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SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1130

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1130

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1130

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: January 17, 2007

Recorder Job Number: 1249

Committee Clerk Signature Stephanie N Thomas

Minutes:

Chair Keiser opened the hearing in HB 1130.

Grant Levi, ND Department of Transportation: See written testimony #1.

Rep. Amerman: In your testimony, it sys the prime contractors can and does mark up the price submitted to account for their supervision administrative costs, how much can they mark this up, and how does that work?

Grant: During the bidding process as they're putting together the bids, we have no cap established for that. There are situations when we add additional work to a contract, and the subcontractor is doing the work. We have worked with the industry to establish some levels of administrative charges that they would add when we add additional work, and I believe that is about 10%, and it varies based on dollar amounts.

Rep. Zaiser: What if a subcontractor submitted a claim to the prime, and the prime would refuse to take it to you, what reasons does he have, and what avenue does he have?

Grant: When the prime contractor and the subcontractor agree on prices based on an agreement, the subcontractor then would have no right to a dolt line in his agreement. We are aware of the situations in other states where the subcontractors have gone forward and either

taken them to court or they have gone to their bonding company and put a lean against the bond until those issues were resolved.

Rep. Thorpe: Do you need the length of time that we have here. We've got the lower level of 60 days for up to $3 million, and 180 days over that, does it take that long?

Grant: We have found in our experience that the 60 days for those claims below $3 million is usually adequate for us to go through.

Rep. Thorpe: When they have a contract for completion, I was wondering how this reports to the other. Are they up against a completion date?

Grant: Typically, those time frames are outside of the completion date for a contract. If there is some disagreement as to how the work should precede, and we agree it needs to be done, we ask a contractor to go forward, and we track all costs.

Rep. Boe: Would you happen to have a number of how many times a year you end up with a claim over $3 million?

Grant: In the past 3 years, I'm only familiar with one.

Rep. Kasper: In your testimony you talk about modifying some of our internal procedures to make it easier for contractors to notify us when they have contract concerns and to ensure we respond quicker. What are you doing to modify your internal procedures? What was the problem there, and then have a follow up in that area of your responding quicker?

Grant: We have a form that the contractors had you complete in order to give us notice. We found that the form was somewhat cumbersome for them to complete, and the form had to be done within 10 days as the state statute indicates. In sitting down with the contracting industry, we are making some modifications to that form, and we're also trying to put into place a process that requires their management team to sit across the table with the contractor within a reasonable amount of time, just to clarify what the issues are and be able to dissolve them.

Rep. Kasper: So, you're expanding your length of time to respond to the concerns of the contract, would you have an objection to putting a timeline in here when the department must respond to the contract?

Grant: We'd be willing to discuss that. Some of the challenges we have is that sometimes we have difficulty getting enough information from the contracting industry to respond. In order for us to really respond to it, we need to know what they bid for the work, and we also need to be able to have an appreciation of an impact of their costs to be able to respond.

Rep. Kasper: Respond time does not mean decisions time, it just means we acknowledge and received your paperwork, and here's what we need to follow through. In the last 3 or 4 years, how many cases of arbitration have actually gone through arbitration?

Grant: Our last arbitration proceedings were in April of 2003, and this information goes back to 1984. Since 1984, we've had about 12 arbitrations.

Rep. Kasper: Is it public record on how those arbitrations are resolved?

Grant: I would assume they are where we still have our records, because are records are all public records.

Rep. Ruby: Have you perceived any problems with dealing with the subs, that in the past they've been able to come and deal with your agency to give an increase, and now that's not going to be possible? What's going to happen between the sub and the primary contractor?

Rep. Ruby: The sub contractor has a contract with that prime contractor, and if there is something that they feel we've changed in the contract that requires additional conversation, the prime contractor still has the right to come to us, and express those views. We do not direct the subcontractor how to do work, and what to do.

Rep. Ruby: Then are those subcontractors bonded?

Grant: In our industry, that varies. Some prime contractors require bonds, and some do not.

Rep. Amerman: When it goes to arbitration and the arbitrator rules, is his decision binding on all parties, or is there recourse after that?

Grant: We consider the arbitration decision to be binding.

Rep. Keiser: You mentioned that they have to now give notice through the prime, and it has to be done in a timely fashion. What is the definition for in a timely fashion?

