

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 2007-0134
Burleigh County District Court No.: 05-C-1945

JAMES TEIGEN, DEB LUNDGREN, GREG SVENNINGSSEN, FARMERS'
EDUCATIONAL AND CO-OPERATIVE UNION OF AMERICA, NORTH DAKOTA
DIVISION, D/B/A NORTH DAKOTA FARMERS UNION, AND DAKOTA
RESOURCE COUNCIL,

Appellants,

v.

STATE OF NORTH DAKOTA,

Appellee.

APPELLANTS' BRIEF

**APPEAL FROM ORDER FOR SUMMARY JUDGMENT ISSUED BY JUDGE
THOMAS J. SCHNEIDER
BURLEIGH COUNTY DISTRICT COURT**

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. This case involves a challenge under three provisions of the Constitution of North Dakota of a clause found in two subsections of the law governing the North Dakota Wheat Commission. The challenged clause (which is identical in both subsections) was adopted by the 2005 Legislative Assembly. Subsection 4 of [N.D.C.C. §4-28-07 \(applicable from July 1, 2005 to June 30, 2009\)](#) and subsection 4 of [N.D.C.C. §4-28-07.1 \(applicable after July 1, 2009\)](#) provide that the Wheat Commission shall expend funds at least equivalent to two mills of wheat tax levies to contract for services on domestic wheat issues. These two subsections also contain a restrictive clause requiring the Wheat Commission to contract with only one or two trade associations that meet the requirements of the restrictive clause. Only two entities meet this restrictive clause: the North Dakota Grain Growers Association (“Grain Growers”) and the Durum Growers Association of the United States, Inc. (“Durum Growers”). The restrictive clause forbids the Wheat Commission from expending the two mills on contracts with any other potential service providers.
2. The challenged clause (hereinafter "Trade Association Clause") is: *"The Contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers."*
3. Four issues are presented for review:
 - 1) Whether the Trade Association Clause is unconstitutional as a special law in violation of Article IV, Section 13.

- 2) Whether the Trade Association Clause is unconstitutional as a law granting special privileges and immunities in violation of Article I, Section 21.
- 3) Whether the Trade Association Clause is unconstitutional as a law making a gift in violation of Article X, Section 18.
- 4) Whether the North Dakota Farmers Union (NDFU) and the Dakota Resource Council (DRC) have standing to contest the constitutionality of the Trade Association Clause.

STATEMENT OF THE CASE

4. This declaratory judgment action arises as a result of the adoption of House Bill 1518, by the Fifty-ninth Legislative Assembly, which amended N.D.C.C. §4-28-07 and created N.D.C.C. §4-28-07.1. *See* 2005 N.D. Sess. Laws, ch. 70 as codified in N.D.C.C. ch. 4-28, Wheat Commission.
5. As amended, [N.D.C.C. §4-28-07\(1\)](#) provides for a fifteen mill levy (“Wheat Tax”) on all wheat grown in North Dakota, delivered into this state, or sold to a first purchaser in North Dakota between July 1, 2005 through June 30, 2009. Effective July 1, 2009, [N.D.C.C. §4-28-07.1\(1\)](#), reduces the mill levy from 15 mills to 12 mills.
6. Under both provisions, the Wheat Tax is collected by grain elevators, mills and similar entities throughout the State via a deduction from the wheat producers’ or other marketers’ gross proceeds from the value of the wheat marketed, and is paid quarterly to the North Dakota Wheat Commission (“Wheat Commission”), an agency of the State of North Dakota. Farmers may request

refunds of the Wheat Tax if they meet certain requirements. *See, generally*, [N.D.C.C. ch. 4-28](#).

7. Both amended Section 4-28-07(4), and new Section 4-28-07.1(4) mandate that the Wheat Commission “shall expend” two mills of the Wheat Tax for contracting services on domestic wheat issues:

The Commission shall expend an amount at least equal to that raised by two mills of the levy provided for in this section to contract for activities related to domestic wheat policy issues, wheat production, promotion, and sales.

8. The challenged portion of the law – the “Trade Association Clause” –appears in subdivision (4) of N.D.C.C. §4-28-07, and subdivision (4) of §4-28-07.1:

The contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers.

9. Plaintiffs filed a Complaint for Declaratory Judgment October 2, 2005, asking the trial court to declare that the Trade Association Clause was unconstitutional. (App. 4-13)¹ The Complaint does not challenge the legislature’s decision to increase the Wheat Tax to 15 mills effective July 1, 2005, or to dedicate two mills of the Wheat Tax to domestic wheat issues.
10. The State served its Answer October 26, 2005, denying that the statutes were in any way unconstitutional and interposing other defenses. (App. 14-18)

¹ The Complaint also sought declaratory judgment on two open records/open meeting issues regarding use of the funds by Grain Growers and Durum Growers, but this part of the Complaint was withdrawn in February 2007 and is not an issue in this appeal. Docket 76.

11. The State filed a Motion to Dismiss for Lack of Standing June 21, 2006, with a supporting memorandum and affidavit, asserting that none of the plaintiffs had standing. Docket 10, 12.
12. Plaintiffs filed a reply brief July 28, 2006, to the Motion to Dismiss for Lack of Standing. Docket 16. Among the attachments to that Brief were the Affidavit of Robert Carlson, President of NDFU, (App. 19-23) (without exhibits), and the Affidavit of Mark Trechock, Staff Director of DRC, (App. 24-26) (without exhibits).
13. Plaintiffs took the deposition of Neal Fisher, the representative designated by the State pursuant to N.D.R.Civ.P. Rule 30(b)(6) on August 28, 2006. (App. 296-300)
14. The State served a Reply Brief in Support of Motion to Dismiss for Lack of Standing August 8, 2006. Docket 18.
15. On September 18, 2006, the trial court held the hearing on the State's Motion to Dismiss for Lack of Standing. Docket 20
16. The trial court issued an Order dated October 6, 2006 finding that the individual plaintiffs had standing as taxpayers because they had paid the wheat tax, but that neither NDFU nor DRC had standing because the record did not show that they had obtained or tried to obtain contracts with the Wheat Commission in the past. (App. 27-29.)
17. The State filed a Motion for Summary Judgment October 30, 2006, with a brief and supporting documents, requesting that all counts be dismissed. Docket 38, 39.

18. Plaintiffs filed a Cross Motion for Summary Judgment January 11, 2007, supported by a brief that also opposed the State's Motion for Summary Judgment. Docket 56, 57. Affidavits by Sarah Vogel and Beth Baumstark, with attached exhibits, were filed with the Cross Motion and brief. Vogel Aff., (App. 30-324); Baumstark Aff., (App. 325-369.)
19. On January 19, 2007, Plaintiffs filed a Motion to Revise or Amend the Order issued October 6, 2006 asking the trial court to reverse its earlier decision that NDFU and DRC did not have standing. Docket 63. The State responded to this Motion February 2, 2007, Docket 65, with Plaintiffs filing a reply brief February 9, 2007. Docket 67. The trial court did not issue a ruling on this motion.
20. The State filed a combined brief February 13, 2007 on the competing motions for summary judgment. Docket 72.
21. Plaintiffs served a motion February 20, 2007 to delete Counts IV and IV (which sought declaratory judgment as to the open records/open meetings law's application to the two trade associations receiving the funds under the Trade Association Clause. Docket 76. The trial court did not issue a ruling on this motion.
22. Plaintiffs filed their final reply brief February 21, 2007 in support of their Cross Motion for Summary Judgment. Docket 78.
23. Also on February 21, 2007, the trial issued an Order for Summary Judgment in favor of the State of North Dakota, and denying Plaintiffs' Cross Motion for Summary Judgment. (App. 370-378)

24. The Judgment of Dismissal was entered March 12, 2007, Docket 82, with Notice of Entry of Judgment served March 22, 2007. Docket 84.
25. On May 10, 2007, Plaintiffs/Appellants filed a timely Joint Notice of Appeal. (App. 379)

STANDARD OF REVIEW

26. Whether a trial court properly granted summary judgment is a question of law subject to *de novo* review. [Minn-Kota Ag. Products, Inc. v. Carlson](#), 2004 ND 145, ¶5, 684 N.W.2d 60. In this *de novo* review, all evidence must be viewed in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences that can reasonably be drawn from the evidence. [Matter of Estate of Stanton](#), 472 N.W.2d 741, 743 (N.D. 1991).
27. Because this is a challenge to the constitutionality of a law, four of the five justices must concur in a decision that the law is unconstitutional. [N.D. Const. Art. VI, §4](#). Statutes carry a strong presumption of constitutionality. [Southern Valley Grain Dealers' Ass'n v. Bd. of County Comm'rs](#), 257 N.W.2d 425, 434 (N.D. 1977). Whether the statute is constitutional is a question of law fully reviewable on appeal. [Hoffner v. Johnson](#), 2003 ND 79, ¶8, 660 N.W.2d 909.

ARGUMENT

- I. **N.D.C.C. §§04-28-07(4) and 4-28-07.1(4) that Mandate the Wheat Commission to Contract with Only Two Specific Trade Associations ("The Trade Association Clause") Are Unconstitutional Special Laws in Violation of Article IV, Section 13.**
28. Article IV, Section 13 of the Constitution of North Dakota provides:

The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution. Except as otherwise provided in this

constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.

A. Leading North Dakota Cases Require Examination of the Effect of the Law, Not Just Its Language, to Determine if It Is a Special Law.

29. North Dakota’s prohibition against special laws has been an integral part of its constitutional fabric since before statehood. *See, e.g.,* [Smith v. Adams](#), 130 U.S. 167 (1889) (special laws were illegal in the Dakota Territory.) In [Vermont Loan & Trust Co. v. Whithed](#), 49 N.W. 318, 320 (N.D. 1891), the Court defined the difference between a special law and a general law. “‘A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.’... ‘Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances.’” (Internal citations omitted.)

30. The legislature power’s to classify persons and subjects is limited:

It is not an arbitrary power, waiting the will or the whim of the legislature. Its exercise must always be within the limits of reason, and of a necessity more or less pronounced. Classification must be based upon such differences in situation, constitution, or purposes, between the persons or things included in the class and those excluded therefrom, as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation in the line of the statute in which the classification appears.

Id. (internal citations omitted.)

31. From the earliest days, the Court recognized that a special law masquerading as a general law is unconstitutional. In [Edmonds v. Herbrandson](#), 50 N.W. 970,

973 (N.D. 1891), the Court held that a law general on its face is unconstitutional if it operates as a special law. The Court emphasized the inquiry must be to the effect of the law and observed that unless the Court carefully reviews the effect of artful legislative drafting, the prohibition against special laws would become ineffective.

So far as this particular provision of the constitution against special legislation is concerned, it is immaterial that the act is general in form. The question is always as to its effect. Any other doctrine would render nugatory the prohibition of the fundamental law against special legislation. Under the guise of statutes general in terms, special legislation, in effect, could be adopted with no inconvenience, and the evil to be extirpated would flourish unchecked. Statutes general in terms have been adjudged void as special legislation, because they could operate only upon a part of a class. The authorities are explicit upon this question.

Id.

32. In [Angell v. Cass County](#), 91 N.W. 72, 73 (N.D. 1902), the Court stated:
“under well-settled rules of statutory construction, [a law], which, so to speak, masquerades as a general law, is in fact and in its practical operation a special law... and, as such, falls squarely under the ban of the constitution.”
33. By 1917, the Court recognized that any determination of whether a law is a “special law” requires significantly more than a cursory review of its form, stating that there was “no doubt” that a law “general in its form, but special in its operation, violates a constitutional inhibition of special legislation as much as if special in form.” [McDonald v. Hanson](#), 164 N.W. 8, at 12-13 (N.D. 1917).

