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Revenue Committee
April 03, 2012

[AM2629 TO LB727]

The Committee on Revenue met at 12:00 p.m. on Tuesday, April 3, 2012, in Room 1524 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on AM2629 to LB727. Senators present: Abbie Cornett, Chairperson; Greg Adams; Lydia Brasch; Deb Fischer; Galen Hadley; Pete Pirsch; and Paul Schumacher. Senators absent: LeRoy Loudon, Vice Chairperson.

SENATOR CORNETT: Good afternoon. Let's begin the Revenue Committee hearing today. I am Senator Cornett from Bellevue. Senator LeRoy Loudon from Ellsworth had a previous engagement and will not be joining us today. To my left is Senator Deb Fischer from Valentine; and to her left is Senator Greg Adams from York. On my far right is Senator Schumacher from Columbus; Senator Lydia Brasch from Bancroft; Senator Pete Pirsch from Omaha I believe will be joining us; Senator Hadley from Kearney. The research analyst today is Stephen Moore and committee clerk is Matt Rathje and our page today is Justin. Before we begin, I'd ask everyone to please turn their cell phones to either the silent or vibrate mode while in the hearing room. Sign-in sheets for testifiers are on the tables by both back doors and need to be completed prior to coming up to testify. If you are testifying...well, we only have one bill today so let's just skip that part. When filling out the form, please print and sign your name and hand the sheet to the committee clerk when you come up. There are clipboards also at the back of the room where you can sign in and indicate either your support or opposition to a bill. Those will be included in the official record. We will follow the agenda and we'll have the introducer, then followed by proponents, opponents, and neutral testimony. As you begin your testimony, please state and spell your entire name for the record. If you have handouts, please have ten copies and the pages will distribute them. If you do not, we will make copies for you. With that, we will begin the hearing on AM2629. Senator Mello, you are recognized.

SENATOR MELLO: (Exhibit 1) Good afternoon, Chairwoman Cornett, members of the Revenue Committee. My name is Heath Mello, H-e-a-t-h M-e-l-l-o, and I represent the 5th Legislative District in south Omaha. Bellevue's Offutt Air Force Base, home to the headquarters of the U.S. Strategic Command or StratCom, is one of the major economic development engines in the state of Nebraska. As a state senator who formerly represented parts of Bellevue, I have been fortunate enough to work with members of the Offutt community on a number of issues. The estimated economic impact of Offutt to our state is more than \$1.7 billion, and the upcoming construction of a new headquarters for StratCom is projected to be a \$1 billion project. Under existing state law, construction materials used for the federal building projects like the new StratCom headquarters are exempt from sales taxes. This exemption applies in cases where the federal government purchases the materials directly from a supplier or if the government has issued a purchasing agent appointment under statute 77-2704.15, which can be accomplished by completing Form 17 from the Department of Revenue.

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The reason that we are here today and for the introduction of AM2629 is that contractors' bids for the StratCom project were coming in higher than expected due to the inclusion of state sales taxes on the construction materials. Apparently, the U.S. Army Corps of Engineers, which is overseeing the StratCom project, has historically refused to fill out Form 17 to designate a purchasing agent due to concerns about being held legally responsible for the private contractor's actions. AM2629 would provide that materials purchased by private contractors for use in the construction of federal buildings owned or used by the U.S. Department of Defense or the U.S. Department of Veterans Affairs in a county with a city of the metropolitan class or at least three first-class cities are exempt from sales and use tax regardless of whether a Form 17 has been filled out. As those who are here to testify following me will explain in more detail, there is a significant concern that without the adoption of AM2629 or some other remedy, construction of both the StratCom headquarters and the new Omaha Veterans Affairs Hospital will be delayed, and costs to federal taxpayers, including Nebraskans, will be increased. Because both of these major projects are reliant on specific federal appropriations, I would argue that the policy of taxing these materials simply because the Army Corps of Engineers refuses to fill out Form 17 endangers both projects as well as future federal projects in the state of Nebraska. Recognizing the difficult fiscal picture that we face this session, AM2629 was carefully drafted to be a narrow exemption that realistically should only apply to the StratCom project and the VA hospital in the short term, while not creating a closed class that would violate the special legislation clause. There are officials behind me from the Offutt community as well as the Army Corps of Engineers who can discuss the underlying legal issues in more detail. I'd like to thank U.S. Senator Ben Nelson and his staff for bringing this issue forward to Senator Cornett and myself over the last month. I would also particularly like to thank my colleague and former Bellevue colleague, Senator Cornett, and her staff for working with my office on this issue, as well as the Tax Commissioner, of trying to find some kind of remedy or alternative solution to this problem if the committee sees that AM2629 cannot go forward. More importantly, on a short notice, Senator Cornett, myself, amongst many others over the last hour or so have been able to work out a language agreement that ultimately changes the purchasing agent statute to clarify that the appointment of a purchasing agent will not impose any liability on the governmental unit who is applying for the sales tax exemption. In our estimate, that ultimately would remove any potential fiscal note that's associated with this issue because all we're essentially implying is that there would be no liability if a government entity fills out this Form 17 which is not clarified currently under statute or on Form 17. With that, I'd be happy to answer any questions the committee may have and would hope that the committee could support AM2629 or an alternative solution that will be forthcoming from Senator Cornett. Thank you, Madam Chair. [AM2629 TO LB727]

SENATOR CORNETT: Questions from the committee? Senator Adams. [AM2629 TO LB727]

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SENATOR ADAMS: Thank you. Senator, I'll ask it of you and if there's somebody else that could be more specific, I have to ask the obvious and I need more explanation. Why is the Corps reluctant on this Form 17? I mean I'm assuming they've used it in the past on other projects. [AM2629 TO LB727]