Grant: What we look for is as soon as the contractor knows that there is a change, either in conditions or it's not being built according to our plans, the state statute requires they need to give us notice within 10 days. We've had claims filed as much as a year later indicating there were problems with work activities in projects, and that to me is not timely notice.

Rep. Keiser: I recognize that there's a substantial change, and what's going to have to happen verse the time track. I recognize it today, and it takes us to months to get into it and do it. So, I have 10 days to recognize it. When do I submit the amount of the change, or the cost of the change?

Grant: Basically, before the work starts as they're working on that activity, if they recognize there's a change they should give us notice. The notice consists of informing us what the change is, and what items of the contract were affected by the change.

Rep. Keiser: How quickly does the department now say, we agree?

Grant: Our response happens quickly.

Rep. Keiser: You say go forward, so I bring in new equipment, new cost to me, and I go forward, and then some later point you say no, we said to go forward, but we're not going to pay for it.

Grant: There's probably a disagreement between us and the contractor to start with, whether or not it was a change. If we truly acknowledge right up front that it was a change that occurred in the plans, and we cannot reattempt to resolve cost differences right away, if we're

unsuccessful in that we have provisions in our contract to monitor it according to prices we put in a special provision that we use in those situations that we agree that there's a change.

Rep. Keiser: What happens when the department won't represent you?

Grant: You would have recourse through this contract with the contractor. You could also go to the bonding company, and indicate that you weren't properly compensated for the work, because there was a change in the relationship.

Rep. Amerman: As the law stands now, the subcontractor can make direct claims to your department without going through the prime, correct?

Grant: Yes, that's correct.

Rep. Amerman: When you get the ruling back from the arbitrator, do you have a guess of the average length of time this process takes after?

Grant: That is not a quick process. That could take up to 6 months to a year, depending on the complexity in everything that's occurred.

Rep. Amerman: If it passes and he has to go through the prime contractor, and the prime says no, his other options would be to go to court or put a lean on this. So, how long do you think that process is?

Grant: That would depend on the court system.

Rep. Kasper: You said since 2003 there's been one arbitration case. Where is the problem then with the current process? We've had 3 years and one arbitration case, it appears there's not many arbitration cases, where is the problem?

Grant: We've created an environment in our industry that is forcing the Department of Transportation to deal with situations that we shouldn't have to deal with in getting negotiations going. That's why we are asking for the change.

Rep. Zaiser: Could not this process instead of being more efficient be counterproductive in terms of time statement. We talked about going to court and the appeal process, and we don't know how long that's going to take. Where as, the other way when the sub could deal directly with you, that could probably be handled easier, and might not slow the whole ship down.

Grant: The issue relates to the time limits. We are more concerned that we at times don't have all of the details of what the relationship is between the prime and the sub. The subcontractor is coming to us for payment, and it becomes challenging for us to deal with those situations.

Rep. Ruby: When you're talking about the 10 days notice, how do you know when they notice it? How do you know when that 10 day starts?

Grant: Allot of that depends on the type of work that's occurred.

Rep. Ruby: With any of these problems that you talked about the course would be to go to arbitration, but do any of these problems with these bids result because of the fuel prices and the way they jumped?

Grant: One of the things that we have done in our working relationship is we have made changes, so if fuel prices do go up we have provisions to pay them through that.

Rep. Thorpe: Under the present system versus what we have here, which one would be the easiest to work with, as far as time element with the contractors?

Grant: From my perspective, I don't see that either passing this or not passing this would affect them, because the contract provisions we have in place would require the prime contractor to get the work done and to carry through.

Rep. Clark: You said you had provisions in place for increasing fuel prices, do you have provisions for other commodities like steel?

Grant: No.

Rep. Clark: How often does failure to give a timely notice result in failure of the arbitration? Doesn't the contractor always lose if he doesn't give timely notice?

Grant: What has been occurring is that we've gone into arbitration and we've indicated a timely notice, and was not given that. The arbitrator's do not decide that issue right away. They indicate to us that we want to listen to the entire issue, and what facts were given, and we've gone through the whole process, and in the end in some instances they've come back and said that there is no conversation in this deal, and no notice was given. All we're asking is to give us a notice.

Don Diederich, Industrial Builders Incorporated of Fargo: Opposed to HB 1130. See written testimony #2.

Rep. Kasper: You've been doing business with the DOT for 50 years, and you hear the explanation about having to deal with these subcontractors that are always coming to them, because of the way the current system works. Do you have any idea how many subcontractors have been unhappy with your company, where they have not been able to resolve directly with you, and had to go to the department?