34. These special law cases, despite their age, are still sound precedent and are cited in modern times. *See, e.g.*, [Bourchard v. Johnson](#), 555 N.W.2d 81 (N.D. 1996), [MCI Telecommunications v. Heitkamp](#), 523 N.W.2d 548, 552 (N.D. 1994) and [Best Products Co., Inc. v. Spaeth](#), 461 N.W.2d 91, 99 (N.D. 1990).
35. This Court has recently stated that a classification that is written to address only one or two entities in a “class” would likely run afoul of the constitutional provision against special laws. *See, e.g.*, [Morton County v. Henke](#), 308 N.W.2d 372, 378 (N.D. 1981) (a classification of only two counties would create serious doubts as to constitutionality); [Bouchard](#), 555 N.W.2d at 88 (if classification had been of only one ski resort, the law would have been a special law.) Although these statements are *dicta*, they are nevertheless very instructive under the facts of this case, where the law was written in such a way that only two potential providers of services on domestic wheat policy issues would qualify under the restrictive classification.
36. In granting summary judgment for the State, the trial court failed to apply the type of searching analysis required by the special law jurisprudence of North Dakota. Indeed, the trial court failed to consider the actual classification, but incorrectly asserted that the Trade Association Clause was not a special law because it “applies equally to all trade associations incorporated in North Dakota, which is the class chosen by the Legislature.” Order for Summary Judgment, (App. 379)
37. Even though the sponsors wrote the Trade Association Clause in ostensibly neutral language (“no more than two trade associations that are incorporated in

this state and which have as their primary purpose the representation of wheat producers”), this wording is simply the type of artful drafting under which special laws can masquerade and hide their actual nature. The evidence presented to the trial court and summarized below in Subsections B, C, and D compels a finding that the Trade Association Clause has the effect of a special law and therefore is unconstitutional.

B. The Wheat Commission’s Administrative Construction of the Trade Association Clause Establishes that the Trade Association Clause Is a Special Law.

38. “So far as this particular provision of the constitution against special legislation is concerned, it is immaterial that the act is general in form. The question is always as to its effect.” Edmonds, 50 N.W. at 973. There really can be no doubt that the Trade Association Clause has the effect of a special law “made for individual cases.”

39. The effect of the Trade Association Clause’s language is to exclusively dedicate funds generated by two mills of the Wheat Tax to contracts with Grain Growers and Durum Growers, and to no other entity or person. This effect is plainly shown by the Wheat Commission’s administrative construction of the Trade Association Clause.

40. The Wheat Commission confirmed at a meeting shortly after the 2005 legislature adjourned that the effect of the law was that only Grain Growers and Durum Growers were eligible for contracts utilizing the two mills. The June 13-14, 2005 Minutes of the Wheat Commission stated that the 2005 legislation “**mandates two mills for the N.D. Grain Growers Association and the U.S. Durum Growers Association.**” (Emphasis added.) (App. 331)

41. The Wheat Commission's Annual Report to Producers for 2004-2005 expressly states that the law "directs" \$520,000 per year to Grain Growers and Durum Growers. In the section captioned "Domestic Policy," the Annual Report states:

The 2005 state legislature approved an increase to the North Dakota wheat check off of five mills or one-half cent per bushel. *The legislation directs two mills, or 40 percent of the increase, budgeted at \$520,000 in 2005-2006, for the North Dakota Grain Growers and U.S. Durum Growers associations to address domestic policy issues.*

(Emphasis added.) (App. 302)

42. The same effect – to restrict contracts using the two mills to Grain Growers and Durum Growers – was acknowledged several times by Neal Fisher, the N.D.R.Civ.P. Rule 30(b)(6) Representative of the State. *See, e.g.* (App. 299, lines 22-25); (App. 300, lines 1-5):

Q. And none of those contracts [with WETEC or Wheat Foods Council] or the money that you contract with for NDSU for research purposes, none of that comes out of this two mills, does it?

A. That's correct. That's correct. Those two mills are specific.

Q. For these two groups [Grain Growers and Durum Growers]?

A. Yes. I think that's the way – the legislation is pretty clear on that.

43. Even the Attorney General's office asserted during the Rule 30(b)(6) Deposition that the legislature, not the Wheat Commission, selected the two contractors. *See* (App. 298, lines 9-24):

Q. Did any legislators ever raise any questions with you in terms of whether any of this money would go to any

other groups other than the Grain Growers or Durum Growers?

A. A. No, I don't think so.

Q. Did you consider whether you would get the same or as beneficial results if you contracted directly with NAWG [National Association of Wheat Growers] rather than through Grain Growers and Durum Growers to provide these services?

A. MR. MANN: I'll object to this one, too, on the lines that it's not really relevant what Mr. Fisher or the Commission thought. I mean, the legislature is the one that made this determination on who to contract with. But if you can answer her, go ahead.

C. The Legislative History of House Bill 1518 Establishes that the Trade Association Clause Is a Special Law.

44. In determining the effect of the Trade Association Clause, it is appropriate to also examine the legislative history of H.B. 1518. *See, e.g., Whithed*, 49 N.W. at 323: “[w]e have the undoubted right, and it is our solemn duty ... to effect the clear intent and purpose of the legislature in its enactment, although such construction may require us to place a limitation upon the language used.” (Internal citations omitted.)

45. “The statements of individual legislators ... can be given effect if they are consistent with statutory language and other legislative history which justifies reliance upon them as evidence of legislative intent.” [Little v. Tracy](#), 497 N.W.2d 700, 705 (N.D. 1993) (internal citations omitted)

46. The legislative history, which is based in part on the language of the law prior to the 2005 amendments, shows that the ostensible neutrality of the Trade Association Clause is simply a “masquerade”.

47. Between July 1, 2003 and the effective date of 2005 N.D. Sess. Laws, ch. 70, subsection 5 of N.D.C.C. §4-28-07 provided that the Wheat Commission could

contract with Grain Growers and Durum Growers for funds up to two mills. However, the law gave the Wheat Commission discretion on whether to contract with Grain Growers and Durum Growers and to decide the amounts of any contracts. *See*, 2003 Session Laws Ch. 59.

48. In 2005 the legislature removed the Wheat Commission's discretion through enactment of the Trade Association Clause. Now at *least* two mills of the Wheat Tax is *specifically dedicated* to Grain Growers and Durum Growers.

49. On February 4, 2005 the House Agriculture Committee considered H.B. 1518 with amendments that "clarified" the bill. After the amendment, H.B. 1518 provided that the Wheat Commission "shall expend an amount at least equal to two mills to contract for activities related to domestic wheat policy issues, wheat production, promotion, and sales. The contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers." (App. 191)

50. Fiscal Notes on H.B. 1518 submitted by the Wheat Commission before and after the House amendment show that the Wheat Commission consistently understood H.B. 1518 to limit the eligible contractors to Grain Growers and Durum Growers. (App. 80, 82, 84-86) Each Fiscal Note provides "Under this proposal, two mills or 13.3 percent (\$1,124,000) of the potential total gross revenue produced by the 15 mill checkoff would be allocated to two wheat trade associations incorporated in North Dakota under contracts for specific services." That the Wheat Commission understood that Grain Growers and Durum Growers were the only "two wheat trade associations" is shown by the next sentence: "The

NDWC has had ongoing contractual agreements with these associations since 1989.” It is a matter of public record that the Wheat Commission had contracted with Grain Growers and Durum Growers for a number of years. The Wheat Commission publishes an Annual Report and a biennial report to the legislature showing the entities with which it contracts. *See, e.g.*, Report to 2005 legislature on entities with which Wheat Commission contracted in the 2003-2005 biennium, including Durum Growers and Grain Growers (App. 274-276); testimony of Wogsland “funding through check off dollars has existed since the mid 1980’s” (App. 227); chart showing “regular” contracts with Grain Growers for \$40,000 to \$50,000 per annum prior to 2005 and for \$426,000 in 2005 (App. 338); pre-2005 contracts (App. 339-353); chart showing “regular” contracts with Durum Growers for \$26,000 to \$30,000 per annum prior to 2005 and for \$93,600 in 2005 (App. 354); pre-2005 contracts (App. 355-369).

51. At the House Agriculture Committee hearing, Mr. Wogsland, Executive Director of Grain Growers and Durum Growers, explained why he felt that the “designation of two mills for the North Dakota’s Wheat Commission’s use **in contracting with the North Dakota Grain Growers Association and the U.S. Durum Growers Association regarding domestic policy issues is so critically important.**” (App. 226) (emphasis added.) Commenting on the bill as amended, he testified: “**Is this a mandate? Absolutely.**” (App. 227) (emphasis added.) Wogsland assured the Committee that Grain Growers and Durum Growers would “account” for the way contract dollars were spent and would not slack off on seeking memberships despite the influx of state dollars. *Id.*

52. Most witnesses (many of whom were members of Durum Growers and Grain Growers) testified in support of the dedication and the mandate. However, various members of the public opposed the “mandate.” The representative of Plaintiff NDFU testified against the bill, objecting to removal of authority to select contractors from elected members of the Wheat Commission. (App. 230-232) With regard Mr. Wogsland’s claims that only Grain Growers and Durum Growers represented wheat farmers, NDFU pointed out that “North Dakota Farmers Union and many other farm organizations also represent North Dakota Wheat producers.” (App. 231) DRC testified against the bill. (App. 187, 233) Plaintiff Jim Teigen, testified “It is wrong to take public monies, such as the wheat tax, and give it to private organizations.” (App. 238) Marcy Svenningsen, testifying on behalf of herself and her husband Plaintiff Greg Svenningsen stated: “I feel the Wheat Commission is abdicating some of their responsibility by agreeing that 2 mils would be given directly to the grower groups;” and that concern about accountability for tax dollars because the grower groups’ “fiscal house wasn’t very well in order” (referencing the previous executive director’s embezzlement). (App. 211-212) Plaintiff Deb Lundgren testified that the constitutionality of the funneling of money to the two trade associations must be a matter of concern. (App. 235-236)
53. H.B. 1518 as amended and “clarified” was passed by the House on February 16, 2005 and sent to the Senate February 23, 2005. (App. 62, entries for 2-04, 2-14, 2-15, 2-16, 2-23-05)

54. At the Senate Agriculture Committee, there was no pretense that the two mills could *ever* be contracted to any entity or person other than Grain Growers and Durum Growers. The prime sponsor of H.B. 1518, Representative Eugene Nicholas, Chairman of the House Agriculture Committee, opened the Senate Agriculture Committee on February 25, 2005, by flatly stating: “**The bill allocates 2 mills to the North Dakota Grain Growers and the Durum Growers.**” (Emphasis added.) (App. 90)
55. Mr. Wogsland presented written testimony to the Senate Agriculture Committee on February 25, 2005 (App. 225-228) and to the Senate Appropriations Committee on March 15, 2005 (App. 262-265). At both committee hearings, Mr. Wogsland posed and answered three questions.
56. At both hearings, he asked, “Is this a mandate?”, and then answered the question, “Absolutely.” (App. 227, App. 264) Second, he asked, “is there accountability?” and answered yes, that the two groups would appear before the next legislature and present their accomplishments. *Id.* On the subject of accountability, Senator Flakoll asked if Mr. Wogsland “would be opposed to an amendment that, as a caveat to receiving the funds, his organizations [Grain Growers and Durum Growers] would be required to appear before the legislature to present a report,” and Mr. Wogsland answered, “they would welcome it, they welcome openness and transparency.” (App. 94) Third, he asked “Why should this money go to NDGGA and USDGA?” He told the Agriculture Committee: “There are only 2 wheat specific farm organizations in this state, thus the directive in the legislation.” (App. 227) He told the Appropriations Committee: “I will

remind the committee that these are wheat check off dollars and no other organizations in North Dakota are wheat and durum specific.” (App. 264) (As discussed later at pages 20-22, these assertions are not accurate.)