SENATOR MELLO: I'll do my best to give an answer, but I also would probably recommend that you ask them as well, Senator Adams, because they will be testifying after me. It came to our...when this issue was brought forward and Senator Nelson brought this issue to Senator Cornett and myself in regards to some challenges in regards to the bids that were coming back higher, that was the initial inclination that I think everyone had, which is, why doesn't the Army Corps of Engineers simply fill out Form 17 and they would qualify for a sales tax exemption? Ultimately the Corps has come back and their legal department has found that by filling out Form 17 with the language on Form 17 right now that they would be held legally liable by designating a contractor as an agent on behalf of the federal government. They feel that that liability would spread beyond just the purchasing, so to speak, of materials or supplies for the contract. They feel that they would be held liable for anything that contractor does because the federal government does not designate someone as an agent on their behalf. So that's been kind of the underlying issue of why they haven't, I should say the short version of why they haven't filled out the form previously in any previous projects. But I would allow the Corps to come up. Their legal department is here and they can provide a little bit more detail as well as legal rationale, since I'm not an attorney, of what their legal department has come to in regards to why they choose not to fill it out. [AM2629 TO LB727]

SENATOR CORNETT: Senator Schumacher. [AM2629 TO LB727]

SENATOR SCHUMACHER: Thank you, Madam Chairman. Just a couple questions. Have these bids been accepted for this project yet, or is it just in the receiving portion? [AM2629 TO LB727]

SENATOR MELLO: Dave, actually there's been no contractor selected yet, and I think the understanding was is that because bids were...the initial bids that were put out were coming back dramatically higher because they incorporated state sales tax, that's why we're here today. And so ultimately those bids will go back out or I should say are currently out as we speak where there's been no contractor or no one selected to actually build or take part in the StratCom project right now. [AM2629 TO LB727]

SENATOR SCHUMACHER: Has the Department of Veterans Affairs or the Department of Defense or the feds ever signed one of these Form 17's? Is this the first time they're going to be signing one, or would it? [AM2629 TO LB727]

SENATOR MELLO: My understanding, and it can be clarified by the Army of Corps of

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Engineers, is that they have not...at least the Army Corps of Engineers, with the projects they have undergone in Nebraska, have not filled out a Form 17. [AM2629 TO LB727]

SENATOR SCHUMACHER: So none of...this is a kind of a first time this has been tried or... [AM2629 TO LB727]

SENATOR MELLO: Yes. [AM2629 TO LB727]

SENATOR SCHUMACHER: Now this exempts and it carves out an unusual exemption that I don't think we've ever seen before in statute for a metropolitan-class city or at least three cities of the first class. And when we carve out such distinctions there's got to be a rational basis for it. What's the rational basis between three cities of the first class and two cities of the second class, one city of the primary class, and one city of the...(laugh)...why this carving? What's the rational distinction? [AM2629 TO LB727]

SENATOR MELLO: I think the reality, Senator Schumacher, is to try to find a legal way to ensure we were not creating a closed class...we were trying not to create closed class legislation with this amendment, was there have been other bills that have been passed by the Legislature that uses that very similar designation to incorporate Douglas and Sarpy Counties. So a county with a city of the metropolitan class, as well as an adjoining county with at least three first-class cities, that has been used in other pieces of legislation not to create closed class legislation but to designate where the primary focus of the legislation is. [AM2629 TO LB727]

SENATOR SCHUMACHER: But what's the rational distinction between the Veterans Affairs folks building a building in Hastings and them doing it here? Why do we say they've got to pay tax and sign one of these forms in Hastings to build an office building and they don't have to here? [AM2629 TO LB727]

SENATOR MELLO: Senator Schumacher, initially when this issue was brought forward and Senator Cornett's office and my office were working with Senator Nelson's office and the Army Corps of Engineers, the Tax Commissioner and our own Legislative Fiscal Office indicated that any kind of statute change where it dealt with the exemption itself would have a fiscal note they thought to some extent. They couldn't tell us how much it was when we were initially drafting the legislation. They could simply provide that making a change with the exemption no doubt they thought would have some kind of fiscal note if we tried to exempt any one entity, any one department, and any one county. And so what we tried to do, our rationale was we understand that there are two sizable, probably the two largest federal installations being...that are currently, one, the StratCom project at Offutt Air Force Base in Bellevue is the first project, and the second project would be the Department of Veterans Affairs new veterans hospital in Omaha that has essentially been approved but is coming down the road, so to speak, in the next couple of years. Those were the projects that we know of right now that would be

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eligible for this exemption. There are...initially when we started out there could have been the potential for any potential federal project, so to speak, the way it was drafted. And so the rationale was not to...was to get essentially a starting point for how we can move forward, because the immediate concern is trying not to delay ultimately the StratCom project, which is the concern that we have. [AM2629 TO LB727]

SENATOR SCHUMACHER: Well, wouldn't this disincentivize the feds from taking on projects outside of these two counties? Because they get a bargain if we pass this, and if they put it someplace else in the state they have to pay taxes. So it's a disincentive to a lot of the stuff we've been trying to do to help rural Nebraska. [AM2629 TO LB727]

SENATOR MELLO: I don't see that it's a...Senator Schumacher, I don't see this as a disincentive. I see it as a starting point in the sense of trying to get I would say the state's hands wrapped around how much the federal government pays us in sales taxes, so to speak. And I think the initial intention was never to...and I would emphasize this as well in my closing. I think the underlying policy issue that if we can discuss that is whether or not the federal government should be paying the state of Nebraska sales taxes on projects that they ultimately should be exempt from if they simply fill out this Form 17. And I think what we tried to do with this amendment was try to narrow it down as a starting point, not saying that we don't want to open it back up eventually. Now granted, Senator Cornett will explain and we can discuss this with the committee after the hearing, we found, we feel another way besides AM2629 to be able to accomplish to allow the federal government to sign Form 17. That is not this amendment. It does not create any new exemption at all. It simply clarifies the liability issues that are at the heart of the concerns of the federal government. [AM2629 TO LB727]