Don: I would say very few to none. We have hundreds of disputes with some contractors, and we resolve them within the prime contractor sub contractor scenario.

Rep. Clark: Isn't the prime contractor sort of obligated to bring forth the claim for the subcontractor, even if he thinks he probably has a poor pace?

Don: Yes, they are. They have due diligence that is also a part of the contract for completing.

Rep. Zaiser: Are you aware of any contractors out there that when the subcontractor has a claim against the prime, that the prime refused to bring it to the DOT?

Don: It would be hard to understand why the prime contractor would take that tact. It would certainly be against good business practice to fail to forward a subcontractors request.

Rep. Amerman: If this were the past, the subcontractors couldn't go claim, it would have to go through the prime, and if the prime refuses, then they would have to go through this court process, and could put a lean on the prime. This could get fairly expensive for a prime contractor.

Don: The process is very slow, even in the best case scenario. Bonding companies can take a long time and are generally quite slow for paying attention to claims.

Rep. Keiser: There are cases where the department has a concern that they paid the prime for the job, then there's a claim made afterwards, and they don't want to pay for the same project again. From your perspective, how significant is that problem, how does that problem work?

Don: If it involves 2 parties, the prime still is ultimately the owners contact. If a subcontractor has failed to price things properly, that is between the subcontractor and the prime contractor.

Rep. Keiser: He would get reimbursed by you or the state for that increase?

Don: It would go from the sub to the prime, and the prime would have to contact the state. The state would have to either recognize the changed condition and pay for it, then they would have to pay down, and there's definitely a middle man at that point being the prime contractor.

Hearing Closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1130

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: 01-29-2007

Recorder Job Number: 2118

Committee Clerk Signature

Minutes:

Chairman Keiser allowed committee discussion on HB 1130. HB 1130 relates to highway construction arbitration. Rep. Dosch was absent.

Rep. Amerman: We had amendments drawn up to implement what was agreeable from Mr. Dietrich into the bill and Rep. Ruby and I contacted different people and that's pretty much what we came up with would be to put the language, what has been deleted, put that all back in there and implements the amendments that were agreeable on both parties.

Rep. Kasper: Are the contractors now fully in support of the bill, with the amendments?

Rep. Amerman: I feel they are fully in support in, if anybody ever is, there didn't seem to be much opposition from DOT. With the bill going back to original status and just implementing the agreements were compliant.

Rep. Ruby: In speaking with Mr. Levi of the DOT, the main issue they had been with the subcontractors having the ability to come back and request funds and adjustments. They really weren't in favor of that being removed. I asked them if he was willing to prepare some kind of cut off line where it allowed a certain amount of access to them from the subs, but set some limits different than what they have now and he stated the they liked it as it was. They weren't planning on offering anything that would be compromise to it and of course, anything they may

have offered may have run into more controversy from the industry. I think the amendments fall under the approval of the industry.

Rep. Amerman moved to adopt the amendments. Rep. Gruchalla seconded.

Voice vote: Unanimous. Amendments are adopted.

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

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

Carrier: Rep. Amerman

Proposed amendments to HB 1130

Donn Diederich
Executive Vice President of Industrial Builders Incorporated
President of the Associated General Contractors

Page 1, line 9, remove the overstrike over "~~If the contractor believes the~~"

Page 1, remove the overstrike over lines 9 though 13

Page 1, line 14, remove the overstrike over "~~compensation.~~"

Page 2, line 3, remove ", and this waiver must be strictly enforced and not excused on grounds of claimed"

Page 2, remove lines 4 through 6

Page 2, line 7, remove "may not take place"

Page 2, line 11, remove the overstrike over "~~personally or on behalf of another person or entity~~"

Page 2, line 11, remove "including any claims for work subcontracted"

Page 2, remove line 12

Page 2, line 13 remove "upon the department"

Note: You should look at the proposed new language on page 1, lines 14 through 20. The AGC did not directly oppose the new language, rather just the changes made on lines 9 through 13. If the amendments were adopted as proposed, language would be repeated.