57. In testimony before the Senate Appropriations Committee, Mr. Wogsland posed and answered a fourth question: “*What will NDGGA and USDGA do with all the money?*” His answer to that question makes clear that the bulk of the Wheat Tax moneys were intended to support Grain Growers’ and Durum Growers’ “current intended level of operations”:

Fourth, what will NDGGA and USDGA do with all the money? Funding between the NDWC and the grower Associations has existed since the mid 80s. The budget presented to the NDWC this year for NDGGA was \$322,000; for USDGA, the budget was \$140,000. Additionally, the NAWG [National Association of Wheat Growers] dues, which the Associations will assume from the NDWC upon implementation of this bill, are \$119,000 this year and are slated to be between \$113,000 and \$128,000 for 2005. As you can see, the Associations will still need a membership base as well as other outside income sources in order to meet its current intended level of operations.

(App. 265)

58. During the Senate hearings, it is apparent that legislators who participated in the debate on both sides of the issue knew that if H.B. 1518 passed, only Grain Growers and Durum Growers would be eligible for the two mills dedicated for domestic policy work. In a discussion of post biennium “accountability” reports, Senator Klein said “the Wheat Commission, the Grain Growers and the Durum Growers would give their separate reports, bringing forth what they have done [during the 2005-2007 biennium.]” (App. 113) Senators Erbele and Klein

discussed the anticipated reporting by Grain Growers and Durum Growers and indicated that if they would not come to a subsequent legislature to report, they would thereafter have a change in their funding or receive “zero.” (App. 113) During the Senate Agriculture Committee hearing, the Committee defeated an amendment by Senator Warner (App. 213-214) to change the “shall” expend to a “may” expend which would have made the transfer of the two mills discretionary. In Senator Warner’s words, “It allows some oversight and some accountability by an electoral body over a contracted service.” (App. 213)²

59. During the debate on Senator Warner’s amendment, Senator Taylor supported the amendment, saying: “We have opened up the box where we are taking public money and distributing them to private groups.” He urged that the “more democratic process” of having the elected members of the Wheat Commission decide on contracts would be preferable. In rebuttal, Senator Flakoll stated that one advantage of the bill’s language saying that the funds “shall” go to the two groups was that it gives the two groups “a better handle on what funding they have to work with.” (App. 144)

60. Other legislators also expressly recognized the money was going to Grain Growers and Durum Growers. *See e.g.* Representative Mueller’s dialogue with President of Grain Growers (App. 73); Senator Klein (App. 95); Senator Taylor, asking about number of wheat farmers in Grain Growers (App. 100); Senator

² Senator Warner’s testimony, like many others, refers to the embezzlement by the prior executive director of the two groups by referencing their “recent problems”, thereby making clear that he was referring to the Grain Growers and Durum Growers specifically. Grain Growers also testified on this embezzlement, asserting all such issues were in the past. (App. 99) *See also* Docket 55, Exh. 12.

Klein, asking if Durum Growers would share resources with Grain Growers (App. 102); Senator Taylor, asking about number of wheat farmers in Durum Growers (App. 102); Senator Taylor, asking about budgeting and presentations by Grain Growers and Durum Growers (App. 104); Senator Flakoll, asking about audits of Grain Growers (App. 108); Senator Taylor, following up to ask if the “grower groups” would be audited by Wheat Commission auditor (App. 109); Senator Klein, Grain Growers and Durum Growers would present reports (App. 113); Senator Andrist, asking if “funding of the Grain and Durum growers [had] come out of the House” (App. 121); Senator Krauter’s, dialogue with Wogsland as to the need to “cement into law” funding for Grain Growers and Durum Growers. (App. 123)

61. Explicit references to Grain Growers, Durum Growers by the opponents and proponents of the Trade Association Clause are too numerous to list. *See* full legislative history of H.B. 1518. (App. 56-295)

62. In summary, the legislative history of H.B. 1518 establishes that the Trade Association Clause is either an overt special law or is a special law masquerading as a general law.

D. The Legislature’s Implied Repeal of Chapter 54-44.4 the State Purchasing Practices Act, as to Contracts Entered Pursuant to the Trade Association Clause Further Establishes that the Trade Association Clause Is a Special Law.

63. In addition to the prohibition against enactment of special laws, Article IV, Section 13 of the North Dakota Constitution provides that the legislature may not “indirectly enact special or local laws by the partial repeal of a general law.” The Trade Association Clause is an unconstitutional partial repeal of competitive

bidding laws required by the State Purchasing Practices Act, N.D.C.C. ch. 54-44.4.

64. As part of its general powers, the Wheat Commission is granted broad authority to contract with “any person, firm, corporation, limited liability company or association” and to employ “personnel, employees and agents” as it deems necessary to conduct the affairs of the Commission. [N.D.C.C. §4-28-06\(4\)](#), (6). As an executive branch agency, the Wheat Commission’s exercise of this purchasing authority is subject to the State Purchasing Practices Act, and in particular to [N.D.C.C. §54-44.4-02.1](#) “All services ... purchased by an agency ... in the executive branch of state government must comply with the standards and guidelines for procurement of services established by the office of management and budget.” These OMB standards and guidelines include the “competitive bidding process” provided by N.D.C.C §54-44.4-05(a)(1). *See, also*, N.D. Admin. Code, ch. 4-12-04 “Ethics of Public Procurement,” and [N.D. Admin. Code §4-12-04-02](#) (requiring the “highest practicable degree of full and fair competition.”)
65. The Trade Association Clause, however, mandates that the Wheat Commission annually spend over a half million dollars in Wheat Taxes without any competitive bidding at all. Only Grain Growers and Durum Growers qualify, and no other bidders are allowed to obtain contracts using the two mills.
66. The State Purchasing Practices Act applies “unless otherwise provided by law.” N.D.C.C. §54-44.4-01. N.C.C.C. §54-44.4-02 lists ten exceptions, none of which apply here. Further, the legislature may enact specific laws to exempt

particular purchases of commodities or services. When such an exemption is needed, the legislature does so explicitly. *See, e.g.*, 2005 N.D. Sess Laws, ch. 428, §1, codified at N.D.C.C. §50-24.1-28 (exempting particular consultant services from Chapter 54.44.4); 2005 N.D. Sess Laws, ch. 482, §1, codified at N.D.C.C. §54-10-29(1)(c) (exempting particular information security system specialist services from Chapter 54-44.4). No such exemption occurred with regard to the services for domestic wheat issues that are the subject of the Trade Association Clause.

67. Under the Trade Association Clause, the Wheat Commission entered into contracts with Grain Growers and Durum Growers without engaging in any bidding at all. *See*, Answer, Par. 17: “[The State] Admits the allegation in paragraph 21 that neither the NDGGA nor the USDGA were required to bid for the contracts entered into with the Wheat Commission.” (App. 18)
68. The effect of the Trade Association Clause is to indirectly enact a special law by the implicit repeal the State Purchasing Practices Act for services contracted from two mills of the Wheat Tax for domestic wheat policy services.
69. In summary, whether this Court analyzes the Trade Association Clause as an overt special law, as a special law masquerading as a general law, or as a special law created by an implied repeal of a general law, the result is the same. It is unconstitutional because it violates Article IV, Section 13 of the North Dakota Constitution and must be declared void.

II. The Trade Association Clause Is an Unconstitutional Law Granting Special Privileges and Immunities to Grain Growers and Durum Growers is in Violation of Article I, Section 21.

70. Article I, Section 21 of the Constitution of North Dakota, often called the equal protection clause, provides:

No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

71. A law is not in violation of this section “as long as the law operates alike on all members of a class including all persons similarly situated.” [State for Benefit of Workmen's Compensation Fund v. E. W. Wylie Co.](#), 58 N.W.2d 76, 84 (N.D. 1953.) A classification must be based on a “proper and justifiable” distinction. *Id.* A classification cannot be simply plausible, it must be “based upon some reasonable grounds, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.” [Christman v. Emineth](#), 212 N.W.2d 543, 555 (N.D. 1973), (internal citations omitted.) *See, also*, [Bratberg v. Advance-Ruemely Thresher Co.](#), 238 N.W. 552, 561 (N.D. 1931) (a classification was reasonable that applied equally to “all” buyers and “all” sellers “in the same way.”)

72. When the reasons for a statute are articulated, the courts may review the legislative history to determine the “evils and objectives at which the legislation was aimed.” *See*, [State v. Knoefler](#), 279 N.W.2d 658, 661-665 (N.D. 1979). *See also*, 2001 N.D. Att’y Gen. Op. L-07 (stating that reasonableness of classification

is based on whether it has some reason relating to the legislation's documented purposes based on the legislative history).

73. H.B. 1518 was introduced to “allocate two mills to the North Dakota Grain Growers and the Durum Growers.” Testimony of Representative Nicholas, February 25, 2005, (App. 116) The rationale for this dedication, as articulated by Mr. Wogsland, and others was that there are only two wheat specific farm organizations in this state and no other organizations in North Dakota are wheat and durum specific. The law provided the two associations must “have as their primary purpose the representation of wheat producers.”

74. Examination of this rationale, however, does not show the “proper and justifiable” relationship between the overall purpose of the expenditure (“to contract for activities related to domestic wheat policy issues, wheat production, promotion and sales”) and the restriction on which entities can provide such services.

75. The wheat-specific rationale entirely fails regarding Grain Growers. Grain Growers was originally incorporated in 1967 under the name “North Dakota Wheat Producers.” (App. 304-309) However, it abandoned that name and its wheat-specific mission when it officially changed its name to “North Dakota Grain Growers Association.” At the time H.B. 1518 was being considered, the primary purpose listed by Grain Growers in its official corporate report to the Secretary of State was much more generic: “To promote grain products.” (App. 303) (2005 Corporate Report to Secretary of State.) Further, Grain Growers, both before and after adoption of H.B. 1518, entered into contracts with the North

Dakota Barley Council which asserted “Whereas the NDGGA was organized for the broader purpose of promoting the use and development of all grain and all products....” (July 2003 contract for \$40,000) (App. 316) and “the Grain Growers was organized for the broader purpose of promoting the use and development of wheat and barley and related products.” (July 2005 contract for \$40,000). (App. 313) These statements contradict Wogsland’s assertion that Grain Growers, is What Specific show that there is not a “proper and justifiable” relationship between the selection of the Grain Growers and its “primary purpose.” It, among many other farm groups, including NDFU and DRC, represents wheat producers, but apart from its original incorporation documents there is nothing to indicate that its “primary purpose” is specific to wheat.

76. In [Best Products Co., 461 N.W. at 99](#), this Court discussed the absence of a “just and proper” rationale for the classification used in [Edmonds](#). The Court stated: “The reason for the classification, time, bore no relationship to the statutory purpose, preventing waste. The classification was not ‘natural,’ but was ‘artificial,’ and did not ‘stand upon some reason, having regard to the character of the legislation.’” Applying that same line of reasoning here, the reason for the classification – that Grain Growers is “wheat specific” or has as its “primary purpose” the representation of wheat farmers – is not “natural”. Rather, it is an “artificial” and false rationale.

