

MICROFILM DIVIDER

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



ROLL NUMBER

DESCRIPTION

2394

2007 SENATE POLITICAL SUBDIVISIONS

SB 2394

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2394**

Senate Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: February 8, 2007

Recorder Job Number: 3226 & 3263

Committee Clerk Signature

Shirley Borg

Minutes:

Chairman Cook called the Senate Political Subdivisions Committee to order. All members (5) present.

Chairman Cook opened the hearing on SB 2394 relating to bidding preferences.

Senator O'Connel, District 6, Prime Sponsor introduced SB 2394. (See attachment # 1)

Representative Boucher, District 9, testified in support of SB 2394. (See attachment #2)

Jason Hagness, Harlows Bus Sales, Rollette and Bismarck, ND, testified in support of SB 2394. We do business in six states. We spend an awful lot of money training our staff to make sure that they are certified individuals to work on warrantee products that are sold.

We feel that it is a very competitive business that we are in. All we are asking is to level the playing field to make it fair for us to stay in the state. I like living here and would like to continue keeping our business here in the state. We have two dealer business license that we buy through the state and as part of that we get inspected every year at both locations.

The license is not a very expensive fee. It is \$100 for the application fee. Some of the things that you are required to have for that can be very expensive. Bids are happening without dealerships that have licenses in the state.

Testimony in Opposition.

Sherry Neas, State Procurement Manager, OMB, State Procurement Office, testified in opposition to SB 2394 (See attachment # 3)

Chairman Cook : In listening to this testimony this bill is really not needed

Sherry Neas: We don't believe so. The bill asked for a preference to a ND bidder if the bids are potentially equal, at least in the case of a tie bid. If it meet that and the price is the same they already have a preference for the North Dakota bidder.

Shannon Sauer, Financial Management Director for Department of Transportation testified in opposition of SB 2394. (See attachment # 4)

Chairman Cook closed the hearing on SB 2394.

Recorder # 3263 February 9, 2007 (action)

Senator Warner Moved a Do Not Pass on SB 2394

Senator Olafson seconded the motion.

Discussion

Roll call vote: Yes 5 No 0 Absent 0

Carrier: **Senator Cook**

REPORT OF STANDING COMMITTEE (410)
February 9, 2007 12:11 p.m.

Module No: SR-28-2717
Carrier: Cook
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2394: Political Subdivisions Committee (Sen. Cook, Chairman) recommends DO NOT PASS (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2394 was placed on the Eleventh order on the calendar.

2007 TESTIMONY

SB 2394

SB 2394 Summary

Senator David P. O'Connell

SB 2394 gives preference to North Dakota companies who bid for state contracts.

The office of management and budget or any other state entity authorized to accept bids for the purchase of motor vehicles shall give preference to a resident North Dakota bidder if two or more bidders submit substantially equal bids and any of those bidders is a nonresident bidder (*line items 18-21, pg. 1*).

This is to protect North Dakota companies from being outbid by out-of-state contractors by small amounts.

Contracts are being given to out-of-state contractors, who underbid North Dakota companies by small amounts (in some instances \$15-100) who do not have ties to North Dakota, nor pay in-state taxes.

This bill makes sure North Dakota businesses are given top preference.

**SB 2394 TESTIMONY
SENATE POLITICAL SUBDIVISIONS COMMITTEE
SENATOR COOK, CHAIRMAN**

Chairman Cook and members of the Senate Political Subdivisions Committee.
For the record, I am Merle Boucher, member of the North Dakota House of
Representatives from District Nine (9).

SB 2394 sets the requirements relating to bidding preferences for the purchasing goods of
any nature for the state. The preference must be equal to the preference given or required
by the state of the nonresident bidder, seller, or contractor.

A North Dakota licensed and bonded motor vehicle dealer must have a physical
dealership location within the state of North Dakota along with a myriad of other
requirements set forth by the North Dakota Licensing Division. However, when bids are
let for vehicle purchases by the state of North Dakota, no requirement exists for the
“bidding dealer” to hold a valid North Dakota Dealers License.

The licensed, bonded, and franchised North Dakota dealers believe there is no benefit to
holding; much less meeting the requirements; of their North Dakota issued vehicle
dealers license.

In order to participate in the bidding process for North Dakota vehicles, the bidding dealership shall possess a valid and a North Dakota issued vehicle dealers license. The dealer must also be licensed, bonded and hold a franchise from the manufacturer of the product being bid upon. Also, the bidding dealer must have facilities and trained personnel to provide factory approved warranty, parts, and service for the vehicles being purchased.