SENATOR SCHUMACHER: Okay. Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Senator Hadley. [AM2629 TO LB727]

SENATOR HADLEY: Senator Cornett, Senator Mello, thank you. I just have a couple quick questions and maybe you can't answer them. In 2000, the Roman Hruska Courthouse was done in Omaha. Was there sales tax paid on that? [AM2629 TO LB727]

SENATOR MELLO: It is my understanding, yes. [AM2629 TO LB727]

SENATOR HADLEY: It was. Okay. How about the renovation of the Edward Zorinsky in 2004? [AM2629 TO LB727]

SENATOR MELLO: It is my understanding, yes. [AM2629 TO LB727]

SENATOR HADLEY: So the state of Nebraska did receive sales tax from the federal

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government in those two instances, and we used it. Is that correct? [AM2629 TO LB727]

SENATOR MELLO: My understanding is that the state of Nebraska has consistently received sales tax dollars when the federal government chooses to do a federal government project in the state of Nebraska because they've not signed this form due to liability concerns. [AM2629 TO LB727]

SENATOR HADLEY: Okay. I'm going to be very interested to see how we've worked with the fiscal notes, because we've consistently received funding from the federal government. And if we put in a bill now that says we're not going to receive that, I'm going to be shocked if we don't come up with a fiscal note, because we've been receiving the money. If we're no longer receiving the money, that's a fiscal note. [AM2629 TO LB727]

SENATOR MELLO: I would argue, Senator Hadley, that state statute as well as I think the Department of Revenue's rules and regulations show that the federal government is exempt from these projects. And so regardless of whether or not the federal government has chosen to pay these funds, because they've actually at the end of the day had chosen to pay state sales tax where they legally do not have to. So the argument I would make in rebuttal of that is that we shouldn't be counting any sales tax we're getting from the federal government because they don't have to pay us at the end of the day if they simply choose to sign Form 17. They would be exempt from the sales tax we're talking about. They have chosen not to sign that form due to legal reasons or liability reasons, but our fiscal projections and I think the Department of Revenue's fiscal projections to some extent can't ultimately equate that the federal government will always choose to pay those taxes because statutorily they don't have to. It's simply a choice that they have chosen to do because of liability concerns. [AM2629 TO LB727]

SENATOR HADLEY: Okay. So you're basically...am I correct, this is the first time the federal government has come to the state of Nebraska and said they will not pay sales tax? Is that...is every other project in Nebraska they have voluntarily paid sales tax, is that a fair statement? [AM2629 TO LB727]

SENATOR MELLO: My understanding, or at least from the Army Corps of Engineers' projects that they've undergone in Nebraska, they've paid sales tax on, and so they can probably go a little bit further if you would like to ask them the questions in regards to that background. The underlying issue though, policywise, is that the federal government is exempt from state sales tax under state statutes right now. [AM2629 TO LB727]

SENATOR HADLEY: I understand that. But the contractor is not. Isn't that...that to me is a very distinct difference. The contractor is not exempt. [AM2629 TO LB727]

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SENATOR MELLO: They are exempt if Form 17 is filed by the federal government. [AM2629 TO LB727]

SENATOR HADLEY: If...if...if. That's right. But in and of themselves, the contractor is not exempt. Isn't that...? [AM2629 TO LB727]

SENATOR MELLO: No, I would say no contractor is exempt in Nebraska. Any governmental entity... [AM2629 TO LB727]

SENATOR HADLEY: That's right. No contractor is exempt. [AM2629 TO LB727]

SENATOR MELLO: Any governmental unit is exempt if they fill out this form though. [AM2629 TO LB727]

SENATOR HADLEY: Okay. So if the federal government doesn't choose to fill out this form, they technically are not exempt either, right? [AM2629 TO LB727]

SENATOR MELLO: Well, they haven't been exempt. They've been paying...they've chosen to pay the taxes instead of filling out the form. But every governmental unit in Nebraska has that choice at the end of the day. [AM2629 TO LB727]

SENATOR HADLEY: Okay. [AM2629 TO LB727]

SENATOR CORNETT: Senator Pirsch. [AM2629 TO LB727]

SENATOR PIRSCH: Yeah. I just wanted to...and thank you for your introduction. Is the compelling reason why you've focused on Douglas County and Sarpy, which currently would be the only counties that would qualify under the...although it's an open class and not a closed class in the manner in which you've chosen to define it here in the statutory language. But is it...does this feed into the idea of economic development as core? What is the significance of StratCom to the state? [AM2629 TO LB727]

SENATOR MELLO: To answer...Senator Pirsch, to answer your question, and it sounds to some extent it is a continuation or a further explanation of Senator Schumacher's question, is that the rationale is the Strategic Air Command is one of the largest economic engines in the state of Nebraska, and it is by far the largest federal installation in the state of Nebraska, and that being that the, right now, at least, the initial largest federal government installation with the new StratCom. The economic development or economic impact that that has obviously is tremendous, and that is the focal point of ultimately AM2629 is the new Strategic Air Command Base. But ultimately there is...we know there is somewhere coming down the line soon the new Department of Veterans Affairs veterans hospital in the Omaha area. So the compelling reason obviously is to ensure that the state continues to allow that new StratCom project to move forward with

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their bidding process, which right now has been hung up due to this Form 17 issue that we're trying to rectify with AM2629 and a pending amendment that will be coming from Senator Cornett. [AM2629 TO LB727]

SENATOR PIRSCH: Well, thanks. And I guess just if...I know there are those who are slated to testify after you, and to me a salient point would be we can describe the impact economically of the air base and StratCom in terms of its effect on the state in terms of employment or economic, and the overall competitive environment in which, you know...and we had a glimpse of this on Government Committee, that there are very...you know, those air bases and federal installations are highly coveted. So with that, I'll move on. Thank you for your testimony. [AM2629 TO LB727]