77. The assertion that Durum Growers is a corporation “incorporated in this state” and which has as its “primary purpose the representation of wheat producers” is literally true. However, the wheat producers who pay the Wheat Tax are *North*

Dakota wheat producers and Chapter 4-28 is for their explicit benefit. *See*, N.D.C.C. §4-28-01 (purpose of Chapter is “with the objective of stabilizing and improving the agricultural economy of the state.”); N.D.C.C. §4-28-02(5) (definition of “producer” (landowner or tenant engaged in growing wheat). Durum Growers is a corporation organized and dedicated in 1978 for the purpose of promoting *United States* grown durum wheat. (App. 317) There is no mention of North Dakota durum wheat farmers in its Article of Incorporation. *Id.* Thus, the reason for the classification – that Durum Growers is incorporated in North Dakota for the primary purpose of representation of *North Dakota* durum wheat producers – is artificial and not natural.

78. But an even more important reason for finding the classification unreasonable is that the dedicated purpose for the two mill levy is to provide “activities related to domestic wheat policy issues, wheat production, promotion, and sales” urgently needed by North Dakota wheat farmers.
79. It is the longstanding public policy of the State of North Dakota to use competitive purchasing practices. This policy existed long before the adoption of N.D.C.C. ch. 54-44.4, or its application to services. *See, e.g., Melland v. Johanneson*, 160 N.W.2d 107, 111 (N.D. 1968). As a matter of law and public policy, North Dakota wheat producers are better off with competitive bidding for services worth millions from a pool including all potential qualified providers, than if all the funds are simply awarded on a non-competitive basis to just Grain Growers and Durum Growers.

80. The question for this Court is whether the classification in the Trade Association Clause of potential providers of services for “domestic wheat policy issues, wheat production, promotion, and sales” is a reasonable classification if it limits the providers to only Grain Growers and Durum Growers. Plaintiffs submit that it is not reasonable. This narrow classification does not “stand upon some reason, having regard to the character of the legislation.” The purpose of this law is to procure services urgently needed by wheat farmers. Limitation of potential providers of these services is not reasonable under the public policy, laws, and Constitution of this State.

81. Because of this restrictive classification, the Wheat Commission cannot consider as potential providers of services any other farm and agricultural organizations that also represent North Dakota wheat farmers and work on wheat issues. Two examples of such organizations are DRC and NDFU, each of which has a long record of accomplishments regarding domestic wheat policy work. *See* Affidavit of Robert Carlson, (App. 19-23); Affidavit of Mark Trechock, (App. 24-26), testimony of NDFU (“North Dakota Farmers Union and many other farm organizations also represent North Dakota Wheat producers.”) (App. 231.) The Wheat Commission’s 2005 Report to the legislature (App. 268-283) lists the Wheat Commission’s Advisory Committee. (App. 273) The North Dakota Farm Bureau, NDFU, and North Dakota Grain Dealers Association are members of that Committee and are relied upon by the Wheat Commission to develop its priorities on domestic wheat policy issues. Yet these three associations are ineligible to become contractors.

82. Because of this restrictive classification, the Wheat Commission cannot consider national wheat groups if they are not incorporated in North Dakota. Mr. Fisher stated in his deposition that the people best equipped to work on domestic market development work at an entity known as the “Wheat Foods Council.” (App. 299) Yet the Wheat Foods Council as an entity is ineligible, because it is not incorporated in North Dakota, and its employees are also ineligible because they are individuals and not trade associations.
83. Because of this restrictive classification the Wheat Commission can not tap into the expertise of the nationally and internationally preeminent economic and agricultural policy specialists at NDSU’s Center for Agricultural Policy and Trade Studies for research on domestic issues. Neither the Center nor its employees are a “trade association.”
84. This classification further prohibits consideration of NDSU, other Universities, private corporations, “think tanks” or law firms, none of which are “trade associations.”
85. None of the foregoing exclusions (and many others that could be listed if there were time and space) “stand upon some reason having regard to the character of the legislation”. The Trade Association Clause does not allow the Wheat Commission to consider the potential contractor’s ability, resources, affordability, availability, or competitiveness in entering into contracts utilizing the two mills. It “must” spend at least the full two mills (approximately \$1,124,000 per biennium) on Durum Growers and Grain Growers. The Trade Association Clause

is purely and simply a special privilege provided to Grain Growers and Durum Growers.

III. The Trade Association Clause Operates as an Unconstitutional Gift to Grain Growers and Durum Growers in Violation of Article X, Section 18.

86. Article X, Section 18 of the Constitution of North Dakota (commonly called the “gift clause”) states:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by Article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner or capital stock in any association or corporation.

A. The Trade Association Clause Makes an Implicit Gift to Grain Growers and Durum Growers Because It Eliminates Competitive Bidding.

87. The Court has found that the gift clause is violated not only by an outright gift, but also when the State parts with its property for less than the full value it could have received. Two cases arising out of the “Great Depression” illustrate the principle that there must be a correlation between the funds paid to the State and the value of the property sold by the State and unless there is such a correlation, the difference is an unconstitutional gift. These cases are [Herr v. Rudolf](#), 25 N.W.2d 916 (N.D. 1947), and [Solberg v. State Treasurer](#), 53 N.W.2d 49 (N.D. 1952).

88. Herr involved the sale of farm land by the Industrial Commission. During the Great Depression, Rudolf (father) owned farm land financed by the Bank of North

Dakota. He became delinquent and lost his farm through foreclosure. The land then became an asset of the State and backed a state bond fund. In 1943, the legislature passed a bill that allowed the Industrial Commission to sell lands acquired through foreclosures to certain descendants of the original owner at the appraised value. If no such descendant purchased the land, the land could be sold at public auction. When offered the property, the son of Rudolf offered to buy his father's land at the appraised value of \$2500, and the Industrial Commission agreed that it would sell him the land. Herr was a neighbor who also wanted the land. Herr made an offer to purchase the land for \$100 more than the appraised value and said he would pay more if it came up at public auction. The State rejected Herr's offer. Herr sued the Industrial Commission to enjoin the sale to Rudolf's son at the appraised value. The Court ruled that the law authorizing a sale at appraised value was an unconstitutional gift to the purchaser, because the state could have received more money by use of a *competitive* sales process.

89. The Court held that “by eliminating competitive bidding, [the classification] lessens, if it does not destroy, the probability of realizing the best possible price obtainable.” Herr, [25 N.W.2d at 921](#). Further, by granting the right to buy the land at a private sale rather than a public sale, there would be less likelihood of having multiple competitive bidders and the legislative purpose of sale of the land at a better price is lessened. “Manifestly, there is less probability of the lands being sold and restored to the tax lists when the members of the narrow class created by the statute are privileged to buy at the appraised price without competition.” *Id.* [at 921](#).

90. As in Herr, the legislature “by eliminating competitive bidding, lessens, if it does not destroy, the probability of realizing the best possible price obtainable” from the funds derived from the two mills of the Wheat Tax dedicated to contracts on domestic wheat issues. In effect, the legislature allows, on an annual basis, a “private sale” of a half-million dollars worth of domestic wheat contract services by only allowing Grain Growers and Durum Growers to contract to provide such services. No competition whatsoever is allowed for obtaining these contracts from the Wheat Commission.
91. Solberg also arose out of the Great Depression. Solberg had also lost his land through foreclosure by the State. He later repurchased his property, but when it was conveyed back to him, the State reserved 50% of the oil, gas and minerals. A law was later adopted that gave former owners like Solberg the authority to purchase the minerals for about 10 cents an acre, which was only a small fraction of the actual value of the mineral acres. Solberg applied for, but was denied, the right to purchase these minerals pursuant to the law authorizing the 10 cents an acre price, because the Attorney General had advised the State Treasurer that the law was likely unconstitutional as a violation of the gift clause. Solberg then sued the State Treasurer and the Industrial Commission to enforce the law and compel transfer of the minerals to him. The Court, however, found that the law allowing Solberg to purchase the minerals at a lower price than the actual value was in violation of the gift clause, relying primarily on Herr.
92. Solberg and Herr together stand for the proposition that “correlation” in value received by the State to the value of the moneys paid, and an open and

competitive bidding process are vitally and integrally connected to the gift clause. In Solberg and Herr, an imputed “gift” occurred because the buyer was paying the State too little for State assets. The legal principles in Herr and Solberg are as applicable to contracts for services as they are to contracts for sale of land and mineral rights and apply to the facts before the court.

93. Neither the legislature nor the Wheat Commission made any attempt to value the work to be done under the contracts entered pursuant to the Trade Association Clause. The State admitted in its Answer, Par. 17 “that neither the NDGGA nor the USDGA were required to bid for the contracts entered into with the Wheat Commission.” (App. 15) Further, the work performed was duplicative because the contracts call for each of the two associations to perform essentially the same services. *See* Complaint, Par. 20; and Answer, Par. 16 (admitting Par. 20) (App. 7 and 15)

B. The Trade Association Clause Makes an Explicit Gift to Grain Growers and Durum Growers Because Funds Paid Are Unrelated to Services Provided.

94. The contract amounts for the Grain Growers and Durum Grower contracts have no bearing on the services provided. The Minutes of the Wheat Commission dated June 13-14, 2005 show that the amounts in the 2005 contracts with Grain Growers and Durum Growers were determined by multiplying two mills times the anticipated total production of wheat, less refunds, that would be generated over the contract period. The division of funds for each group was arbitrarily selected based on the percentage of HRS wheat production durum compared to wheat production.

Domestic Policy.

Domestic Policy budget is proposed at \$567,000, an increase of \$472,050. ... The increase is due to the 2005 legislation that mandates two mills for the N.D. Grain Growers Association and the U.S. durum Growers Association. This amount (\$520,000) is net after refunds, and based on estimated 2005 production. The Commission has met with presidents of the two organizations as well as Dan Wogsland, executive director, and proposes paying the amount in five payments. Each quarter will be an equal amount and the fifth payment will be determined when the final elevator remittances have been received. The Commission and the grower groups are aware that adjustments may need to be made midyear due to lower or higher production amounts. Wogsland stated their attorney is reviewing the contract and that the two organizations will split the funding based on a five year Olympic average production. Current discussions indicated the U.S. Durum Growers will receive 18 percent or \$93,600 and the NDGGA will receive 82 percent or \$426,000, based on relative production.

(App. 331) (Emphasis added.)

C. The Contracts Make an Explicit Gift by Making a Final Payment Unrelated to Services Rendered.

95. The law requires the Wheat Commission to pay Grain Growers and Durum Growers, an amount **“at least equal to that raised by two mills.”** The mills are assessed per bushel and no one can tell in advance how many bushels will be grown, sold, or mortgaged in any given year or the amount of the Wheat Tax to be collected. Wheat taxes are paid by wheat producers by a deduction from the proceeds at the time that they convey wheat to a “first purchaser” [N.D.C.C. §4-28-07](#). However, the receipt of these funds at the Wheat Commission lags by up to several months, since the remittance from the “first purchaser” is only made quarterly. *See*, [N.D. Admin. Code §91-02-01-06](#). Further, farmers have up to 60

days to apply for a refund. [N.D.C.C. §4-28-07\(2\)](#). Thus, the Wheat Commission did not know, when it entered into the 2005 and 2006 contracts, the amount of money that would be “at least equal to that raised by two mills.”