Adopted by the Industry, Business and Labor Committee

January 29, 2007

House Amendments to HB 1130 (78166.0101) - Industry, Business and Labor Committee 02/01/2007

Page 1, line 9, remove the overstrike over "~~If the contractor believes the~~"

Page 1, remove the overstrike over lines 9 through 13

Page 1, line 14, remove the overstrike over "~~compensation.~~" and remove "Any time a claim will be made for additional compensation for work performed"

Page 1, remove lines 15 through 19

Page 1, line 20, remove "compensation will be as provided for in the specifications for force account work."

House Amendments to HB 1130 (78166.0101) - Industry, Business and Labor Committee 02/01/2007

Page 2, line 3, remove ", and this waiver must be strictly enforced and not excused on grounds of claimed"

Page 2, remove lines 4 through 6

Page 2, line 7, remove "may not take place"

Page 2, line 11, remove the overstrike over "~~personally or on behalf of another person or entity~~" and remove "including any claims for work subcontracted"

Page 2, remove line 12

Page 2, line 13, remove "upon the department"

Renumber accordingly

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

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1130

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 Zaiser

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. Amerman

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

REPORT OF STANDING COMMITTEE

HB 1130: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1130 was placed on the Sixth order on the calendar.

Page 1, line 9, remove the overstrike over "~~If the contractor believes the~~"

Page 1, remove the overstrike over lines 9 through 13

Page 1, line 14, remove the overstrike over "~~compensation.~~" and remove "Any time a claim will be made for additional compensation for work performed"

Page 1, remove lines 15 through 19

Page 1, line 20, remove "compensation will be as provided for in the specifications for force account work."

Page 2, line 3, remove ", and this waiver must be strictly enforced and not excused on grounds of claimed"

Page 2, remove lines 4 through 6

Page 2, line 7, remove "may not take place"

Page 2, line 11, remove the overstrike over "~~personally or on behalf of another person or entity~~" and remove "including any claims for work subcontracted"

Page 2, remove line 12

Page 2, line 13, remove "upon the department"

Renumber accordingly

2007 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1130

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1130**

Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: **March 5, 2007**

Recorder Job Number: **4323**

Committee Clerk Signature

Highway construction arbitration:

Grant Levi – Deputy Director for Engineering, ND Dept. Transportation - *In Favor*

TESTIMONY # 1 *Went over testimony*

Changes are on page 2, 6-8. Act on 60 days.

S Klein: A claim, what would that be like?

Grant L: Process: when put together a contract, there are specifications and plans that the contractor needs to follow. If the contractor encounters a condition or a disagreement on how we're interpreting the plan note, they'll give us the list. They'll tell us that they disagree with how they had to build this, and if through the process of notice we're not able to resolve it, the next step we have set up, they file a "formal claim." They put together a document which outlines what their costs were to do the work which was above and beyond what they felt they did. We take a look at the claim, and if we're in agreement, we settle it. If not in agreement with the claim, the next process, our director, has a time frame. If it's above 3 million dollars, we have 180 days to formerly respond. If the contractor does not agree with our response, then the next step is to go through arbitration. We go before an arbitration board.

S Klein: The construction company is telling you that they can't do it for that, "it's going to cost you 3.1 million dollars." That would open the door to using this. That's when you have to figure out if they're legit or are you legit.

Grant L: That's correct. We take a look at the documents and bid documents. It's most important thing that we can do is make sure the tax payer gets what they paid for, and contractors are treated fairly.

S Heitkamp: I get the point, you work out a deal. Do you fear from them that some information gets out? How it's bid you don't always want everyone to know.

Grant L: We try to keep it private and confidential.

S Heitkamp: ...for the suppliers. You can get in trouble with suppliers if you get a better deal, and some times you need to keep that quiet.

Grant L: Because of other provisions in our programs, some quotes become public. Trade secrets we don't change. Change: Page 3, line 1 & 2. Consensus is to have timely notice and the right to arbitrate. *Testimony ends 9:05m*

S Klein: How does the arbitration board work. Who are they?

Grant L: There is a national board of arbitrators. Depending on the sizes of the arbitration claim, the dollar amount, what we do, is we work with the contractor who has filed for arbitration and we select committee members. The State of ND will select a member, the contractor will select a member and then a 3rd member will be selected by both parties who agree to it. There is a panel that exists. After they are selected, they run the show as a court session and bring in all parties.

S Klein: They don't have to do this in writing? Now we are going to require them to have this printed?

Grant L: In the past they weren't very detailed, we are asking fro them to put it in writing on the basis of the decision. We believe that there should be additional information and helpful for all.