SENATOR CORNETT: I'm going to stop questions from you, Senator. We have one hour and five minutes until we have veto override discussion. With that, I'm going to limit time. [AM2629 TO LB727]

SENATOR MELLO: Okay. [AM2629 TO LB727]

SENATOR CORNETT: Thank you. First proponent. [AM2629 TO LB727]

BEN NELSON: (Exhibit 2) Madam Chair and members of the Revenue Committee, I want to thank you for the opportunity to testify here today. I'm Ben Nelson, B-e-n N-e-l-s-o-n. I'm a United State Senator for Nebraska. I serve on the U.S. Senate's Appropriations Committee where I am a member of its Military Construction and Veterans Affairs Subcommittee. I also serve on the U.S. Senate's Armed Services Committee where I chair its Strategic Forces Subcommittee which has oversight over StratCom in the Omaha/Bellevue area. And I'm here today to testify on AM2629 to LB727 which, as Senator Mello has so very eloquently pointed out, concerns an issue that I've been looking into that impacts construction of a new headquarters for the U.S. Strategic Command at Offutt Air Force Base. I would first like to provide a summary of the significant impact that U.S. Strategic Command, or StratCom, has on our state in jobs and economic activity. The military population on Offutt Air Force Base is about 10,000 individuals, and an additional 22,000 civilian and contract defense workers, as well as retirees and family members who live in the Omaha and Bellevue area. As Senator Mello pointed out, the annual economic impact to Nebraska is estimated at \$1.7 billion. The new StratCom headquarters is slated to be a billion-dollar project with half of that amount directed to construction of the facility, the rest of it with very highly technological and sensitive equipment to facilitate the Command. Let me discuss just a bit of history of this headquarters. Some years ago, I was made aware that the existing headquarters, built in 1957 for Strategic Air Command, was in a state of severe disrepair and had suffered electrical service and cooling system failures. Further, I learned that it was inadequate to meet StratCom's expanded twenty-first century mission to protect Americans from nuclear and nonnuclear attacks and threats from

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cyberspace and space. At my request, Congress appropriated \$10 million in fiscal year 2009 to begin planing and designing for a new headquarters. The following two years, the President's budget sought additional funding for further planning and design. Last year, Congress approved \$120 million to begin construction this year, and the President's fiscal year 2013 budget has requested an additional \$161 million for the project. This incremental or phased-in funding will continue into the future for future fiscal years. But recently a problem arose between state and federal agencies, and it's one that has already caused a delay in construction. But if unresolved soon, there could be additional delays on this facility which is crucial to our national security. We talk about economic development but we're also focused on our national security here, because every day there are more cyberattacks on our businesses and in our government and other private individuals that we're experiencing. Given that, I'm very pleased that the committee has become engaged in this tax issue. As you might know, after Congress approved initial funding, the U.S. Army Corps of Engineers stepped in, as it does for military construction projects, to oversee working with private contractors to build the new StratCom headquarters. Under Nebraska state law, as you've heard, federal building projects are exempt from Nebraska state sales tax on materials used for construction. But to become eligible for the exemption, the federal agency must fill out a "Purchasing Agent Delegation" form that is required by the state Department of Revenue--not required by state law but required by the Department of Revenue for administration purposes. The Army Corps has concerns about liability if they designate a private contractor as a federal purchasing agent. The concern is that designating a private individual or company as a "federal purchasing agent" would transfer, or could transfer liability for the project construction from private contractors to the taxpayers, federal taxpayers, even though they are not federal officials or employees and are simply contracted to do the construction work. Now, if the contractors pay state sales taxes for materials used in the construction, it's going to increase, as you've heard, the project's cost by an estimated \$15 million to \$18 million. That will further delay construction and increase the overall costs. I also learned that in the past the Army Corps of Engineers has just paid the sales tax on construction materials rather than try to resolve their concerns about liability. This has quietly raised the cost of projects to taxpayers, and it has boosted tax revenues to the state of Nebraska--perhaps some that I had the benefit of when I was Governor a few years ago. But needless to say, I was surprised and disappointed to learn that taxes have been paid on projects funded by taxpayers that I think most of us absolutely thought were exempt from such taxes, and are exempt by the law. Also concerning to me, this has occurred in other states as well. As a result, taxpayers are paying federal taxes that are then being used to pay state taxes. This double taxation is problematic, to say the least, particularly because most of us believed that the projects were exempt and are exempt from state taxes. The bottom line principle is this: The federal government shouldn't be paying state sales taxes it doesn't owe, and taxpayers shouldn't have their federal taxes used to pay state sales taxes they don't owe. So, last week, StratCom Commander General C. Robert Kehler testified before the Senate Armed Services Committee and said that the activities

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conducted at StratCom are unique and that the existing building simply cannot be upgraded to handle the modern technology needed for StratCom to perform its critical deterrence mission into the future. The underlying concern I have is that this state sales tax issue has already caused a slowdown in a vitally important project for national security. As a matter of policy, it's my view that AM2629 falls short, whether it comes to exempting projects such as levies or dams that help communities, or projects like this where the intent is to exempt federal taxpayers from paying additional taxes. I would support a policy that applies to both scenarios and hope that an agreement can be worked on, and I believe it is being worked out between state and federal entities that will achieve that objective. But absent a solution that applies to all federal projects, I believe that AM2629, or a similar remedy, is absolutely crucial to ensuring that the StratCom project proceeds without further delay and is done so without assessing taxes to taxpayers on a project that is intended to be exempt. Let me summarize by saying this is not a request for a new exemption, an exemption that already exists in the law, but a plea for a solution to find the way to make sure that administratively--administratively--it can be accomplished. Thank you. I'd be glad to try to answer questions. I know there are some people behind me coming forward who probably can respond to a lot more detail on the project than I have, but I'm happy to try to answer any of your questions. [AM2629 TO LB727]