96. To address this uncertainty and the lag in collections, Section II of the 2005-2006 and 2006-2007 contracts between the Wheat Commission and Grain Growers and Durum Growers (App. 33 – 55) provide for four quarterly payments (at the beginning of each quarter) in a specific amount. Each contract also provides for a fifth and final payment following the fourth quarter “assuring” that the two groups will get all of the funds generated by the two mills by providing: “A fifth payment will be made following the fourth quarter, on or about August 15, [2006 or 2007] to comply with the statutory language assuring that the amount raised by 2 mills be committed to domestic policy matters (Section 4-28-07, ¶ 4) under this contract.” (App. 33A, 39, 45, 51)
97. The 2005-2006 contract with Grain Growers provides four quarterly installments starting on July 1, 2005 of \$85,280 each (a total of \$341,120), followed by a fifth payment in an unknown amount on or about August 15, 2006. (App. 33A)
98. For the same year, the contract with Durum Growers provides four quarterly payments of \$18,720 (a total of \$74,880), followed by a fifth payment in an unknown amount on or about August 15, 2006. (App. 45)

99. The Wheat Commission issued two “final payments” on August 25, 2006.³ Grain Growers received a “final payment” of \$135,498.00, (App. 321-322), and Durum Growers received a “final payment” of \$29,743, (App. 323-324.)
100. These two “final” payments totaling \$165,241 bear no relation to work conducted by the two organizations between July 1, 2005 and July 1, 2006. The amounts of these final payments rest solely on Wheat Tax receipts, less refunds, less the quarterly advance payments previously made. Grain Growers and Durum Growers did not perform any extra services for these extra payments. They are an automatic “bonus,” unrelated to the quantity or quality of services provided under the contract. These final payments, at a minimum, are an explicit gift in violation of Article X, Section 18 of the North Dakota Constitution.

D. The Wheat Commission Is Not Engaged in the Wheat Industry.

101. The trial court dismissed Plaintiffs’ claim that the Trade Association Clause violated the prohibition of the gift clause by summarily concluding that the payments fell under the “business and industry” exemption to Article X, Section 18, and that the Wheat Commission was engaged in the “wheat industry” according to N.D.C.C. §4-28-06.

102. The trial court’s conclusion ignores the specific wording of [N.D.C.C. §4-28-01](#):

“The provisions of this chapter must not be construed to abrogate or limit in any way the rights, powers, duties, and functions of the State Department of Agriculture or any other agency of the State, but are supplementary thereto and in aid and cooperation therewith; nor may such provisions be construed to

³ Presumably, similar payments will be made in August 2007.

authorize the State Wheat Commission to engage in competitive business enterprises, it being the intent and purpose of this chapter that the Commission shall promote, aid and develop the orderly marketing and processing; of North Dakota Wheat.”

Emphasis added.

IV. NDFU and DRC Have Standing to Contest the Constitutionality of the Trade Association Clause.

103. NDFU and DRC were dismissed by the trial court due to an asserted lack of standing. Order, October 6, 2006 (App. 27-29)

104. Plaintiff asked the trial court to reconsider this ruling, but it did not do so before dismissing the entire case on the merits. *See* Docket 61-63, 72, 75, 80.

105. When standing is considered in a declaratory judgment action, as here, the remedial purposes of the Declaratory Judgment Act are to be kept in mind. *See, e.g., Medcenter One, Inc. v. North Dakota State Bd. of Pharmacy*, 1997 ND 54, ¶9, 561 N.W.2d 634.

A. NDFU and DRC as Non-Profit Organizations Have Standing to Challenge the Constitutionality of the Trade Association Clause.

106. This Court recognizes the right of non-profit organizations such as NDFU and DRC to maintain a civil action for the enforcement of rights when the entity “has in an individual *or representative capacity* some real interest in the cause of action.” *Rebel v. Nodak Mut. Ins. Co.*, 1998 ND 194, ¶8, 585 N.W.2d 811 (emphasis added). In *Nodak Mutual Ins. Co. v. Ward County Farm Bureau*, 2004 ND 60, ¶14, 676 N.W.2d 752, the Court quoted with approval the following general rules of organizational standing:

[A] nonprofit organization that has not suffered an injury itself can sue as the representative of its members if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. In addition, a nonprofit membership corporation has standing to seek judicial review on behalf of its members, of governmental or municipal regulations directly affecting such members. But the corporation or its members ordinarily must be adversely affected or injured in fact by the challenged action or regulation.

(Internal citations omitted.)

107. NDFU and DRC meet the first requirement for organizational standing because they have members who are wheat farmers and have standing to sue in their own right. NDFU has 39,000 members, a large number of whom are wheat producers. (App. 20) About 1/3 of DRC's members are wheat farmers or retired wheat farmers. (App. 24)
108. NDFU and DRC also meet the second requirement for organizational standing because the purpose for assessing the two mills on its members pursuant to the Trade Association Clause is germane to the two organization's overall mission, purpose and activities. (App. 19-23) (listing wheat-related activities of NDFU); (App. 24-26) ((listing wheat related activities of DRC).
109. NDFU and DRC also meet the third requirement because the claim of unconstitutionality of the Trade Association Clause does not require the participation of individual members.

B. NDFU and DRC Have Direct Standing to Contest the Constitutionality of the Trade Association Clause.

110. NDFU and DRC also have direct standing as organizations intimately involved in domestic wheat policy issues on behalf of their members.

111. In [Saefke v. Stenehjem](#), 2003 ND 202, ¶12, 673 N.W.2d 41, this Court summarized the standing requirements for a declaratory judgment action under [N.D.C.C. ch. 32-23](#): (1) “the existence of a genuine conflict in the tangible interests of the opposing litigants;” (2) “possession of a legal interest or right which is capable of and in need of protection from the claims, demands or objections emanating from a source competent legally to place such legal interest or right in jeopardy;” and, (3) “[a]lthough complainant need not necessarily possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement, possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner.” *Id.* 45. NDFU and DRC meet all of these requirements. There is a genuine conflict involving millions of contract dollars; NDFU and DRC have the legal right to be considered for contracts under N.D.C.C. Ch. 54-44.4; and as a result they have a bonafide interest. Further, pragmatically the only way a farmer may influence expenditure of the two mills is to join and become active in Grain Growers or Durum Growers. Thus, NDFU’s and DRC’s members may be *de facto* forced to join Grain Growers and Durum Growers to have influence over domestic wheat policy issues. *See, e.g.*, [International Printing Pressmen and Assistants Union of North America v. Meier](#), 115 N.W.2d 18, 20 (N.D. 1962), where the Court scoffed at the

State's suggestion that other printers could join the impermissibly favored printing union, if they wanted to do work for the state, stating: "It would be just as reasonable to suggest a law which would limit the awarding of such contracts to persons belonging to some particular political party, because presumably any man could join that party by meeting certain conditions."

112. The [major](#) basis for the trial court's finding NDFU and DRC did not have standing was the direct result of the unconstitutional application of the Trade Association Clause. The trial court stated that "there is no indication that [NDFU and DRC] would even qualify for the contracts let alone receive them." This reasoning is seriously flawed. To draw an analogy, if U.S. District Court Ronald Davies had denied standing to the black students seeking to enter the segregated Little Rock schools, those schools might still be segregated.

113. The [trial](#) court did not consider that the Trade Association Clause does not allow any person, corporation or entity to qualify for the contracts other than Grain Growers and Durum Growers. Given the qualifications, staffing, background, interests and accomplishments of NDFU and DRC as shown in the record, (App. 19-26) (Carlson and Trechok Affidavits), they are among the pool of qualified contractors, but for the resolution in the Trade Association Clause. As summarized by Mr. Carlson, "North Dakota Farmers Union has the capacity, experience, and qualifications to provide services for activities related to domestic what policy issues, wheat production, promotion and sales." (App. 22, Par. 22) As summarized by Mr. Trechock, "DRC has the capacity and experience to prove

services related to domestic wheat policy issues.” (App. 26, Par. 14) As potential bidders, they have a “bona fide interest” sufficient to confer standing.

114. Under [parallel](#) circumstances, the United States Supreme Court has been reluctant to find that plaintiffs lack standing when denial of standing could result in insulating an unconstitutional law from judicial review. In [Arkansas Writer’s Project, Inc. v. Ragland](#), 481 U.S. 221 (1987), the publisher of a general interest magazine challenged a special tax exemption dedicated to newspapers and specialized religious, sports, trade, and professional journals. The taxing authority asserted that the general interest publisher did not have standing because it was not a member of the identified tax exempt groups and would not be entitled to relief even if the tax exemption were held unconstitutional. The Supreme Court soundly rejected that argument, stating:

We do not accept the Commissioner’s notion of standing, for it would effectively insulate under inclusive statutes from constitutional challenge, a proposition we soundly rejected in [Orr v. Orr](#), 440 U.S. 268, 272... . The Commissioner’s position is inconsistent with numerous decisions of this Court in which we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant... Contrary to the Commissioner’s assertion, appellant has alleged a sufficient personal stake in the outcome of this litigation.

[Id. at 227](#) (some internal citations omitted.)

115. Where as here, a “special law” allows only entities in the favored classification to be a contractor, the trial court’s requirement that an entity in the non-favored classification (NDFU and DRC) prove that it can get a contract

before being able to challenge the law is frankly nonsensical. NDFU and DRC have standing to contest the constitutionality of the Trade Association Law.

CONCLUSION

116. The Trade Association Clause is an unconstitutional law under one or more of the constitutional prohibitions against special laws and special privileges and immunities, and is in violation of the gift clause. It must be declared void.
117. NDFU and DRC have standing to contest the constitutionality of the Trade Association Clause.

Word Count: 10,533

Dated this 19th day of June, 2007.

SARAH VOGEL LAW FIRM, P.C.
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_____/s/_____
Sarah Vogel ([ID 03964](#))
Beth A. Baumstark ([ID 04835](#))

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 2007-0139
Burleigh County District Court No.: 05-C-1945

The following document was electronically served on this date to Dean Haas at dhaas@nd.gov:

Appellants' Brief

The following document on this date delivered by hand to Dean Haas at the Office Attorney General, 500 North 9th Street, Bismarck, ND 58501:

Appendix

Dated this 19th day of June, 2007.

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ADDENDUM

- 2005 N.D. Session Laws, Chapter 70
- N.D.C.C. ch. 4-28, North Dakota Wheat Commission
- N.D.C.C. ch. 54-44.4, State Purchasing Act

CHAPTER 70**HOUSE BILL NO. 1518**

(Representatives Nicholas, Boucher, Brandenburg, Mueller, Uglem)
(Senator Warner)

WHEAT COMMISSION AND LEVY

AN ACT to create and enact a new section to chapter 4-28 of the North Dakota Century Code, relating to the wheat tax levy; to amend and reenact sections 4-28-06 and 4-28-07 of the North Dakota Century Code, relating to the North Dakota wheat commission; to repeal section 4-28-07 of the North Dakota Century Code, relating to the wheat tax levy; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 4-28-06 of the North Dakota Century Code is amended and reenacted as follows:

4-28-06. Wheat commission - Duties and powers. In the administration of this chapter, the commission has the following powers, authority, and duties:

1. To foster and promote programs aimed at increasing the sale, utilization, and development of wheat, both at home and abroad.
2. To publish and disseminate reliable information on the value of wheat and wheat products for any purpose for which they are valuable and useful to both processor and consumer.
3. To search for and promote new uses of wheat and wheat products.
4. To contract and cooperate with any person, firm, corporation, limited liability company, or association, or with any local, state, or federal department or agency for executing or carrying on a program or programs of research, education, and publicity.
5. To lease, purchase, own, equip, maintain, and operate a commission office.
6. To appoint, employ, bond, discharge, fix the compensation and prescribe the duties of such administrative, clerical, technical and other personnel, employees, and agents as it may deem necessary to conduct the business and affairs of the commission.
7. To accept donations of funds, property, and services or other assistance, financial or otherwise, from federal, state, and other public or private sources for the purpose of aiding and promoting the work and objectives of the commission, depositing all funds so received in the state wheat commission fund in the state treasury.
8. To promote North Dakota opportunities as afforded by the development of the St. Lawrence seaway provide market maintenance and development services, utilization research, transportation research, and education.

