

2019 HOUSE POLITICAL SUBDIVISIONS

HB 1410

2019 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Prairie Room, State Capitol

2/1/2019
HB 1410
Job # 32028

- Subcommittee
 Conference Committee

Committee Clerk: Carmen Hickle By: Elaine Stromme

Explanation or reason for introduction of bill/resolution:

Relating to arbitration of public improvement contracts

Minutes:

Attachments: 1- 4

Chairman J. Dockter: Opens the hearing on HB 1410.

Rep. Trottier: Introduces the bill. (Attachment #1). Read his testimony.

Rep. Adams: When a street is designed for redo, Do the city contractor and the city engineer decide on what to do?
Doesn't anyone check on the contractor to see if they are doing what he said in the contract?

Rep. Trottier: The small towns are leaving it up to the contractor and hopefully the city street superintendent is involved in this and they do the checking on the work in progress.

Rep. Ertelt: Why only above ground or above grade street projects?

Rep. Trottier: This is mostly for redoing streets and replacing it. They could encounter problems underground.

Rep K. Koppelman: As you know arbitration is a good form of alternative dispute resolution as is mediation, short of going to court. Why do we need a bill, why don't cities just adopt the policy of having it in their contracts that says any disputes will be settled by arbitration?

Rep. Trottier: I have heard that currently arbitration is not available for these kinds of disputes.

Rep K. Koppelman: Is this binding arbitration or mediation?

Rep. Trottier: That is what I thought.

Rep. Johnson: I am sure arbitration is expensive. The rules of evidence don't apply. Why arbitration over the regular process? 10:56

Rep. Trottier: I'm probably over simplifying it.

Rep. Johnson: Common sense doesn't always dictate the process.11:34

Chairman J. Dockter: If this bill does pass maybe the parties will come to some sort of agreement before it gets to a point where they have to go to court.

Rep. Trottier: That is exactly what I thought. If either party says no, we are not going to arbitration then it is a court case.

Rep. Hatlestad: Normally there is mediation first then it goes to arbitration.

Chairman J. Dockter: Anyone opposed to HB1410?

Terry Traynor: Association of Counties: (Attachment #2). Read his testimony. He is opposed to this bill. The threat of arbitration is likely enough to bring the parties together.

Chairman J. Dockter: How often are there disputes?

Mr. Traynor: There is quite often disputes. Most often it is negotiated out.

Stephanie Dassinger: Here on behalf of the League of Cities. Arbitration has the potential because of open records law. It's unclear whether you would have a right to appeal. Often times you have to bring an arbitrator from out of state. (Attachment #3)

Shane Goettle: (Attachment #4) Read testimony from Lance Meyer. 21:30

Chairman J. Dockter: closed the hearing

Reopened for committee work.

Chairman J. Dockter: I think in theory this is a good idea, but it is not practical.

Rep. Johnson: Move a Do Not Pass on HB1410

Rep. Guggisberg: second

A Roll Call Vote was taken: Yes 14 No 0 Absent 0

Do Not Pass carried

Rep Koppelman will carry HB 1410

**2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1410**

House Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Rep. Johnson Seconded By Rep. Guggisberg

Representatives	Yes	No	Representatives	Yes	No
Chairman J. Dockter:	X				
Vice Chairman Pyle:	X				
Rep. Ertelt:	X				
Rep. Fegley:	X				
Rep. Hatlestad:	X				
Rep. Johnson	X				
Rep K. Koppelman:	X				
Rep. Longmuir	X				
Rep. Magrum:	X				
Rep. Simons:	X				
Rep. Toman:	X				
Rep. Strinden:	X				
Rep. Adams:	X				
Rep. Guggisberg	X				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Koppelman

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

REPORT OF STANDING COMMITTEE

HB 1410: Political Subdivisions Committee (Rep. Dockter, Chairman) recommends **DO NOT PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1410 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

HB 1410

Trottier, Wayne A.

#1
2-1-19

From: Trottier, Wayne A.
Sent: Thursday, January 31, 2019 9:22 PM
To: hatwooduniversity@yahoo.com; Trottier, Wayne A.
Subject: HB 1410

HB 1410

Good morning Chairman Kaiser and members of the IBL committee As read by your clerk, HB 1410 deals with arbitration, out of a contract with above ground or above grade street projects.

Currently, I have been told, the only course to settle a dispute is the courts.