SENATOR CORNETT: Questions from the committee? Senator Fischer. [AM2629 TO LB727]

SENATOR FISCHER: Thank you, Senator Cornett. Thank you, Senator Nelson, for coming in today. It's nice to see you. You mentioned that this occurs in other states, that the taxing occurs. Do other states have a form similar to what we have in Nebraska? [AM2629 TO LB727]

BEN NELSON: Senator, some other states do have a similar if not the same form. [AM2629 TO LB727]

SENATOR FISCHER: Are there complaints in other states? Are they looking at changing the way they do business as you are asking us to do here today? [AM2629 TO LB727]

BEN NELSON: My sense is that this has gone on quietly for so long that it has not arisen to anyone's attention at a policy level. It's been administered this way and it has continued to be, until now, until the policy has been raised because of the size of the project and the fact that it was creating a cost overrun, potentially cost overruns. [AM2629 TO LB727]

SENATOR FISCHER: How much of a delay is taking place at StratCom? You mentioned that there's delays taking place because of this. [AM2629 TO LB727]

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BEN NELSON: Colonel Press probably can answer that more specifically than I can, but it's delaying getting bids back in without knowing what the actual bids will be adjusted for any kind of a change. I think the key here is for us to recognize that there are other states who may be doing the same thing that's been accomplished here for a long period of time, but because they haven't had a project this large it probably just hasn't come to their attention. It's gone on and been acceptable. I think it...quite honestly, I'm sympathetic with the concern of the Army Corps of Engineers. I don't necessarily agree with their legal opinion on it, but then lawyers disagree with one another all the time--I assume that Senator Pirsch would agree with that--and are different views. [AM2629 TO LB727]

SENATOR FISCHER: Or he might disagree. [AM2629 TO LB727]

BEN NELSON: And he might disagree. Or he might agree, you never know. But the key here is that we do need to resolve this in a quick way for Nebraska so we can continue to move this project along, and then we need to work on it on a larger scale, recognizing that more would need to be done. The goal is if we want to be competitive, we have to be competitive on the private sector as well as with the government sector. And if there are impediments such as this one, then I think we ought to find ways to resolve them to move forward. That's why I'm very encouraged that the Chairman has solutions being worked on right now that probably can resolve this administratively. But it does need to be resolved. [AM2629 TO LB727]

SENATOR FISCHER: In your position on the committee, have you heard of complaints of other projects in other states? [AM2629 TO LB727]

BEN NELSON: No, I have not. I'm surprised, but I think it's a matter of the size of the projects or nobody paying attention to the revenue issues at a policy level. [AM2629 TO LB727]

SENATOR FISCHER: Getting back to the liability issue, if the Corps refuses to sign this, who is liable? The contractors? [AM2629 TO LB727]

BEN NELSON: I guess the contractors would be liable for whatever they do. And if the proposed alternative is worked out, the contractors would remain liable. [AM2629 TO LB727]

SENATOR FISCHER: So there would be no change in liability if nothing is done. [AM2629 TO LB727]

BEN NELSON: That's correct. [AM2629 TO LB727]

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SENATOR FISCHER: What you are... [AM2629 TO LB727]

BEN NELSON: No...yeah. No, if nothing is done. [AM2629 TO LB727]

SENATOR FISCHER: If nothing is done there would be no change in liability. So what we're looking at here is a change basically asking the Corps or any federal agency, I would assume on any project, would not have to fill out a state form and still receive the benefit. [AM2629 TO LB727]

BEN NELSON: No, they would have to fill out... [AM2629 TO LB727]

SENATOR FISCHER: Or change the wording on the form in order to... [AM2629 TO LB727]

BEN NELSON: Change the wording on the form so that there is no transfer of liability and it's clearly spelled out so that that issue goes away. [AM2629 TO LB727]

SENATOR FISCHER: Okay. Thank you. [AM2629 TO LB727]

BEN NELSON: Sure. [AM2629 TO LB727]

SENATOR CORNETT: Further questions? Seeing none, thank you, Senator Nelson. [AM2629 TO LB727]

BEN NELSON: Thank you, Madam Chair. Thank you, members of the committee. Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Next proponent. May I see a show of hands for the number of testifiers that we have today on this bill? [AM2629 TO LB727]

BOB HINSON: (Exhibits 3 and 4) Madam Chair and members of the Revenue Committee, good afternoon. I'm Bob Hinson, B-o-b H-i-n-s-o-n. I'd first like to begin by thanking you for your service and all that you do for our state. I'd also like to thank you for allowing me to appear before you today. I'm here representing the board members of the Nebraska State Chamber, the Greater Omaha Chamber, and the Nebraska Military Support Coalition to offer support of AM2629 to LB727. I'm a retired Air Force Lieutenant General and past Vice Commander at U.S. Strategic Command from 2000 to 2002, and now a citizen of the great state of Nebraska. I proudly served 33 years in the Air Force with two active duty assignments here in Nebraska. I've had the great privilege of appearing and testifying before the United States Senate, but this marks my very first time to appear before a committee of the Nebraska Legislature. This too is a great honor and I thank you for the opportunity. After retirement, I moved back to Nebraska from Colorado Springs and have tried to become actively involved in the

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community and many related activities to support our military troops at Offutt Air Force Base. I'm honored to serve on both the Omaha Chamber and the Nebraska State Chamber and a number of other board positions. I'm also the executive director for the Nebraska Military Support Coalition located in Omaha. This coalition membership numbers 14 senior business leaders in both Omaha and Bellevue whose charter has been to support our military men and women, and to engage the Department of Defense and the Air Force leadership to promote the interest of U.S. StratCom, Offutt Air Force Base, and Nebraska. I have a signed letter from Mr. Ken Stinson, our chairman of the Nebraska Military Support Coalition, and supported by our members. I'm prepared to read that letter or offer it to you for the record. Would you like me to read that letter? [AM2629 TO LB727]