9. To address trade and domestic issues.
10. To seek improvement in the export quality of wheat.
- ~~10.~~ 11. To exercise all express and implied rights, powers, and authority that may be necessary to perform and carry out the expressed purposes of this chapter and all of the purposes reasonably implied incidentally thereto or lawfully connected therewith and to adopt, rescind, modify, and amend all necessary and proper orders, resolutions, rules, and regulations for the procedure and exercise of its powers and the performance of its duties.
- ~~11.~~ 12. To prosecute in the name of the state of North Dakota any suit or action to enforce collection or assure payment of the tax or assessment authorized by the provisions of this chapter, and to sue and be sued in the name of the commission.
13. To engage in any other related activities.

⁴⁵ **SECTION 2. AMENDMENT.** Section 4-28-07 of the North Dakota Century Code is amended and reenacted as follows:

4-28-07. Wheat tax levy.

1. a. A tax of ~~ten~~ fifteen mills per bushel [35.24 liters] by weight must be levied and imposed upon all wheat grown in this state, delivered into this state, or sold through commercial channels to a first purchaser in this state.
- b. The tax must be levied and assessed at the time of sale and deducted by the purchaser from the price paid, or in the case of a lien, pledge, or mortgage, deducted from the proceeds of the loan or claim secured, subject to adjustment at the time of settlement in the event the number of bushels [liters] is not accurately determined at the time of the lien, pledge, or mortgage.
- c. At the time of sale, the first purchaser in this state shall issue and deliver to the producer or seller a record of the transaction in the manner prescribed by the commission.
2. a. Any producer who sells wheat to a first purchaser in this state and who is subject to the deduction provided in this chapter, within sixty days following the deduction or final settlement, may make application by personal letter to the wheat commission for a refund application blank.
- b. Upon the return of the blank, properly executed by the producer, accompanied by a record of the deduction by the purchaser, the producer must be refunded the net amount of the deduction collected.

⁴⁵ Section 4-28-07 was repealed by section 4 of House Bill No. 1518, chapter 70.

- c. If no request for refund has been made within the period prescribed above, then the producer is presumed to have agreed to the deduction. However, a producer, for any reason, having paid the tax more than once on the same wheat, upon furnishing proof of this to the commission, is entitled to a refund of the overpayment.
3. The commission, to inform the producer, shall develop and disseminate information and instructions relating to the purpose of the wheat tax and manner in which refunds may be claimed and to this extent shall cooperate with governmental agencies, state and federal, and private businesses engaged in the purchase of wheat.
4. ~~The commission may use the amount raised by two mills of the levy provided for in this section to support the commission's involvement in trade issues throughout the world.~~
5. ~~The commission may use the~~ shall expend an amount at least equal to that ~~raised by up to two mills of the levy provided for in this section for the purposes of providing market maintenance and development services, utilization research, transportation research, and education; addressing domestic policy issues; and engaging in other related activities; or for the purposes of contracting for market maintenance and development services, utilization research, transportation research, and education; addressing domestic policy issues; and engaging in other related activities,~~ to contract for activities related to domestic wheat policy issues, wheat production, promotion, and sales. The contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers. The contracts must require that any trade association receiving money under this section pay from that money all dues required as a condition of the trade association's membership in any national trade association. The contracts also must prohibit any trade association receiving money under this section from eliminating any dues required as a condition of membership in that trade association or from reducing such dues below the amount required for membership as of January 1, 2005.
5. The commission shall expend an amount at least equal to that raised by three mills of the levy provided for in this section to pay any debts for legal services incurred by the commission, until the debts for legal services are paid in full.
6. When the wheat commission presents the report required by section 4-24-10, the commission shall present a separate report detailing the nature and extent of the commission's efforts to address trade and domestic policy issues. The commission may invite other entities with which it has contracted to assist in the presentations.
7. At the time the wheat commission presents the report required by section 4-24-10, each trade association with which the wheat commission has contracted under subsection 4 also shall present a report detailing all activities in which the trade association engaged under the provisions of the contract.

SECTION 3. A new section to chapter 4-28 of the North Dakota Century Code is created and enacted as follows:

Wheat tax levy.

1. a. A tax of twelve mills per bushel [35.24 liters] by weight must be levied and imposed upon all wheat grown in this state, delivered into this state, or sold through commercial channels to a first purchaser in this state.
- b. The tax must be levied and assessed at the time of sale and deducted by the purchaser from the price paid, or in the case of a lien, pledge, or mortgage, deducted from the proceeds of the loan or claim secured, subject to adjustment at the time of settlement in the event the number of bushels [liters] is not accurately determined at the time of the lien, pledge, or mortgage.
- c. At the time of sale, the first purchaser in this state shall issue and deliver to the producer or seller a record of the transaction in the manner prescribed by the commission.
2. a. Any producer who sells wheat to a first purchaser in this state and who is subject to the deduction provided for in this chapter, within sixty days following the deduction or final settlement, may make application by personal letter to the wheat commission for a refund application blank.
- b. Upon the return of the blank, properly executed by the producer, accompanied by a record of the deduction by the purchaser, the producer must be refunded the net amount of the deduction collected.
- c. If no request for refund has been made within the period prescribed in this subsection, the producer is presumed to have agreed to the deduction. A producer that, for any reason, has paid the tax more than once on the same wheat, upon furnishing proof of that payment to the commission, is entitled to a refund of the overpayment.
3. To inform the producer, the commission shall develop and disseminate information and instructions relating to the purpose of the wheat tax and manner in which refunds may be claimed and to this extent shall cooperate with state and federal agencies and private businesses engaged in the purchase of wheat.
4. The commission shall expend an amount at least equal to that raised by two mills of the levy provided for in this section to contract for activities related to domestic wheat policy issues, wheat production, promotion, and sales. The contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers. The contracts must require that any trade association receiving money under this section pay from the money all dues required as a condition of the trade association's membership in any national trade association. The contracts also must prohibit any trade association receiving money under this section from eliminating any dues required as a condition of

membership in that trade association or from reducing such dues below the amount required for membership as of January 1, 2005.

5. When the wheat commission presents the report required by section 4-24-10, the commission shall present a separate report detailing the nature and extent of the commission's efforts to address trade and domestic policy issues. The commission may invite other entities with which it has contracted to assist in the presentations.
6. At the time the wheat commission presents the report required by section 4-24-10, each trade association with which the wheat commission has contracted under subsection 4 also shall present a report detailing all activities in which the trade association engaged under the provisions of the contract.

⁴⁶ **SECTION 4. REPEAL.** Section 4-28-07 of the North Dakota Century Code is repealed.

SECTION 5. EFFECTIVE DATE. The increase in the levy imposed by section 2 of this Act applies to all sales occurring on and after the day of the next calendar quarter occurring at least thirty days after the effective date of this Act.

SECTION 6. EFFECTIVE DATE. Sections 3 and 4 of this Act become effective on July 1, 2009.

Approved April 14, 2005
Filed April 18, 2005

⁴⁶ Section 4-28-07 was also amended by section 2 of House Bill No. 1518, chapter 70.

CHAPTER 4-28 NORTH DAKOTA STATE WHEAT COMMISSION

4-28-01. Legislative intent. The public policy of the state is declared to be that to foster, promote, and protect opportunities for economic security, individual rights and enterprise, the development of the natural resources of the state, and the health, prosperity, and general welfare of all of the people of the state, the greater development, more effective utilization and better marketing of wheat produced in the state involves and concerns a public purpose, the accomplishment of which among other things, requires and demands the establishment of a state wheat commission for the purpose and with the objective of stabilizing and improving the agricultural economy of the state.

The provisions of this chapter must not be construed to abrogate or limit in any way the rights, powers, duties, and functions of the state department of agriculture or any other agency of the state but are supplementary thereto and in aid and cooperation therewith; nor may such provisions be construed to authorize the state wheat commission to engage in competitive business enterprises, it being the intent and purpose of this chapter that the commission shall promote, aid, and develop the orderly marketing and processing of North Dakota wheat.

4-28-02. Definitions.

1. "Commercial channels" means the sale of wheat for any use, when sold by the producer to any commercial buyer, dealer, processor, cooperative, or to any person, firm, corporation, limited liability company, association, or partnership who resells any wheat or product produced therefrom.
2. "Commission" means the North Dakota state wheat commission.
3. The term "final settlement" means the date the wheat upon which a loan was obtained is sold to the elevator or to a private person or is assigned or transferred to an agency of the United States government; or the date upon which the payment for the wheat is made in instances when wheat is sold but payments are deferred.
4. "First purchaser" means any person, firm, corporation, association, partnership, agent, or broker buying, accepting for sale, or otherwise acquiring, after harvest, the property in or to wheat from the grower and includes a mortgagee, pledgee, lienor, or other claimant having a claim against the producer, where the actual or constructive possession of wheat is taken as part payment or in satisfaction of such mortgage, pledge, lien, or claim.
5. "Producer" means any landowner or tenant engaged in growing wheat and receiving, in such capacity, any portion of the crop produced.
6. "Sale" includes any pledge or mortgage of wheat, after harvest, to any person, firm, corporation, limited liability company, association, or partnership.
7. "Wheat" includes all varieties of hard red spring wheat, durum, and winter wheats.

4-28-03. Wheat commission - Members.

1. The North Dakota state wheat commission consists of seven members. One member must be appointed or elected from each of the districts of the state established by this chapter and one member must be appointed or elected from the state at large. Each member, except the member from the state at large, must be a resident of and a qualified elector in the district the member represents and must have farming operations in the district. The member from the state at large must have similar qualifications except as limited by district lines. An individual is not eligible to be a member of the wheat commission if that individual requested a

refund under section 4-28-07 during the twelve-month period before the date on which the term sought by the individual would commence. This ineligibility does not apply to an individual who requested a refund because of an overpayment, as provided in subdivision c of subsection 2 of section 4-28-07. Each member of the wheat commission must be actively engaged in the production of wheat. A member of the wheat commission who elects not to plant wheat for one growing cycle may continue to serve on the commission if the member continues to be actively involved in farming. If a member elects not to plant wheat for more than one growing cycle, the member is deemed to have resigned and the commission shall declare the member's office vacant. A member of the wheat commission is not eligible to receive a refund under section 4-28-07; however, a member may request a refund because of an overpayment, as provided in subdivision c of subsection 2 of section 4-28-07. The commission may declare a member's position vacant if the member fails to attend two consecutive commission meetings.