S Klein: The 10 million dollar arbitration issue, the bridge, how did that come together?

Grant L: The contractor had concerns with the fact that there was low water, water lower than indicated would be possible from Lake Sakakawea and we're going through a draught. That would create some challenges with their means and methods. Less water means longer cranes. We had a 3.5 million dollars settlement.

S Behm: When it goes into arbitration, is it "what he says, goes?"

Grant L: That's the intent. In most cases, the arbitrator decision goes. Today's decisions with the arbitrator will be upheld in the courts.

Questions? Support?

Russ Hanson - Agency of North Dakota and Association with DOT in Interim - *In Favor*

We're in agreement with engrossed bill 1130 and why the changes are necessary.

S Heitkamp: This looks more like a compromise. Either you get the job or not.

Russ H: It's a give-n-take process, yes.

Questions? Support? Opposition?

CLOSE

Motion for a DO PASS by S Wanzek

Second by S Behm

Vote on DO PASS FOR HB 1130 – 7-0-0 Passed

Carrier: Heitkamp

Date: 3-5-07

Roll Call Vote : 1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. HB 1130

Senate **INDUSTRY BUSINESS & LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Motion Made By Wanzek Seconded By Behm

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 7 No 0

Absent

Floor Assignment Heitkamp

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

REPORT OF STANDING COMMITTEE

HB 1130, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1130 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1130

HOUSE INDUSTRY, BUSINESS, AND LABOR COMMITTEE
January 17, 2007

North Dakota Department of Transportation
Grant Levi, P.E., Deputy Director for Engineering

HB 1130

Good morning, Mr. Chairman and members of the committee. I'm Grant Levi, Deputy Director for Engineering for the North Dakota Department of Transportation. Thank you for giving me the opportunity to present information to you today. I'm here to testify in support of HB 1130, which was introduced at the request of the department.

Since 1953, the state of North Dakota has had in state statute some form of arbitration procedure for resolving construction contract issues that cannot be resolved by the owner and the contractor. The last modifications to sections of the arbitration statute were made in 1995. We are comfortable with the use of the arbitration process as a means to resolve contract issues after all negotiation efforts have been exhausted. We continually attempt to resolve all issues through collaboration and negotiation with the prime contractor, but we also recognize that we need a process to resolve issues when those efforts fail.

While we are comfortable with the arbitration process, we do feel some modifications to the process are necessary. We have been working with representatives from the contracting industry to obtain their input in an attempt to reach an agreement on the changes we believe are necessary to make the arbitration process more equitable for all parties involved. As a result of our meetings, we have a better understanding of each other's views as they relate to contract management. We are modifying some of our internal procedures to make it easier for contractors to notify us when they have contract concerns and to ensure we respond quicker to their notice of intent to file a claim. The meetings were productive; however, we were not in agreement on all the changes we are suggesting. While we appreciate the contracting industry's concerns, we feel it is essential to make the following changes:

- The first change in **Section 1** starting on page one, line nine, through page two, line seven clarifies that the contractor, when claiming additional compensation, must notify the engineer in writing of their intent to make claim for additional compensation. It also requires the issue of proper notice by the contractor, must be determined by the board prior to arbitration taking place. If there is no notice, there would be no compensation. This change is necessary because there have been occasions when contractors have not informed the state in a timely manner that they were having problems. When this occurs, the state does not have the opportunity to make changes in the field to eliminate the problem or to document what additional costs the contractor may be incurring as a result of the problem.

We are then put at a disadvantage and have difficulty ensuring the state's interests are protected and the contractor is paid fairly. By making these changes, state statute will make it clear the contractor must give timely notice. If there is a question of whether or not notice was given, the arbitration board will decide that issue prior to discussing the claim.

- The second change in **Section 1**, page two, line ten through line thirteen, clarifies that only a prime contractor has the right to directly file a claim. The state enters into a contract with the prime contractor, who then enters into contracts with subcontractors to complete the work. We allow the prime contractor to subcontract up to 70 percent of the work. The prime contractor supervises his subcontractors and controls the sequencing of their work. The prime contractor can, and does, mark up the price submitted by the subcontractor to account for their supervision and administration. Therefore, when a subcontractor has a problem, they should work with the prime contractor to resolve any differences as per their agreement. The state role in the relationship the prime has with the subcontractor is to concur with the prime contractor's request to subcontract since our contract is with the prime contractor, any correspondence and dealings on a project are directed to the prime contractor. We require the prime contractor to have a representative on the project at all times, even if they are not physically performing any work.