SENATOR CORNETT: Why don't you, in the interest of time, submit the letter and we can peruse that. But if you would like to summarize we would appreciate that. [AM2629 TO LB727]

BOB HINSON: Okay. And I will do that through the remainder of this testimony. I'm certainly not here to challenge the Nebraska state law, the tax laws, nor to challenge the Army Corps of Engineers' process for military construction projects. However, after 33 years of active duty military service, I'm very familiar with the Military Construction process, or MILCON, as it's often called. I've always believed that federal projects, like the StratCom Headquarters Command, Control and Communications Center, were exempt from state taxes because...and became very surprised at the issue involving this construction project. That being said, I'd like to offer my own experiences about the current StratCom headquarters building. This building was constructed in the mid to late 1950s, designed for a single mission: to support, control, and communicate with the United State Strategic Air Command Nuclear Forces. In the early 2000s, U.S. StratCom battled with repeated problems with communication systems that had become outdated by technology, requiring us to string new fiber cabling throughout the building. Since 2002, this Command has undergone repeated additions to its command responsibilities, and today struggles to maintain control and communications with nine very disparate missions. To further compound its problems, the internal infrastructure of the building has repeatedly shown its age with flooding of the underground, inadequate cooling, and fires from overheated electronics equipment. Several years ago, under General Chilton's tenure as Commander at StratCom, this MILCON project was organized and prioritized through the Air Force and Department of Defense channels. General Kehler has subsequently testified before numerous House and Senate committees about the criticality of this new headquarters and its absolute necessity to meet his national security mission responsibilities. This MILCON project has received considerable scrutiny and challenges from those who have even suggested the mission be relocated to a different state. After considerable pressure and constant vigilance from folks like Senator Nelson, the StratCom leadership, and the Nebraska Military Support Coalition, this MILCON project has survived all those challenges, moved through the Air Force

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and Department of Defense approval processes, and now sits as one of the very few top priority MILCON projects in the President's FY '12 budget. This was in many ways a string of miracles to arrive at this position today with funding prepared for release to begin construction this year. I would like to remind you that although projects like this exist in the budget, failure to execute funding potentially jeopardizes the security of that funding. Additionally, the Department of Defense is facing very severe budget challenges introduced by the Budget Control Act of 2012. It requires DOD spending reductions of approximately \$487 billion over ten years. Each military service has been directed to reduce costs, and if required, to reduce personnel, infrastructure, and mission equipment. Some commanders have even suggested that a Base Realignment and Closure process is required to meet the demands of eliminating excess infrastructure. I'm not suggesting that this has a direct bearing on your decision before you today. However, I'm suggesting any further delays to awarding a contract or potential cost increases for this very critical construction project could very well jeopardize the execution time line and place its funding at risk. Therefore, on behalf of the Nebraska State Chamber, the Omaha Chamber, and the Nebraska Military Support Coalition board, we request your immediate and favorable resolution of this issue by passage of the LB727 and AM2629, or variance thereof. I'd like to thank you for the opportunity to appear before you today and again thank you very much for your service. [AM2629 TO LB727]

SENATOR CORNETT: Senator Schumacher. [AM2629 TO LB727]

SENATOR SCHUMACHER: One quick question. So the core issue then boils down to a delay arising out of the uncertainty on the part of the contractors as to whether or not they will have to pay sales tax or not. [AM2629 TO LB727]

BOB HINSON: I think that would be better answered by the Corps and maybe the StratCom folks. But that's part of the understanding is certainly they have to determine in the contract how they're going to address the cost, the overcosts that are associated with the contract bids. [AM2629 TO LB727]

SENATOR SCHUMACHER: So if we can give them certainty one way or the other, we're just fine. [AM2629 TO LB727]

BOB HINSON: I'm sorry? [AM2629 TO LB727]

SENATOR SCHUMACHER: So if we give them certainty one way or the other, it resolves the issue. [AM2629 TO LB727]

BOB HINSON: I'm only assuming that would be true. [AM2629 TO LB727]

SENATOR SCHUMACHER: Thank you. [AM2629 TO LB727]

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SENATOR CORNETT: General Hinson, one of the issues that I have heard is that the appropriation has been made, and if we give them certainty that they will be taxed, that that money will come directly out of the project itself. Am I correct? [AM2629 TO LB727]

BOB HINSON: That's my understanding, yes. [AM2629 TO LB727]

SENATOR CORNETT: So if we do not resolve this issue either legislatively or administratively, we are actually reducing this funding for the project itself. Am I correct? [AM2629 TO LB727]

BOB HINSON: That is my understanding as well. [AM2629 TO LB727]

SENATOR CORNETT: Thank you, General. Senator Hadley. [AM2629 TO LB727]

SENATOR HADLEY: Thank you, General. Just a follow-up on that, and maybe someone later will get to it. But if we've been paying this in the past, and we have a \$281 million project, it would seem to me that that would have been figured in when we were doing the project. If we've been paying sales tax all along, wouldn't that have been a part of the capital budgeting decision as we go along? Or did somebody finally say, well, I guess we're not going to pay sales tax anymore? [AM2629 TO LB727]

BOB HINSON: Sir, I can't answer that question directly. I think the bids, as the Corps and as other contracts are released for these projects, those bids go out for contractors to bid on that based upon the amount of money that's authorized for these MILCON projects. And as I understand it, we are right up against the very limit, if not over, based upon the current bids that have been received, although I don't have direct insight to that, that that jeopardizes certainly the beginning of this, because the Corps and StratCom have to resolve that issue. [AM2629 TO LB727]

SENATOR HADLEY: Okay. Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Senator Pirsch. [AM2629 TO LB727]

SENATOR PIRSCH: And I'm sorry, I'll be brief. Are you aware...and perhaps it's a question better put to somebody who follows. Are you aware of the environment in other states, how other states have approached this? Do they have similar issues? Are there similar forms? [AM2629 TO LB727]