2. Not more than sixty days prior to expiration of the term of the member from the state at large, a nominating committee consisting of the agriculture commissioner, the president of the North Dakota crop improvement association, the director of the North Dakota agricultural experiment station, the director of the North Dakota state university extension service, the president of the North Dakota farm bureau, the president of the North Dakota farmers union, the president of the North Dakota grain dealers association, the president of the North Dakota grain growers association, and an individual who is a resident of this state and a member of the United States durum growers association, or their duly authorized representatives, shall submit to the governor a list of three names and within sixty days after expiration of the term the governor shall appoint, from the nominees so named, the member at large to the commission.
3. Each member of the commission shall hold office for a term of four years and until the member's successor has been selected and has qualified except that the commissioners elected and serving from the first and fourth districts shall hold office for terms ending on June 30, 1984; the commissioners elected and serving from the second and fifth districts shall hold office for terms ending on June 30, 1985; and the commissioners elected and serving from the third and sixth districts shall hold office for terms ending on June 30, 1982; and the commissioner appointed and serving as the state at large member shall hold office for a term ending on June 30, 1983. No producer is entitled to serve more than three terms.
4. At least sixty days prior to the expiration of the term of office of a commissioner representing any district, a meeting of producers must be held in each county in the district for the purpose of electing a county representative. The county agent shall call such meeting by publishing notice in the official newspaper of the county for two successive weeks, the last publication to be not less than five nor more than ten days prior to the meeting. The meeting must be held at a central location within the county and must be called to order by the county agent. The county agent, in cooperation with the cooperative extension service, shall conduct all elections under this section in each county in the manner the county agent deems fair and reasonable, except that a producer may vote only in the producer's county of residence. Votes must be canvassed by the county agent and certified by the county agent with the name and post-office address of the elected county representative to the director of the North Dakota state university extension service who shall thereupon, as expeditiously as possible, call a meeting of the county representatives of the district. Notice of such meeting must be sent to each county representative by registered or certified mail not less than five days prior to the meeting which must be held at a central location within the district. At such district meeting, the county representatives shall elect one of their number as the district member of the commission. The ballots at such meeting must be canvassed by the North Dakota state university extension service and the result of election certified to the governor by the director. To be eligible to hold the position of county

representative, an individual must be actively engaged in the production of wheat. A county representative who elects not to plant wheat for one growing cycle may continue to serve as a county representative if the individual continues to be actively involved in farming. If a county representative elects not to plant wheat for more than one growing cycle, the member is deemed to have resigned and the commission shall declare the member's position vacant. Additional meetings of county representatives may be called by the state wheat commission for the purpose of promoting its programs. All expenses of all such meetings and elections must be paid from commission funds. County representatives must be reimbursed for expenses necessarily incurred in attending meetings and performing other official duties on the same basis as other state officers.

5. Any vacancy occurring on the commission other than by expiration of term of office must be filled by the county representatives who shall elect one of their number as the district member of the commission for the remainder of the unexpired term. If the vacancy is from the state at large, appointment must be made from three nominations submitted by the nominating committee as in the case of the original appointment.

4-28-04. State wheat commission districts. For the purpose of this chapter, the state is hereby divided into the following districts:

1. State wheat commission district number one consists of the counties of Golden Valley, Billings, Dunn, Mercer, Oliver, Stark, Morton, Slope, Hettinger, Grant, Sioux, Bowman, and Adams.
2. State wheat commission district number two consists of the counties of Divide, Burke, Renville, Williams, Mountrail, Ward, and McKenzie.
3. State wheat commission district number three consists of the counties of McLean, Sheridan, Wells, Eddy, Burleigh, Kidder, Stutsman, Foster, Emmons, Logan, and McIntosh.
4. State wheat commission district number four consists of the counties of Bottineau, Rolette, Towner, McHenry, Pierce, Benson, and Ramsey.
5. State wheat commission district number five consists of the counties of Griggs, Steele, Traill, Barnes, Cass, LaMoure, Dickey, Ransom, Sargent, and Richland.
6. State wheat commission district number six consists of the counties of Cavalier, Pembina, Walsh, Nelson, and Grand Forks.

4-28-05. Wheat commission - Meeting - Expenses - Legal adviser. Upon call of the governor, the commission shall first meet and organize by electing from the membership a chairman and vice chairman, who shall hold office for one year and until their successors are elected and have qualified. Thereafter the commission shall meet at least once every calendar quarter at such times and places as determined by the commission and may meet in special meetings upon such call and notice as prescribed by rules adopted by the commission. The commission shall determine the amount of compensation payable to each member of the commission. The amount payable may not exceed seventy-five dollars per day plus reimbursement of expenses as provided by law for state officers, while attending meetings or performing other official duties directed by the commission. The attorney general shall act as legal adviser to the commission or designate an assistant for that purpose and within the limit of the funds available to the commission it may employ other counsel to advise and represent the commission in its affairs and proceedings.

4-28-06. Wheat commission - Duties and powers. In the administration of this chapter, the commission has the following powers, authority, and duties:

1. To foster and promote programs aimed at increasing the sale, utilization, and development of wheat, both at home and abroad.
2. To publish and disseminate reliable information on the value of wheat and wheat products for any purpose for which they are valuable and useful to both processor and consumer.
3. To search for and promote new uses of wheat and wheat products.
4. To contract and cooperate with any person, firm, corporation, limited liability company, or association, or with any local, state, or federal department or agency for executing or carrying on a program or programs of research, education, and publicity.
5. To lease, purchase, own, equip, maintain, and operate a commission office.
6. To appoint, employ, bond, discharge, fix the compensation and prescribe the duties of such administrative, clerical, technical and other personnel, employees, and agents as it may deem necessary to conduct the business and affairs of the commission.
7. To accept donations of funds, property, and services or other assistance, financial or otherwise, from federal, state, and other public or private sources for the purpose of aiding and promoting the work and objectives of the commission, depositing all funds so received in the state wheat commission fund in the state treasury.
8. To provide market maintenance and development services, utilization research, transportation research, and education.
9. To address trade and domestic issues.
10. To seek improvement in the export quality of wheat.
11. To exercise all express and implied rights, powers, and authority that may be necessary to perform and carry out the expressed purposes of this chapter and all of the purposes reasonably implied incidentally thereto or lawfully connected therewith and to adopt, rescind, modify, and amend all necessary and proper orders, resolutions, rules, and regulations for the procedure and exercise of its powers and the performance of its duties.
12. To prosecute in the name of the state of North Dakota any suit or action to enforce collection or assure payment of the tax or assessment authorized by the provisions of this chapter, and to sue and be sued in the name of the commission.
13. To engage in any other related activities.

4-28-07. (Repealed effective July 1, 2009) Wheat tax levy.

1. a. A tax of fifteen mills per bushel [35.24 liters] by weight must be levied and imposed upon all wheat grown in this state, delivered into this state, or sold through commercial channels to a first purchaser in this state.
- b. The tax must be levied and assessed at the time of sale and deducted by the purchaser from the price paid, or in the case of a lien, pledge, or mortgage, deducted from the proceeds of the loan or claim secured, subject to adjustment at the time of settlement in the event the number of bushels [liters] is not accurately determined at the time of the lien, pledge, or mortgage.

- c. At the time of sale, the first purchaser in this state shall issue and deliver to the producer or seller a record of the transaction in the manner prescribed by the commission.
2.
 - a. Any producer who sells wheat to a first purchaser in this state and who is subject to the deduction provided in this chapter, within sixty days following the deduction or final settlement, may make application by personal letter to the wheat commission for a refund application blank.
 - b. Upon the return of the blank, properly executed by the producer, accompanied by a record of the deduction by the purchaser, the producer must be refunded the net amount of the deduction collected.
 - c. If no request for refund has been made within the period prescribed above, then the producer is presumed to have agreed to the deduction. However, a producer, for any reason, having paid the tax more than once on the same wheat, upon furnishing proof of this to the commission, is entitled to a refund of the overpayment.
3. The commission, to inform the producer, shall develop and disseminate information and instructions relating to the purpose of the wheat tax and manner in which refunds may be claimed and to this extent shall cooperate with governmental agencies, state and federal, and private businesses engaged in the purchase of wheat.
4. The commission shall expend an amount at least equal to that raised by two mills of the levy provided for in this section to contract for activities related to domestic wheat policy issues, wheat production, promotion, and sales. The contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers. The contracts must require that any trade association receiving money under this section pay from that money all dues required as a condition of the trade association's membership in any national trade association. The contracts also must prohibit any trade association receiving money under this section from eliminating any dues required as a condition of membership in that trade association or from reducing such dues below the amount required for membership as of January 1, 2005.
5. The commission shall expend an amount at least equal to that raised by three mills of the levy provided for in this section to pay any debts for legal services incurred by the commission, until the debts for legal services are paid in full.
6. When the wheat commission presents the report required by section 4-24-10, the commission shall present a separate report detailing the nature and extent of the commission's efforts to address trade and domestic policy issues. The commission may invite other entities with which it has contracted to assist in the presentations.
7. At the time the wheat commission presents the report required by section 4-24-10, each trade association with which the wheat commission has contracted under subsection 4 also shall present a report detailing all activities in which the trade association engaged under the provisions of the contract.

4-28-07.1. (Effective after June 30, 2009) Wheat tax levy.

1.
 - a. A tax of twelve mills per bushel [35.24 liters] by weight must be levied and imposed upon all wheat grown in this state, delivered into this state, or sold through commercial channels to a first purchaser in this state.
 - b. The tax must be levied and assessed at the time of sale and deducted by the purchaser from the price paid, or in the case of a lien, pledge, or mortgage,

deducted from the proceeds of the loan or claim secured, subject to adjustment at the time of settlement in the event the number of bushels [liters] is not accurately determined at the time of the lien, pledge, or mortgage.

- c. At the time of sale, the first purchaser in this state shall issue and deliver to the producer or seller a record of the transaction in the manner prescribed by the commission.
2.
 - a. Any producer who sells wheat to a first purchaser in this state and who is subject to the deduction provided for in this chapter, within sixty days following the deduction or final settlement, may make application by personal letter to the wheat commission for a refund application blank.
 - b. Upon the return of the blank, properly executed by the producer, accompanied by a record of the deduction by the purchaser, the producer must be refunded the net amount of the deduction collected.
 - c. If no request for refund has been made within the period prescribed in this subsection, the producer is presumed to have agreed to the deduction. A producer that, for any reason, has paid the tax more than once on the same wheat, upon furnishing proof of that payment to the commission, is entitled to a refund of the overpayment.
 3. To inform the producer, the commission shall develop and disseminate information and instructions relating to the purpose of the wheat tax and manner in which refunds may be claimed and to this extent shall cooperate with state and federal agencies and private businesses engaged in the purchase of wheat.
 4. The commission shall expend an amount at least equal to that raised by two mills of the levy provided for in this section to contract for activities related to domestic wheat policy issues, wheat production, promotion, and sales. The contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers. The contracts must require that any trade association receiving money under this section pay from the money all dues required as a condition of the trade association's membership in any national trade association. The contracts also must prohibit any trade association receiving money under this section from eliminating any dues required as a condition of membership in that trade association or from reducing such dues below the amount required for membership as of January 1, 2005.
 5. When the wheat commission presents the report required by section 4-24-10, the commission shall present a separate report detailing the nature and extent of the commission's efforts to address trade and domestic policy issues. The commission may invite other entities with which it has contracted to assist in the presentations.
 6. At the time the wheat commission presents the report required by section 4-24-10, each trade association with which the wheat commission has contracted under subsection 4 also shall present a report detailing all activities in which the trade association engaged under the provisions of the contract.

4-28-08. State wheat commission fund - Continuing appropriation. Each first purchaser shall make quarterly reports and returns to the commission, on or before the twentieth day of the month next succeeding each calendar quarterly period, commencing with the calendar quarter ending September 30, 1995. The commission shall prescribe the forms to be used. With each report and return, the first purchaser shall remit to the commission, in the form of a remittance payable to the state treasurer, the tax due. The commission shall transmit all such payments to the state treasurer to be deposited in the state treasury to the credit of a special revolving fund known as the "state wheat commission fund". All money in the state wheat commission fund is appropriated on a continuing basis to the commission for carrying out the

purposes of this chapter. Expenditures from the fund may be made upon vouchers duly approved by the commission to carry out this chapter. Regular audits of the commission's accounts must be conducted in accordance with chapter 54-10.

4-28-09. Penalty. Any person violating any of the provisions of this chapter is guilty of a class B misdemeanor.

