believe that we have been successful in improving the code for the betterment of the State of North Dakota and have laid the groundwork for future cooperative endeavors.

As Ms. Staiger indicated, the development of the bill consisted of concurrent discussions of the various delivery methods that were contained in the current code or being considered. My testimony will deal primarily with the "Traditional Approach" to public improvements or the "Design-Bid-Build" methodology. Eric Johnson will follow and address the Construction Management approach to projects.

When the committee began looking through the existing code and discussing the disagreements that had taken place in the past, we came to realize that most of the confusion or debate was the result of conflicting definitions, unclear practices, or including an item in multiple sections of the existing code. For example, in the existing code, there are three different phrases used to define who the successful bidder on a project is. They included:

- Lowest responsible bidder (existing NDCC 48-01.1-02)
- Lowest and best bidder (existing NDCC 48-01.1-05 & 48-01.1-07)
- Lowest, best, licensed bidder (existing NDCC 48-01.1-05 item 4)

This most likely occurred unintentionally over the course of development of the existing code. Therefore, we chose to approach the revisions to the existing code by attempting to clarify definitions of the terms or processes to be involved, list the procedures in a linear non-duplicating fashion, and clarify the procedure as a whole for a design-bid-build process. The goal wasn't to change a process that has served the State well, but rather to better define and describe it. Hence, the modifications made were concentrated essentially on making the process clearer and more consistent and didn't attempt to make significant changes to the process.

This process involved a rather lively but beneficial debate among the participants. However, we all concur that such debate is necessary and beneficial. As a group, we feel this has resulted in a clearer process as reflected in the legislation before you. The side benefit of the process for the State of North Dakota is the development of a coalition of the industry professionals that can work together on future critical issues such as Design-Build and other delivery systems.

As a professional organization and as a part of the Industry Key Leader's Coalition, ACEC/ND urges you to recommend HB 1033 for passage.

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Testimony – HB 1033
House Industry, Business and Labor Committee
January 23, 2007

Mr. Chairman and members of the House Industry, Business and Labor Committee, my name is Eric Johnson and I am a fourth generation contractor from Meinecke Johnson Construction in Fargo, ND. I am the immediate past president of the AGC of ND and I am one of the industry representatives who serve on the key leaders group which drafted the changes to the public improvement statute – Chapter 48 of the ND Century Code. This working group was assembled and met every month during the 2005-2007 interim. I am testifying today in support of HB 1033.

My testimony will cover the addition of a project delivery method to the public improvement contract bid statute. This method is “construction management at risk”. The State’s public agencies have been able to construct projects using “agency construction management” for a number of years but have not been able to use “construction management at risk”. Both methods provide for the “construction manager” to be hired by the public agency during the planning and design phase of a project to add construction expertise to the project from the very beginning. The ability to involve a group with extreme expertise in construction processes in the early stages of a project can improve the entire process and hopefully save taxpayer dollars by making the process more efficient and less adversarial. The big difference in the two methods of project delivery is the risks accepted by the construction manager.

In “agency construction management” the construction manager does not contract directly with any trades companies or subcontractors for work to be done on the project and is only responsible for the coordination of the work performed by contractors selected by the owner to construct individual portions of a project. The “agency construction manager” is required to provide the owner with a bond only for the amount of their construction management contract.

In “construction management at risk” the construction manager works with the owner and design professionals during planning and design phase of project development and then negotiates an acceptable guaranteed maximum price and contract terms with the public owner and holds contracts directly with trade companies and subcontractors necessary to complete the project and is further responsible to the owner for the performance of those entities. The “construction manager at risk” is required to provide the public owner with a bond in the amount of the negotiated guaranteed maximum price. This bond provides protection to the public for a contractor’s performance and their

payment of suppliers, trade companies and subcontractors under contract on the public improvement project.

Adding the "construction manager at risk" project delivery method and the other changes proposed by HB 1033 are necessary and have been constructed by and are supported by all construction industry groups; including the general contractors, electrical contractors, architects, engineers, mechanical contractors, home builders and numerous trade companies. The industry groups worked very hard to make changes to improve the system of public project delivery being conscious of allowing flexibility to the public owners, while still providing the best value to North Dakota's taxpayers and a healthy competitive environment for the all parts of North Dakota's construction industry.

Mr. Chairman and members of the committee I thank you for the opportunity to testify.

I ask for your support of HB 1033 and respectfully request a Do Pass recommendation on HB 1033.

I would be happy to address any questions.

TESTIMONY REQUESTING AMENDMENTS TO HB 1033

Chairman Keiser and members of the House Industry, Business, and Labor Committee, for the record, my name is Greg Sund. I am the Dickinson City Administrator. I am testifying requesting amendments to HB 1033.