BOB HINSON: You know, I was on active duty for 30-plus years and have been retired now nine years, but I can't tell you what's transpired over the last nine years other than budgets have gotten even more scrutinized and tighter. In my past experience, I have never seen an issue where we have had a problem in resolving issues like this, nor has

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state taxes been introduced to my knowledge--to my knowledge. [AM2629 TO LB727]

SENATOR PIRSCH: Okay. Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Thank you, General. [AM2629 TO LB727]

BOB HINSON: Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Next proponent. [AM2629 TO LB727]

THOMAS INGRAM: (Exhibit 5) Good afternoon. My name is Thomas J. Ingram, I-n-g-r-a-m, and I'm an attorney for the Omaha district of the U.S. Army Corps of Engineers. I understand that I've been asked to provide testimony with respect to the interface between the federal acquisition regulation and state revenue regulations. I have a brief prepared statement. The federal acquisition regulation or FAR controls government procurement of all sorts, specifically including construction projects that are a primary mission of the U.S. Army Corps of Engineers. Pertinent to this issue, there's two key provisions of the FAR, Section 29.302(b), that instructs agencies to take maximum advantage of all available exemptions from state and local taxes; and 29.303(a), which says that prime contractors and subcontractors shall not normally be designated as agents of the government. No agency is authorized to make a contractor an agent of the government without agency head review and approval. Such approval has not traditionally been granted because, at least in the case of the Army Corps of Engineers, the agency that I represent, the government is not willing to blur the government-contractor relationship by appointing its contractor, with which it has an arm's length relationship, as an agent of the government for any purpose. The FAR also says at 29.303(b) that when contractors purchase materials for federal projects, the right to an exemption does not depend on the federal government's immunity from direct taxation, sovereign immunity at the federal level, but upon the provisions of the particular state laws involved. Nebraska revenue regulations exempt the federal government from taxes when the government itself is the purchaser. Further, it allows an exemption if the government appoints its contractor as a purchasing agent, which is typically done on the Form 17. The difficulty for the government and specifically the Corps of Engineers is that we will not as a matter of policy appoint our contractors as agents of the government. I believe that the reason for this is the traditional liability that a principal has for the actions of its agent and the government's reluctance to assume those potential liabilities. As it stands, the only way for the government to avail itself of the sales and use tax exemptions that the revenue regulations specifically allow is to do the one thing that the FAR discourages and in effect does not allow: creating a principal/agent relationship where our contractor becomes our agent. The Corps could take advantage of the exemption that is specifically allowed by the revenue regulations if materials for use in federal projects were specifically immune from state tax, as is the case in Colorado, or in the alternative, if contractors could acquire materials for use in

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federal projects without creating an appearance or fact of principal/agent liability as a result of such transactions. That is the end my prepared statement. Can I take any questions? [AM2629 TO LB727]

SENATOR CORNETT: Senator Adams. [AM2629 TO LB727]

SENATOR ADAMS: Thank you. So help me understand then from what you handed out, so there is language that prohibits you from paying the state tax, yet...is that what I'm reading here at 29.302 that you handed out? [AM2629 TO LB727]

THOMAS INGRAM: Oh no, sir. There isn't a prohibition on paying state tax. What the FAR says is that the federal government agencies subject to the FAR should seek out whatever exemptions that the state law allows. [AM2629 TO LB727]

SENATOR ADAMS: Okay. Okay, fair enough. Thank you for that interpretation. So now logically then you would seek out whatever exemptions are available. I get that. [AM2629 TO LB727]

THOMAS INGRAM: Yes, sir. [AM2629 TO LB727]

SENATOR ADAMS: And is also what you're saying that in the past you've gone ahead and paid the tax rather than seek out those exemptions because you didn't like the language in Form 17? [AM2629 TO LB727]

THOMAS INGRAM: Essentially, sir, yes. The legal interpretation that I inherited...I joined the Corps of Engineers in 1996. To my knowledge, since that time and beforehand as far as my superiors were concerned in advising what was allowed, we've never taken advantage of that because we felt that interpreting...you know, our interpretation of the laws of the state of Nebraska created an agency relationship whose liabilities would flow from that, and we would as a result could not assume those liabilities. If we can't assume the liabilities, we can't sign the form. [AM2629 TO LB727]

SENATOR ADAMS: Okay. Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Senator Hadley. [AM2629 TO LB727]

SENATOR HADLEY: Senator Cornett. Mr. Ingram, just...I don't mean to parse words. It says subcontractors shall not normally. So have there been situations where you have designated, in the entire United States, the Corps of Engineers has designated a purchasing agreement with a contractor? [AM2629 TO LB727]

THOMAS INGRAM: To the best of my personal knowledge, sir, no, we have not ever...the Omaha district has never used that provision. I cannot speak for, you know,

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other federal agencies, but I know that within the Army Corps of Engineers, when we have asked the questions on previous projects, we've been, you know, absolutely and unequivocally told that, no, we would not sign such a form. So the Corps of Engineers are very consistent on that, and again to the best of my knowledge we've paid taxes only because we have chosen not to assume the liabilities that we thought would have done that. [AM2629 TO LB727]

SENATOR HADLEY: I guess I just see this as a term "shall not normally," which makes me understand that it is possible. [AM2629 TO LB727]

THOMAS INGRAM: Right. And the attachment to my statement is a section of the FAR which again allows for an agency to go to the head of the agency and seek a special dispensation, if you will, to appoint a contractor or an agent. It's just the counsel that advises those heads of agencies will always uniformly say you shouldn't do that because of the liabilities that it creates. [AM2629 TO LB727]

SENATOR HADLEY: Okay. Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Before I recognize the other members of the committee I just want to clarify though that the language that we have worked on would allow you to sign the form, am I correct, with the stipulations and the definition of agent. Correct? [AM2629 TO LB727]