  Because of past court rulings, the state is forced to deal with subcontractors unless state statute is changed. We presently have subcontractors, and sometimes subcontractors to the subcontractors, who we end up negotiating with when issues arise under the contract. We have even had situations where the prime contractor was paid for an item of work at the bid price. The prime contractor had negotiated a subcontract with a subcontractor for a price much lower than what we paid the prime. The subcontractor filed a claim against us to request additional compensation because he couldn't complete the work as per his subcontract. We ended up working with the subcontractor to resolve the claim. The subcontractor's issues are really with the prime contractor. If the prime feels conditions changed and additional compensation is warranted, the prime contractor should give us notice and file a claim if the issues are not resolved.

  If a person building a home were required to adhere to the same procedures in contract management the NDDOT must follow they would be required to resolve issues with one of the home builder's subcontractors even though they have no contract with them. For example, if an electrician (subcontractor) to the home builder wasn't happy with his payment from the home builder, the home owner would be required to negotiate with him even though he more than likely already settled with the home builder. The changes we are recommending will ensure the NDDOT only deals with the contractor with whom the department has the original contract.

- The third change is outlined on page two, lines nineteen through twenty one. This change would allow the director sixty days to act on claims less than three million dollars and one hundred and eighty days to act on claims greater than three million dollars. The additional time to review claims above three million dollars is being requested because of the amount of time it takes to review the documents the contractor submits for larger claims.

- The last change is on page three, lines fourteen and fifteen. This change requires the arbitration board to state their decision in writing as well as state the basis for the decision. We believe it is reasonable to require the arbitrators to state their reasons for the decision. By knowing the reasons, we would be in a better position to shape future agency practices and policies.

Our goals as we administer contracts are to ensure that our customers get a good product for their investment and to make sure the contractor receives fair payment for the work they complete. During the last seven years, the NDDOT has received 138 notices from the contracting industry relating to concerns with a provision of our contract. Sixty-two, or forty-five percent of those notices have been submitted by subcontractors who we do not have a contract with. Approximately 15 percent of the Notice of Intent (NOI) forms are filed late. By making the changes outlined in HB 1130, we will be creating public policy that ensures the state is notified when there are contracting issues, and that the state works solely with contractors they have contracts with to resolve the issues. We believe these changes are good public policy changes and will allow us to better achieve our contract administration goals.

Mr. Chairman that concludes my testimony. I would be happy to answer any questions.

#2

Testimony – HB 1130
House Industry, Business and Labor Committee
January 17, 2007

Mr. Chairman and members of the House Industry, Business and Labor Committee, my name is Donn Diederich and I am Executive Vice President of Industrial Builders Incorporated of Fargo, North Dakota. I am also the 2007 President of the AGC of North Dakota ,who's members represent many of the contractors who work for the NDDOT. I am also the chair of the AGC arbitration subcommittee. I am here today to talk about North Dakota Century Code Chapter 24-02-26 which requires arbitration as the dispute resolution process for anyone who enters into a contract with the NDDOT, and to urge the committee to recommend a do not pass for HB 1130 as introduced.

I am here today as a contractor, I am not an attorney, I am here as a contractor who's business has worked with the NDDOT on hundreds of projects over the last fifty plus years and never has had to use the arbitration process to resolve a dispute . The existing statute has been in force for many years and has served the industry and department well in most instances. It is our understanding the Department has not had to deal with an extra ordinary number of arbitration cases. It's our belief the number of arbitration cases are small and the outcomes somewhat balanced. You have to remember the arbitration process is the remedy of last resort for a contractor who is working for an owner who has written the contract, interpreted and enforced the specifications - and until being brought to arbitration was the judge as well. The system does not seem to be broken and for that reason alone we feel the proposed changes to the statute are unwarranted.

That being said Mr. Chairman, and as I mentioned earlier the AGC of ND, and the NDDOT have been discussing the changes the DOT would like to make to this section of the code .We have agreed to several of the changes the DOT has proposed but not all, thus the do not pass recommendation. The amendment as introduced would strengthen the DOT's position to which they all ready have great strength, all to the determent of the arbitration process.
I can give you an over view of the proposed amendment as we see it.