CHAPTER 54-44.4 STATE PURCHASING PRACTICES

54-44.4-01. Declaration of policy - Definitions. It is state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons to sell to the state, each state agency and institution shall obtain its necessary commodities and services at competitive cost, consistent with quality, time, and performance requirements, except as otherwise provided by law. As used in this chapter, unless the context requires otherwise:

1. "Commodities" means all property, including equipment, supplies, materials, printing, insurance, and leases of equipment.
2. "Procurement officer" means an individual duly authorized to enter and administer purchasing contracts and make written determinations with respect thereto and also includes an authorized representative acting within the limits of authority.
3. "Professional services" means those services requiring special knowledge, education, or skills when the qualifications and experience of the individual rendering the services are of primary importance and the individual is required to exercise professional judgment. Professional services providers include appraisers, attorneys, accountants, psychologists, physicians, dentists, planners, analysts, and consultants. The term includes human services under which a person provides direct health or social welfare services to the citizens on behalf of the state. The term does not include services defined in section 54-44.7-01.
4. "Purchasing agency" means a governmental entity in the executive branch of government other than the office of management and budget which is authorized by this chapter, rules adopted under this chapter, written policy of the office of management and budget, or by way of delegation from the office of management and budget to enter purchasing contracts for commodities and services.
5. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. The term includes professional services.

54-44.4-02. Office of management and budget purchasing services. The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, services, and other commodities. The International Peace Garden may participate in the procurement authorized by this section. The following commodities and services, however, are not subject to the procurement requirements of this chapter:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.
3. Public books, maps, periodicals, and technical pamphlets.
4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. Procurements through a contract or other instrument executed by the industrial commission under chapters 54-17.5, 54-17.6, 54-17.7, 49-24, and under those statutes in title 38 authorizing the industrial commission to perform well and hole pluggings, reclamation work, equipment removal, leak prevention, and similar work.

6. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.
7. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file.
8. Commodities and services costing less than a specified amount as determined by written directive by the director of the office of management and budget.
9. Specified commodities and services as determined by written directive by the director of the office of management and budget.
10. Employee benefit services, trust-related services, and investment management services obtained by an agency with a fiduciary responsibility regarding those services.

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

54-44.4-02.1. Procurement of services. All services purchased by the office of management and budget or by an agency or institution in the executive branch of state government must comply with the standards and guidelines for procurement of services established by the office of management and budget. Before March first of each year, each agency or institution in the executive branch of state government which purchases services shall file with the office of management and budget a report regarding the services purchased the preceding year. The report must be provided on forms established and made available by the office of management and budget.

54-44.4-03. Director of the office of management and budget may delegate purchasing authority. The director of the office of management and budget or the director's designee may delegate to state agencies and institutions the authority to make purchases of items not otherwise exempted by law. Any delegation of purchasing authority must be in writing and must specify what may be purchased by the agency or institution and the duration of the delegation.

54-44.4-04. Office of management and budget - Rules. The office of management and budget shall adopt, in accordance with the procedures provided by chapter 28-32, rules necessary to administer this chapter. The written directives issued by the director exercising authority provided in sections 54-44.4-02 and 54-44.4-03 need not be adopted in accordance with chapter 28-32.

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

1. Except as otherwise provided in sections 44-08-01 and 25-16.2-02, and in this chapter, purchasing contracts must be awarded through a competitive bidding process to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability, unless it is determined to be advantageous to the state to select a contractor through a competitive proposal process using other or additional criteria. The procurement officer may reject any or

all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state. All bids received under this chapter pursuant to a competitive sealed bid are exempt records under subsection 5 of section 44-04-17.1 until the date and time the bids are opened.

2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The office of management and budget shall adopt rules related to sending notice of intent to make limited competitive, noncompetitive, and negotiated purchases in accordance with this chapter. The notice must describe the needed commodity or service and the intended procurement method and must state that vendors are permitted to submit bids or proposals for contracts to be awarded under this section. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:
 - a. The commodity or service is available from only one source.
 - b. The commodity or service is to be purchased for experimentation or trial.
 - c. No acceptable bid or proposal was received pursuant to a competitive bidding or competitive proposal process.
 - d. Commodities are being purchased for over-the-counter resale.
 - e. Acceptable commodities or services are produced or provided by correctional institutions or other government agencies.
 - f. The anticipated cost of purchasing specified commodities or services is less than an amount determined by the office of management and budget which would justify the expense of a competitive bidding or competitive proposal process.
 - g. A used commodity is advantageous to the state and the commodity is available only on short notice.
 - h. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
 - i. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
 - j. The agency provides documentation indicating that the services or the circumstances are of such a nature that deviation from the procurement procedure is appropriate.

54-44.4-06. All purchases to be made in accordance with specifications - Multistep sealed bids.

1. For purposes of this chapter, specification means a description of all required physical, design, performance, functional, and other characteristics of a commodity or service the purchaser requires and, consequently, what a bidder must offer. The office of management and budget and institutions of higher education shall develop similar specifications for purchases of commodities and services of high common usage. State agencies and institutions shall provide such assistance as may be

requested by the office of management and budget and the institutions of higher education in the development of specifications. The office of management and budget and the institutions of higher education shall implement such procedures as are necessary for the inspection, testing, and acceptance of commodities or services to determine that those received are in conformity with contract specifications.

2. When it is determined to be impractical to initially prepare a purchase description to support an award based on price, a solicitation may be issued requesting the submission of unpriced offers to be followed by a competitive bidding or competitive proposal process limited to those bidders or offerors found to be qualified under the criteria set forth in the first solicitation.

54-44.4-07. (Effective through June 30, 2008) Specification for paper products and inks. The office of management and budget, the institutions of higher education, and any other state agency or institution that has authority to purchase products, are encouraged, whenever possible, when purchasing newsprint printing services, to specify the use of soybean-based ink. The North Dakota soybean council and the agriculture commissioner shall assist the office of management and budget in locating suppliers of soybean-based inks and in collecting data on the purchase of soybean-based inks. In requesting bids for paper products, the office of management and budget must request information on the recycled content of such products.

(Effective after June 30, 2008) Procurement of environmentally preferable products.

1. The office of management and budget, the institutions of higher education, and any other state agency or institution that has authority to purchase products are encouraged to purchase environmentally preferable products.
 - a. Where practicable, specifications for purchasing newsprint printing services should specify the use of soybean-based ink. The North Dakota soybean council and the agriculture commissioner shall assist the office of management and budget in locating suppliers of soybean-based inks and in collecting data on the purchase of soybean-based inks.
 - b. In requesting bids for paper products, the office of management and budget must request information on the recycled content of such products.
 - c. Where practicable, biobased products should be specified.
2. The office of management and budget, in coordination with the state board of higher education, shall develop guidelines for a biobased procurement program.

54-44.4-08. Purchase of recycled paper products. The office of management and budget, and any state agency or institution that has authority to purchase products, shall ensure that at least twenty percent of the total volume of paper and paper products being purchased for state agencies and institutions contain at least twenty-five percent recycled material. The office of management and budget shall implement a methodology to track compliance with this 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. 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.

54-44.4-10. Competitive sealed proposals - Exempt records.

1. A contract for commodities or services may be entered by competitive sealed proposals when a determination is made that the use of competitive sealed bidding is either not practicable or not advantageous to the state. The request for proposal must state the relative importance of price and other factors and subfactors, if any.
2. Proposals must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. All proposals received pursuant to a competitive sealed proposal process are exempt records under subsection 5 of section 44-04-17.1 until an award is made.
3. Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before award for the purpose of obtaining best and final offers. In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing offerors.
4. Unless all proposals are rejected, award must be made to the responsible offeror whose proposal conforms to the solicitation and is determined, in writing, to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The contract file must contain the basis on which the award is made. Written notice of the award of the contract to the successful offeror must be promptly given to all offerors.

54-44.4-11. Small purchases.

1. A procurement not exceeding the amount established by written directive of the director of the office of management and budget or by the state board of higher education under subsection 5 of section 15-10-17 may be made in accordance with small purchase procedures.
2. A small purchase need not be made through competitive sealed bidding or competitive sealed proposals. However, small purchases must be made with competition that is practicable under the circumstances.
3. Procurement requirements may not be artificially divided as to constitute a small purchase under this section.

54-44.4-12. Resolution of protested solicitations and awards.

1. An interested party may protest the award of a contract, the notice of intent to award a contract, or a solicitation for commodities or services by the office of management and budget or purchasing agency under this chapter. The protest must be submitted in writing to the procurement officer responsible for the contract or solicitation within seven calendar days after the protestor knows or should have known of the facts giving rise to the protest.

2. If a contract has been awarded, the procurement officer immediately shall give notice of a protest to the contractor. In the case of pending award, a stay of award may be requested. A stay must be granted unless a written determination is made that the award of the contract without delay is necessary to protect the interests of the state.
3. If the protest is not resolved by mutual agreement, the procurement officer promptly shall send by certified mail to the protestor a written decision containing the basis for the decision and inform the protestor of the protestor's right to appeal.
4. The protestor may file an appeal of the decision rendered by the procurement officer with the director of the office of management and budget or designee. An appeal must be filed in writing within seven calendar days after the protestor receives the decision rendered by the procurement officer of the office of management and budget or the purchasing agency. The appeal must include a copy of the decision being appealed and the basis for the appeal. Within seven calendar days the director of the office of management and budget or the director's designee shall send by certified mail written notice of the decision to the protestor.

54-44.4-13. Cooperative purchasing.

1. The office of management and budget shall purchase commodities or services as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government.
2. The office of management and budget and the agencies and institutions under the jurisdiction of the state board of higher education shall make joint purchases of like commodities or services of high common usage when the office of management and budget and the state board of higher education determine it is in the best interest of the state.
3. The director of the office of management and budget or the director's designee may agree to purchase commodities or services under contracts entered into by the United States general services administration or contracts of other government entities if it is determined to be in the best interest of the state after consideration of price, contractual terms and conditions, and the availability of competition from approved vendors under section 54-44.4-09.
4. The director of the office of management and budget or the director's designee may participate in, sponsor, or administer a cooperative purchasing agreement with one or more government entities or a nonprofit organization established on behalf of public entities for the procurement of commodities or services in accordance with an agreement entered into between the participants.
5. Cooperative purchasing may include open-ended contracts that are available to other government entities or nonprofit organizations established on behalf of public entities.
6. Before entering into a cooperative purchasing agreement under this section, the office of management and budget must determine that the contracts were awarded through full and open competition or source selection methods specified in section 54-44.4-05 and shall send notice to approved vendors of the office's intent to make a cooperative purchase in accordance with this chapter.

54-44.4-14. Procurement information - Web site.

1. The office of management and budget shall establish and maintain a procurement information web site on the internet. This procurement information web site must provide current information regarding North Dakota government procurement

opportunities in order to inform potential vendors of the commodities and services sought by state agencies and institutions. Notwithstanding section 54-44.4-09, for each purchase of services or commodities over the amount established for small purchases, the office of management and budget and every purchasing agency shall provide procurement information on the web site. The time period and manner of providing procurement information on the web site must be in accordance with rules adopted by the office of management and budget. The office of management and budget may contract with a third party to assist in providing or maintaining the procurement information web site.

2. A state agency or institution may elect to use the procurement information web site for the purchase of services and commodities that are not subject to the procurement requirements of this chapter, including:
 - a. Commodities and services exempted under section 54-44.4-02;
 - b. Public improvements under title 48;
 - c. Architect, engineer, construction management, and land surveying services under chapter 54-44.7; and
 - d. Concessions under chapter 48-09.