SB 2394 would authorize the office of management and budget or any other state entity authorized to accept bids for the purchase of motor vehicles to give preference to a resident North Dakota bidder if two or more bidders submit equal bids and if any of those bidders is a nonresident bidder.

North Dakota bidders should have priority over out of state bidders and in particular bidders from the Internet.

Mr. Chairman and members of the House Political Subdivisions Committee I urge a DO PASS ON SB 2394.

Thank you for your time.

Respectfully submitted:
Merle Boucher, Minority Leader
North Dakota House of Representatives

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Presented by: Sherry Neas, State Procurement Manager
OMB, State Procurement Office

Before: Political Subdivisions Committee
Senator Dwight Cook, Chairman

Date: February 8, 2007

Good afternoon, Chairman Cook and members of the committee. My name is Sherry Neas, State Procurement Manager for the Office of Management and Budget.

The State Procurement Office opposes this bill.

First, preference laws are not best practice in public procurement. The basic principal of North Dakota's state procurement law is that state agencies will purchase needed goods and services through "full competition with fair and equal opportunity to all qualified persons to sell to the state" (ref. N.D.C.C. 54-44.4-01).

North Dakota already has a statute requiring preference be given to the North Dakota bidder in the event of a tie-bid. Mr. Chairman and members of the committee, if you could you please turn to Reference 1 attached to my testimony, you see this statute. The tie-bid preference for North Dakota bidders was established last session under HB 1091.

The language in this bill would be difficult to apply. The bill requires "preference to a resident North Dakota bidder if two or more bidders submit substantially equal bids and one of those bidders is a nonresident bidder." "Substantially" equal implies less than equal. How would a purchasing agency determine what is "substantially" equal?

Establishing a preference law for North Dakota vehicle dealers would actually hurt North Dakota businesses that are trying to bid in other states. Most states, some 35 of the 50, have "reciprocal laws." Reciprocal preference laws are intended to deter local preference laws, because these laws have the effect of "punishing" businesses from states with preference laws. Reciprocal preference laws require government entities who receive bids from out-of-state bidders to increase their bid price by the rate of preference given by that bidder's home state.

For example: ND receives a bid from an out-of-state bidder (\$20,000) whose home state has a 3% preference bid. When evaluating that out-of-state bid, we apply the reciprocal preference by adding 3% to their bid (\$20,000 + \$600).

If this legislation is successful, North Dakota dealers will face reciprocal preference when bidding in other states--including our neighboring states of Minnesota, South Dakota, and Montana.

Imagine this scenario:

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ND dealers bids in MN/SD/MT (\$20,000), and ND implements a preference law (? %). When MN/SD/MT evaluates the ND dealer's bid, they apply reciprocal preference (\$20,000 + ?)

North Dakota has a reciprocal preference law that we apply when bids are received from out-of-state bidders. In fact, this bill is an amendment to North Dakota's reciprocal preference law. If you examine page 1, line 11 of the bill, the preference given to resident North Dakota bidders is "equal to the preference given or required by the state of the nonresident bidder, seller, or contractor." When ND bidders are at a disadvantage in that bidder's home state, we apply reciprocal preference. No reciprocal preference is applied if the other state has no preference law.

Finally, federal statutes often prohibit in-state and local preferences if federal funds are involved. We have discussed this bill with the NDDOT. The bill concerns them because they could potentially be found to be non-compliant with federal regulations. This could result in the obligation on the part of the State to refund to the federal government a portion of fleet service charges that represent the cost of granting a preference.

North Dakota cannot be an island--we need our out-of-state bidders to help ensure we receive needed goods and services at a competitive price. North Dakota state law requires OMB to establish a state bidders list. That law is Reference 2 attached to my testimony. Out-of-state bidders become qualified to bid on North Dakota state contracts by paying fees to register with the North Dakota Secretary of State, completing Office of Management and Budget bidders list application, and complying with Secretary of State annual reporting requirements.

We would like to see more North Dakota dealers bid on state vehicle contracts. We know that bidding on state vehicle contracts is a lot of work. North Dakota dealers can and do compete for and win state vehicle bids. The OMB State Procurement Office and NDDOT State Fleet can actively seek more North Dakota bidders to compete on state vehicle bids without implementing a preference law.

We urge a "no not pass" on this bill. However, if the committee recommends a "do pass," we respectfully ask that this office be contacted regarding an amendment to clarify some of the language in the bill as currently written.

This concludes my testimony. I will be happy to answer any questions you may have.