Example: a small town reworked about 3 blocks of a city street. Short story, when the project was completed, the city owed the contractor some over \$80,000. The dispute was between the engineer and the contractor in regard to the height of the high peak of the road, which could cause water problems with the grain storage on the side of the street. Engineer said it would be ok, and the contractor and the city disagreed. They both had discussed this dispute with the engineer, prior to the completion of the project. When it was all said and done, the city attorney felt they could win in a court case, but told the city, it would probably cost \$80,000 plus to go to court, and advised them to pay the contractor. Other cities have expressed some similar experiences.

HB 1410, states that a dispute arising from an above grade/ground street project can be settled by arbitration.

The state engineer suggested arbitration as this is how the federal government and the state deal with such disputes, on federally funded projects.

For a dispute under \$100,000, only one arbitrator, may be jointly selected by both parties.

For a dispute over \$100,000, 3 arbitrators can be selected. One representing the holder of the contract, 2nd representing the claimant, and a third arbitrator is an agreed upon by both parties. This is in accord with the federal funded projects for the state.

I have been told that arbitrators are \$400/hr attorneys. I was hoping and thinking that common sense folks could be selected by both parties and that could be an attorney, hopefully not \$400/hr.

Maybe we, the state, needs to address this issue.

Chairman Kaiser and committee, I thank you so much for your time and consideration

#2
2-1-19



Testimony to the
House Political Subdivisions Committee
Prepared February 2, 2019
By Terry Traynor, Executive Director
North Dakota Association of Counties

RE: Opposition to HB1410 – Mandatory Arbitration

Chairman Dockter and members of the House Political Subdivisions Committee, thank you for the opportunity to express concerns and opposition to House Bill 1410 on behalf of North Dakota's counties.

Counties are not unfamiliar with arbitration, as projects bid through the NDDOT involving federal funds are often governed by the extensive arbitration provisions of NDCC 24-02-26 through 24-02-32. These provisions, among other things;

- determine when arbitration can be demanded,
- establish proper notification requirements,
- provide necessary and required timeframes,
- require access by both parties to relevant records,
- establish judicial and other remedies if arbitration fails,
- outline actual procedures to be undertaken, and
- delineate options available to the arbitrator.

This is a primary concern with HB1410 – no such provisions are defined – leaving the political subdivision and the contractor with a mandate but no guidance. The likely result for a smaller jurisdiction may be placing them at the mercy of a contractor's greater familiarity with the process.

Counties already have the ability to include a requirement for arbitration in their bid documents and construction contracts, if they choose. The cost of arbitration – estimated at \$5,000/day – is often an unreasonable consideration in relationship to the size and risk involved in most county construction, particularly at the lower end of the thresholds established by the bill.

Counties believe their existing authority to include an arbitration provision in their contracts is sufficient and urge a Do Not Pass recommendation on House Bill 1410.

#3

Testimony Presented on HB 1410 to the
House Political Subdivisions Committee
Representative Jason Dockter, Chairman

Erik Johnson, Fargo City Attorney

February 1, 2019

Mr. Chairman and Members of the Committee,

The City of Fargo is OPPOSED to House Bill 1410. Although we assume the bill to be a well-intentioned attempt to protect governmental entities by requiring that disputes be handled through arbitration rather than the courts, it is the policy of our city to delete contract provisions that require arbitration of disputes and, instead, that any agreements between the city and other parties simply state that the parties to the contract agree to consider non-binding mediation (i.e. negotiation assisted by a professional mediator) prior to commencing any lawsuits over disputed matters.

The two frequently-raised reasons why parties to a contract should agree to use arbitration rather than the established public legal system (the "courts") are (a) it is a private dispute resolution process and (b) the parties can engage arbitrators that are knowledgeable and, therefore, their decisions should be better-informed. Neither of those reasons is good when applied to disputes cities may have with other parties. Further, there are a number of reasons, additionally, why arbitration would be bad for cities and other governmental entities.

Private Trials Are Not Good for Government Entities. Private trials are not consistent with the doctrine of open government. Further, while it is possible a "private arbitration trial" may not be required to be an "open meeting" under state law, the legal pleadings and other documents filed in the arbitration case could not be excluded from open records requests. Even if there were a desire to keep the trial private, state open record law would not allow it completely.