We oppose the amendments proposed changes on page one, lines 9 thru 13 in that it does not significantly change or clarify the requirement for providing the department with a "notice of

intent" to file a claim. The DOT is trying to eliminate language that has brought them to arbitrations in the past by adding language which will need to be interpreted in the future. What this language does to remedy the existing notice of intent is unclear to me, the original statute sentences seems clear.

We feel arbitration is at this time the best process to use for settling disputes on DOT contracts based on the flexible nature of the arbitration process. The amendments proposed on page 2, lines 3 through 7 is an attempt by the DOT to provide external direction to the arbitration process and slant the process in their favor by throwing out legitimate claims on a pure technicality, without hearing possible extenuating circumstances.

We agree to the change on line 10 of page two.

We oppose the amendments proposed on page 2, lines 11 through 13 which preclude a subcontractor from making a claim directly against the department. Again NDCC Chapter 24-02-26 requires "All controversies arising out of any contract for the construction of highways entered into by the director must be submitted to arbitration". The fact that a subcontractor can make a demand for arbitration has been the opinion of the North Dakota Supreme Court.

We have agreed to changes made on page 2 lines 19 through 21 which provide the Director up to 180 days to act on claims over three million dollars. We felt this was a reasonable time for acting on larger claims. We have also agreed to the requirement for the arbitrator's decision to be in writing and state the basis for the decision as stated on page 3, lines 14 & 15.

We oppose parts of this bill and feel those issues should be stricken from this legislation; however, the issues we have agreed upon could be incorporated into legislation.

Mr. Chairman and members of the committee, thanks for the opportunity to testify and I would be happy to answer any questions.

SENATE INDUSTRY, BUSINESS, AND LABOR COMMITTEE
March 5, 2007

North Dakota Department of Transportation
Grant Levi, P.E., Deputy Director for Engineering

HB 1130

Good morning, Mr. Chairman and members of the committee. I'm Grant Levi, Deputy Director for Engineering for the North Dakota Department of Transportation. Thank you for giving me the opportunity to present information to you today. I'm here to testify in support of HB 1130, which was introduced at the request of the department.

Since 1953, the state of North Dakota has had in state statute some form of arbitration procedure for resolving construction contract issues that cannot be resolved by the owner and the contractor. The last modifications to sections of the arbitration statute were made in 1995. We are comfortable with the use of the arbitration process as a means to resolve contract issues after all negotiation efforts have been exhausted. We continually attempt to resolve all issues through collaboration and negotiation with the prime contractor, but we also recognize that we need a process to resolve issues when those efforts fail.

While we are comfortable with the arbitration process, we do feel some modifications to the process are necessary. We have been working with representatives from the contracting industry to obtain their input in an attempt to reach an agreement on the changes we believe are necessary to make the arbitration process more equitable for all parties involved. As a result of our meetings, we have a better understanding of each other's views as they relate to contract management. We are modifying some of our internal procedures to make it easier for contractors to notify us when they have contract concerns and to ensure we respond quicker to their notice of intent to file a claim. The meetings were productive; however, we were not in agreement on all the changes we felt were necessary. The original bill submitted by the department contained the changes to the arbitration statute we recommended. The House of Representatives after listening to our comments and the construction industries' comments modified the bill and passed the engrossed version. The engrossed version of the bill makes the following changes:

- The first change is outlined on page two, lines six to line eight. This change would allow the director sixty days to act on claims less than three million dollars and one hundred and eighty days to act on claims greater than three million dollars. The additional time to review claims above three million dollars is being requested because of the amount of time it takes to review the documents the contractor submits for larger claims.

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- The last change is on page three, lines one and two. This change requires the arbitration board to state their decision in writing as well as state the basis for the decision. We believe it is reasonable to require the arbitrators to state their reasons for the decision. By knowing the reasons, we would be in a better position to shape future agency practices and policies.

The original bill also addressed concerns we have with timely notice and the subcontractor's right to arbitrate. We accept the changes that were made by the House of Representatives and we will work with the contracting industry to find ways to address our concerns in these areas without a modification to state arbitration statute. Therefore, we support the Engrossed HB 1130 and respectfully request the committee to give the bill a do pass recommendation.

We will continue to work with the contracting industry to ensure that our customers get a good product for their investment and to make sure the contractor receives fair payment for the work they complete.

Mr. Chairman, that concludes my testimony. I would be happy to answer any questions.