While HB 1033 proposes no change to the dollar amount limitation in NDCC 40-49-14 on page 7, line 12, I believe this bill offers the opportunity to increase the ten thousand dollar reference. Regardless the affects of inflation, this static number has remained in state law. **I ask the committee to amend the reference to "ten thousand dollars" on page 7, line 12 of HB 1033 to at least one hundred thousand dollars in order to recognize the increase in normal costs for purchases over recent years.**

I ask the committee to increase the reference to "one hundred thousand dollars" on page 11, line 23 to one million dollars. This change would recognize the cost typical construction projects today. One hundred thousand dollars no longer refers to a project of complexity wherein the services of an engineer or architect are necessary. The need to hire a professional should be based on the capabilities of the government and the complexity of the project as determined by the governing body.

In the mandate for publication of bids on page 12, lines 7 – 20, there is no mention of posting the advertisement in the official newspaper, whereas the advertisement requirement on page 19, lines 12 – 19 reference advertising "in a newspaper of general circulation in the county in which the public improvement is located and in a construction trade publication in general circulation among the contractors, building manufacturers, and dealers in this state." **I ask the committee to make these advertising requirements consistent. I further ask the committee to consider reducing the items necessary in the newspaper advertisement to simply a reference to the project and contact information for those seeking additional information.** Such a change would reduce the cost of advertising and still make necessary information available.

I ask the committee to consider amending the proposed language in 48-01.2-06 on page 13, lines 21 – 29 to add administrative costs of 5% to 10% when comparing multiple prime bids to single prime bids because if multiple primes are accepted, the affected government would have to retain the services of a manager to oversee the contracts at an additional cost whereas in the case of a single prime bid, the government can hold the single contractor responsible for managing the project.

I ask the committee to strike the proposed addition of 48-01.2-08 on page 14, lines 6 – 8 because this language would greatly limit the ability of people to serve their government. Under this language, no legislator, or local government elected official could contract or sell goods to the government. The use of bidding insures fairness in contracting and assures against favoritism in government thereby making this language unnecessary. In the case of Dickinson, our Mayor Dennis W. Johnson would likely not have served in his position because it would be impossible for his company, TMI to sell casework to the city of Dickinson even if said sale was included in a bid from a

contractor. Such language would discourage potential leaders from serving their cities as elected officials.

I ask the committee to consider amending the words "from the state treasury" in 48-01.2.15 on page 17, line 6 unless the intention is this language only pertains to contracts of the state and not local governments.

I ask the committee to consider replacing the word "assign" on page 18, line 4 with "contract" to recognize the fact this work is unlikely to be done without cost.

I ask the committee to consider replacing the word "that" on page 19, lines 24 and 28, and on page 20 lines 1, 20, and 26 with the word "who" as this is better use of grammar.

I ask the committee to consider removing the list of specific selection committee members on page 21 lines 14 – 17. In doing so, the local government would appoint committee members to best meet its needs. It makes no sense to designate certain members to a selection committee for the process of selecting a construction manager when one considers the awarding of a contract to a bidder is simply based on low bid. Likewise, the list of qualifications on page 22, lines 20 – 27 appear overwhelming when one considers that a low bid decision may be based only on the fact that a bidder has submitted a bid bond and has a state contractor license. Further, the inclusion of fees and expenses as listed on page 22, line 25 is contrary to the established process for making a qualification based selection. Under the established qualification based selection process, fees and expenses are part of the negotiation process with the most qualified firm.

The process describing the selection of a construction manager at-risk under "b." on page 23, lines 10 – 15 seems to assume the three top rated firms would all be qualified. This is not necessarily the case. **Therefore an amendment is needed to qualify negotiations with the next most qualified construction manager at-risk only if that proposer is qualified.**

The language on page 23, line 27 appears to indicate a construction manager at-risk must be hired before the planning and design phase of a project. This may be something the government wants to do, but it should not be mandated in state law because such a decision would increase the cost of construction management and essentially make it project management.

The proposed language of 48-01.2-24 on page 25, lines 12 – 18 appear to indicate only the designer is responsible for determining if designs meet the requirements of the American with Disabilities Act (ADA). I believe it is necessary to broaden the people capable of issuing this compliance consideration. For instance, a city building inspector may be the person who discovers a problem. When the city of Dickinson constructed its new City Hall in 1998-99, we were required to send the plans to the US Attorney General so that office could review the plans and determine if the plans met the

requirements of ADA. These two examples clearly show several people may be involved in the determination of ADA compliance.

I ask the committee to consider the amendments listed above.

To: Senate Industry, Business and Labor Committee
From: City of Bismarck
Date: February 28, 2007

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1033

Page 10, line 23, after "contractor" insert "unless essential services are threatened or a utility infrastructure is placed at risk"

Renumber accordingly.