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Reference 1

N.D.C.C. Section 44-08-01.1. Bids to be sealed - Designation of time and place for opening - Preference for tie bids. Notwithstanding any other provisions of the North Dakota Century Code, the governing bodies of the political subdivisions of the state of North Dakota shall accept only sealed bids, whenever by law or administrative decision they are required to call for, advertise, or solicit bids for the purchase of personal property and equipment. Whenever a political subdivision of this state calls for, advertises, or solicits sealed bids, it shall designate a time and place for the opening of such bids. If all of the bids are not rejected, the purchase must be made from the bidder submitting the lowest and best bid meeting or exceeding the specifications set out in the invitation for bids. In the event that two or more bids contain identical pricing or receive identical evaluation scores, preference must be given to bids submitted by North Dakota vendors.

Reference 2

N.D.C.C. Section 54-44.4-09. Approved vendors.

1. The office of management and budget shall establish and maintain current lists of persons that desire to provide commodities or services to the state. Every person that desires to bid or submit a proposal on contracts for commodities or services awarded under this chapter must be an approved vendor in order to be placed on the bidders list. The office of management and budget or the purchasing agency shall use the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section. The office of management and budget or the purchasing agency shall use the list when sending notice of intent to make cooperative, limited competitive, noncompetitive, and negotiated purchases.

2. To become an approved vendor a person shall file an application with the office of management and budget. The application must contain information requested by the office of management and budget, including business and persons' names, telephone numbers, addresses, federal tax identification numbers, type of business organization, the types of commodities or services for which the applicant is interested in receiving solicitations, and other business information the office of management and budget determines relevant. The application must also contain a statement appointing the secretary of state as the applicant's agent for service of process pursuant to subsection 3. The application must be signed and certified by an owner, partner, or company officer authorized by company bylaws or other organizational document to bind the company. The signature requirement may include the use of an electronic signature as defined in section 9-16-01 when authorized under section 9-16-17. The office of management and budget may require proof of the signing person's authority by certified copy of appropriate company documents.

3. At the time of filing the application to become an approved vendor, the applicant, if organized as a corporation, limited liability company, limited liability partnership, or limited partnership, must be properly and currently registered with the secretary of state according to its type of business organization as a corporation under chapter 10-19.1, a limited liability company under chapter 10-32, a limited liability partnership under chapter 45-22, or a limited partnership under chapter 45-10.2. Any exemptions to registration under the above chapters that would otherwise apply to those entities organized as such do not apply to this section and registration must be made for the applicant to become an approved vendor. Applicants for approved vendor status using a trade name or a fictitious partnership name must be in full compliance with chapter 47-25 or 45-11 at the time of making the application. Whenever any registration required by this section is canceled, revoked, or not renewed, the vendor ceases to be an approved vendor. By signing and filing the application, the vendor applicant appoints the secretary of state as its true and lawful agent for service of process in this state upon whom may be served all lawful process in any action or proceeding against the vendor if the vendor or its registered agent cannot be found for service of process in this state. The signed application is written evidence of the applicant's consent that any process served against the applicant that is so served upon the secretary of state is of the same legal force and effect as if served upon the applicant personally within this state. Within ten days after service of the summons upon the secretary of state pursuant to this subsection, notice of the service with the summons and complaint in the action must be sent to the defendant vendor at the vendor's last-known address by certified mail with return receipt requested and proof of mailing must be attached to the summons. The secretary of state shall keep a record of all process served upon the secretary of state under this section showing the day and hour of service.

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When service of process is made as provided in this subsection, the court, before entering a default judgment, or at any stage of the proceeding, may order a continuance as may be necessary to afford the defendant vendor reasonable opportunity to defend any action pending against the vendor.

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

SENATE POLITICAL SUBDIVISIONS COMMITTEE
February 8, 2007

North Dakota Department of Transportation
Shannon Sauer, Financial Management Director

HB 2394

Good afternoon Mr. Chairman and members of the committee. My name is Shannon Sauer; I'm the Financial Management Director for the Department of Transportation.

As Ms. Neas explained, we are concerned that passage of this bill could result in the State Fleet becoming non-compliant with some federal regulations. Many federal programs do allow preferences for small and minority businesses, but they generally do not support preferences that favor local, state, and domestic firms. The difference is that federal agencies don't support preferences for such businesses because there is no overriding national policy calling for them. While the Buy American Act of 1933 requires preference for domestic firms in federal procurement and has been applied to some federal programs, there are several other statutes and regulations that call for unrestricted trade. We believe we would likely be in violation of some of those regulations if we were to implement the provisions of this bill. Such non-compliance could result in the obligation on the part of the State to refund to the federal government a portion of fleet service charges that are related to the cost of granting such a preference.

Mr. Chairman and members of the committee, I urge you to consider a "do not" pass recommendation on this bill.