Arbitration is Not Cheap. While it only costs \$85 to file a lawsuit in state district court, it may cost \$1000s to file a lawsuit in an arbitration matter. Some arbitration matters, start to finish, could cost over \$100,000, depending upon the amount in dispute and the nature of the dispute. It's only common sense: parties to lawsuits don't need to pay for the judge's time or courtroom usage by the hour but significant fees must be paid for those costs in arbitration matters. Arbitration is not cheap.

There May Be No Right to Appeal from Arbitration. The right by either party to appeal a trial court's decision is designed to keep trial judges honest (figuratively speaking) and paying attention to the law. The risks and vagaries of trial decisions is mitigated by the fact that some bad decisions will be made right by the appellate court. Most arbitration processes do not contain any right of appeal. Therefore, there is greater risk that private arbitrators will either get the law wrong or will ignore established law and there is no right of redress for such instances.

There are Few Arbitrators in North Dakota. It is not uncommon that the nearest arbitrator that can be hired to "sit" on a particular case is from one to three states away from North

1

3
2-1-19

Dakota. This adds to expense and inconvenience. By contrast, the nearest state trial court is in your county seat.

The Supposed Special Knowledge of Private “Arbitrators” May Not Result in Improved Decisions. It is our experience that our state and federal trial judges are very capable of understanding the issues of most lawsuits. In fact, one could argue that a judge who is not a technical expert because the technical expert may carry into the courtroom certain opinions and biases that one or the other party cannot discern or control. By contrast, it is in having to educate a judge as to the issue at hand that the parties get the opportunity to make their best arguments.

Arbitration Clauses Can Included By Agreement—Case-by-Case Basis. There is nothing in North Dakota law that precludes the state or any political subdivision from inserting an arbitration clause in an agreement if that entity chooses to do so. Leave the decision to the parties to the contract to decide whether arbitration is a good idea.

CONCLUSION. Requiring government entities to resolve disputes by arbitration should not be mandated by statute. Therefore, the City of Fargo OPPOSES House Bill 1410 and we urge a DO NOT PASS recommendation from your committee.

4
2-1-19

North Dakota House of Representatives
Political Subdivision Committee
Chairman Jason Dockter

February 2, 2019

By: Lance Meyer, P.E.
Minot City Engineer
lance.meyer@minotnd.org

HB 1410

Thank you for allowing me to submit my testimony regarding House Bill No. 1410.

The City of Minot enters into several construction contracts on a yearly basis. The contracts cover all types of public works improvements such as underground utilities, street construction and reconstruction, demolitions, and structures.

In all contracts the City enters into, dispute resolution mechanics are included to handle contract disputes. Things can happen during construction and contracts need an appropriate process to bring disputes to a proper conclusion.

When disputes arise on Minot contracts, the contractor first attempts to remedy the dispute with the engineer of record. In most instances, this interaction leads to a successful resolution of the dispute. If needed, a change order to the contract is signed to satisfy the dispute.

In instances where the dialog between the engineer and contractor does not lead to a resolution, our contracts require non-binding mediation between the City and the contractor. The 3rd party mediator, selected jointly by the City and contractor, helps both parties to understand the issues of the dispute and most often, the mediation results in success. If necessary, a change order is crafted to settle the dispute and pay the appropriate amounts due to the contractor or City.

In the rare instance both of these methods are unsuccessful, our contracts allow for another dispute resolution method agreed to by both parties, or direct the matter to a court of competent jurisdiction, such as district court in Ward County.

House Bill 1410 would take this local control away from the City and subject the City to only arbitration as a contract dispute resolution. Arbitration is costly to both parties and takes time and resources away from both the City and contractor. Isn't it best to have the parties work through a solution together before submitting to mandatory arbitration? Mediation is relatively inexpensive compared to arbitration or court. Mediation is also much faster of a solution in our

4
2-1-19
HB 1410

experience, and helps to keep the City/Contractor relationship in better standing than to go through the arbitration or court proceedings.

In addition, House Bill 1410 only requires the arbitration proceeding for above grade road or street improvement type projects. All contracts and contractors should be treated equally and not specific to the type of work they perform.

Local control over contracting disputes must be dealt with at the local level. It is the local government's responsibility to ensure contracts are fair, and dispute resolution processes reflect the public's best interests.

Therefore, the City of Minot opposes House Bill No 1410 mandating arbitration only as a dispute resolution process and would ask for a Do Not Pass.