**Senate Industry, Business and Labor
Testimony in Support
of HB 1033**

**Provided by Bonnie Staiger
AIA North Dakota &
Chair, Industry Key Leaders Coalition**

Chairman Klein and Members of the Committee

My name is Bonnie Staiger, Executive Vice President of AIA North Dakota (the American Institute of Architects). Today I appear representing both the AIA and also in my role as Chair of the Industry Key Leaders Coalition. My testimony in support of HB 1033 represents the support of each coalition partner.

The coalition is comprised of the following design and construction industry organizations:

- AIA North Dakota
- ACEC/ND (American Council of Engineering Companies)
- Associated General Contractors of ND
- National Electrical Contractors Association
- ND Builders Association
- ND Plumbing, Heating, and Mechanical Contractors Association
- ND Society of Professional Engineers

The Industry Key Leaders Coalition formed at the end of last legislative session with the passage of HB 1260--a mandatory interim study (initiated by the AIA) to look at procurement and delivery options. That study encompassed 3 project delivery methods: design/bid/build, construction management, and design build. In an effort to address and solve problems caused by industry fragmentation, lack of clear communication and a few questionable practices -- all of these organizations listed here (and are represented in the room today) agreed to discuss these issues which have plagued project delivery for a decade.

For those of you unfamiliar with the history, this undertaking represents an unprecedented level of collaboration on issues which have pitted many of us against one another--not unlike the Hatfields and McCoys.

When this past interim IBL committee received the study in the summer of 2005, we came to them offering to be a resource, partner with them, and maybe if we were really successful, help them craft a bill draft that collectively we could support and would be in the best interest of all of North Dakota.

The interim committee, chaired by Sen. Karen Krebsbach, was most relieved by our offer and as it turns out we did come up with a bill-- with the help of John

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Bjornson from Legislative Council who staffed the interim committee. This was no small feat because first we had to learn how to be in the same room together, then to work together, compromise, and turn out a work product that we could all live with. We are proud of what is now HB 1033. And which, incidentally, passed unanimously in the House

Our charter has been—and will be going forward--to

- Bring together diverse membership and opinions
- Find common ground
- Create a culture of collaboration and trust, and
- Report frequently to the Interim IBL Committee

So for the past 2 years, we have met at least monthly and we have had 3 subcommittees at work. Many other groups representing owners and agencies such as the Association of Counties, Board of Higher Ed, Fargo Public Schools, Department of Transportation, Office of Facilities Management, and League of Cities have been invited and encouraged to fully participate.

Each of these groups has received every meeting notice and every stage of bill drafts. With one exception, all responded and joined us in the negotiations, drafting and crafting. Representatives came to the table in good-faith-- knowing that each would have to compromise and early on--there were tense times. But out of the compromises came respect and out of respect came genuine appreciation.

As you can imagine, the process was profoundly labor intensive. By last summer, it became apparent that we only had time to address 2 of the more traditional procurement methods: design/bid/build and construction management--- with a major focus on CM, the most contentious of the two.

With time running out and the fact that design build is the least known delivery method, we agreed that we would continue our pattern of success and take it up in the next interim. And we reported our long-term commitment to Sen. Krebsbach and the Interim IBL Committee.

Looking ahead to the next interim, we will continue our work and continue discussing issues—inviting participation by all interested groups and sharing our outcomes with legislative IBL groups. We all recognize that we won't agree all the time--and we didn't during this effort. But the debate and input from participants was beneficial to see the whole picture. We all have a better understanding and regard for one another's perspective. And, Mr. Chairman and members of the committee, we will continue our work out of respect for you—knowing that the legislative session and hearing room is not the first place to bring problems and concerns.

Our coalition urges a **do pass on HB 1033** and I will be happy to answer questions from the committee on the process and collaborative efforts of the group however I respectfully request you save more technical questions for the practitioners with us today who will follow my testimony.

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**Industry, Business, and Labor Committee
Testimony in Support
Of HB 1033**

**Provided by Jerold R. Backes
ACEC/ND &
Industry Key Leaders Coalition**

Chairman Klein and members of the Committee:

My name is Jerold R. Backes and I currently have the privilege of serving as the Legislative Chairman as well as the National Director for ACEC/ND (American Council of Engineering Companies/ND) and as the Legislative Chairman of NDSPE. In that role, I am appearing in support of HB 1033 and as a participant in the Industry Key Leaders Coalition that was instrumental in development of this legislation. As mentioned by Ms. Bonnie Staiger, the testimony being presented represents the unified support of the bill by each coalition partner. I believe it is important to recognize that the legislation developed was a result of a cooperative effort among those involved in the industry. It is equally important to note that nothing in the legislation was included unless each of the participants actively agreed with the wording selected and the approach to be outlined. As we agreed at the beginning of the process, a majority opinion was not sufficient; if wording were to be included, we wanted all parties to be in agreement to minimize future items of discussion.

I wish to commend all participants in developing the frankness and willingness to listen to opposing viewpoints that were necessary to be successful in the endeavor. I firmly believe that we have been successful in improving the code for the betterment of the State of North Dakota and have laid the groundwork for future cooperative endeavors within the industry.

As Ms. Staiger indicated, the development of the bill consisted of concurrent discussions of the various delivery methods that were contained in the

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current code or being considered. My testimony will deal primarily with the "Design-Bid-Build" methodology to public improvements or the "Traditional Approach". Eric Johnson will follow and address the Construction Management approach to projects.

When the committee began looking through the existing code and discussing the disagreements that had taken place in the past, we came to realize that most of the confusion or debate was the result of conflicting definitions, unclear practices, or including an item in multiple sections of the existing code. For example, in the existing century code, there are three different phrases used to define who the successful bidder on a project is. They included:

- Lowest responsible bidder (existing NDCC 48-01.1-02)
- Lowest and best bidder (existing NDCC 48-01.1-05 & 48-01.1-07)
- Lowest, best, licensed bidder (existing NDCC 48-01.1-05 item 4)

This most likely occurred unintentionally over the course of development of the existing code. Therefore, we chose to approach the revisions to the existing code by attempting to clarify definitions of the terms or processes to be involved, list the procedures in a linear non-duplicating fashion, and clarify the procedure as a whole for a design-bid-build process. The goal wasn't to change a process that has served the State well, but rather to better define and describe it. Hence, the modifications made were concentrated essentially on making the process clearer and more consistent and didn't attempt to make significant changes to the process.

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This process involved a rather lively but beneficial debate among the participants. However, we all concur that such debate is necessary and beneficial. As a group, we feel this has resulted in a clearer process as reflected in the legislation before you. The side benefit of the process for the State of North Dakota is the development of a coalition of the industry professionals that can work together on future critical issues such as Design-Build and other delivery systems that will be applied to construction in the future of North Dakota.

As a professional organizations and as a part of the Industry Key Leader's Coalition, ACEC/ND and NDSPE urge you to recommend HB 1033 for passage.

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Testimony – HB 1033
Senate Industry, Business and Labor Committee
February 28, 2007

Mr. Chairman and members of the Senate Industry, Business and Labor Committee, my name is Eric Johnson and I am a fourth generation contractor from Meinecke Johnson Construction in Fargo, ND. I am the immediate past president of the AGC of ND and I am one of the industry representatives who serve on the key leaders group which drafted the changes to the public improvement statute – Chapter 48 of the ND Century Code. This working group was assembled and met every month during the 2005-2007 interim. I am testifying today in support of HB 1033.

My testimony will cover the addition of a project delivery method to the public improvement contract bid statute. This method is “construction management at risk”. The State’s public agencies have been able to construct projects using “agency construction management” for a number of years but have not been able to use “construction management at risk”. Both methods provide for the “construction manager” to be hired by the public agency during the planning and design phase of a project to add construction expertise to the project from the very beginning. The ability to involve a group with extreme expertise in construction processes in the early stages of a project can improve the entire process and hopefully save taxpayer dollars by making the process more efficient and less adversarial. The big difference in the two methods of project delivery is the risks accepted by the construction manager.

In “agency construction management” the construction manager does not contract directly with any trades companies or subcontractors for work to be done on the project and is only responsible for the coordination of the work performed by contractors selected by the owner to construct individual portions of a project. The “agency construction manager” is required to provide the owner with a bond only for the amount of their construction management contract.

In “construction management at risk” the construction manager works with the owner and design professionals during planning and design phase of project development and then negotiates an acceptable guaranteed maximum price and contract terms with the public owner and holds contracts directly with trade companies and subcontractors necessary to complete the project and is further responsible to the owner for the performance of those entities. The “construction manager at risk” is required to provide the public owner with a bond in the amount of the negotiated guaranteed maximum price. This bond provides protection to the public for a contractor’s performance and their

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payment of suppliers, trade companies and subcontractors under contract on the public improvement project.

Adding the "construction manager at risk" project delivery method and the other changes proposed by HB 1033 are necessary and have been constructed by and are supported by all construction industry groups; including the general contractors, electrical contractors, architects, engineers, mechanical contractors, home builders and numerous trade companies. The industry groups worked very hard to make changes to improve the system of public project delivery being conscious of allowing flexibility to the public owners, while still providing the best value to North Dakota's taxpayers and a healthy competitive environment for the all parts of North Dakota's construction industry.

Mr. Chairman and members of the committee I thank you for the opportunity to testify.

I ask for your support of HB 1033 and respectfully request a Do Pass recommendation on HB 1033.

I would be happy to address any questions.

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