THOMAS INGRAM: Yes, ma'am. [AM2629 TO LB727]

SENATOR CORNETT: And that has been ran up your chain, correct? [AM2629 TO LB727]

THOMAS INGRAM: Right. I should elaborate to say that, you know, my statement was prepared prior to this meeting. Subsequently, I have been shown by Senator Cornett and Senator Mello draft language which could be acceptable to the Department of Revenue that essentially defines the agency relationship as one that does not transfer the liability that the Army Corps of Engineers is concerned about. And if that is the case and if it is explicit on the form or in the regulations, then the Corps of Engineers could accept that and would then be able to designate its contractors to make purchases on its (inaudible). [AM2629 TO LB727]

SENATOR CORNETT And with that you're referring to the stipulations that we discussed on the form, correct? [AM2629 TO LB727]

THOMAS INGRAM: Yes, ma'am. That's correct. [AM2629 TO LB727]

SENATOR CORNETT Thank you. Senator Pirsch. [AM2629 TO LB727]

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SENATOR PIRSCH: So let me clarify. You had indicated in your testimony, written testimony, that there was two approaches. One was Colorado where they specifically make immune such payments from the state tax (inaudible). [AM2629 TO LB727]

THOMAS INGRAM: They exempt the whole category of projects. A federal project is by its definition exempt from the state sales tax on its materials. [AM2629 TO LB727]

SENATOR PIRSCH: Is that the approach you're using here in this... [AM2629 TO LB727]

THOMAS INGRAM: No, sir. I simply laid it out as an option. [AM2629 TO LB727]

SENATOR PIRSCH: Okay. [AM2629 TO LB727]

THOMAS INGRAM: The other option I think is the one we're more pursuing here for a (inaudible). [AM2629 TO LB727]

SENATOR PIRSCH: Okay. So you're just...you're not allowing for under law what...what you seek to do here is ensure that there's no principal agent. It's the other angle that you're taking, the liability aspect of it. [AM2629 TO LB727]

THOMAS INGRAM: Precisely, sir. Yes, precisely. [AM2629 TO LB727]

SENATOR PIRSCH: Okay. I appreciate that clarification. Do any other states...we're not unique in this, right, Nebraska in having this Form 17 in usage? Which is why Colorado skinned the cat this other way, I would suppose? [AM2629 TO LB727]

THOMAS INGRAM: Right. I cannot tell you exactly which ones they are, sir, but I know that other states follow the same approach. There's a variety of approaches. [AM2629 TO LB727]

SENATOR PIRSCH: Yeah. And I'll be quick. Do any other states...you said Colorado goes the other way. Are any states doing it the way and the manner in which it is now being proposed to the committee here? [AM2629 TO LB727]

THOMAS INGRAM: I do not have personal knowledge but I heard it spoken in the context of the meeting that we had that apparently Kansas may understand the agency...or the principal agency relationship and change it to the extent that we're attempting, or as it is proposed to change it here... [AM2629 TO LB727]

SENATOR PIRSCH: Yeah. [AM2629 TO LB727]

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THOMAS INGRAM: ...to not transfer the liability that would otherwise be transferred.
[AM2629 TO LB727]

SENATOR PIRSCH: Sure. And you may not know the answer to the next question. I'm going to put it out there and maybe somebody else can testify. So it seems pretty clear that we, the states, and the federal government as a whole, everybody agrees to this concept that they ought not to be...there's no benefit from taxing, you know, this type of entity. So there's two approaches. We can do it kind of piecemeal through state by state and each taking their own approaches, or more of a uniform federal approach. Are you aware of efforts on the federal level to effectuate this kind of outcome that I think we all agree in principle on? [AM2629 TO LB727]

THOMAS INGRAM: To the best of my understanding, sir, is the...you know, the concept of federal sovereign immunity, you know, from a constitutional standpoint, it would ordinarily exempt the government as an entity from state taxation; and most every state code that I'm aware of, you know, respects that and enshrines it in its own constitution. So too does Nebraska. The difference is that when someone is acting, as these contractors are, to build projects for us, then the question is, you know, when does the tax accrue? Does it accrue when the contractor purchases the materials or when the building is turned over to the federal government? And I think some states have basically said that for that to be a meaningful exemption, then the taxable then should occur...you know, if it is to occur, you know, when the contractor transfers it to the government, but because the government is immune no tax accrues. [AM2629 TO LB727]

SENATOR PIRSCH: Yeah. Are you suggesting because we're talking about the contractors acting in building not technically a part of the federal government, but acting in a manner only for the federal government, that because of that added complexity that it has to be addressed on a state-by-state basis rather than its (inaudible) being addressed on a federal basis. [AM2629 TO LB727]

THOMAS INGRAM: Yes, sir, because I think (inaudible). The FAR directs us to look at each state's individual provisions and use those to, you know, navigate our solution. And so that's what we do. [AM2629 TO LB727]

SENATOR PIRSCH: Yeah. I appreciate your answers. Thank you. [AM2629 TO LB727]

THOMAS INGRAM: Certainly, sir. [AM2629 TO LB727]

SENATOR CORNETT: Senator Fischer. [AM2629 TO LB727]

SENATOR FISCHER: Thank you, Senator Cornett. Thank you, Mr. Ingram, for being here. I think we have interconnected issues here. We're dealing with a concern by the

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federal government over liability, assuming liability of contractors and subcontractors. Would you agree with that? [AM2629 TO LB727]

THOMAS INGRAM: Yes, ma'am. [AM2629 TO LB727]

SENATOR FISCHER: Which then brings us into the tax issue here at the state of Nebraska with the subcontractors paying the taxes. Can you tell me, has the Corps done a project of this magnitude before? [AM2629 TO LB727]

THOMAS INGRAM: Not to my knowledge, ma'am. [AM2629 TO LB727]

SENATOR FISCHER: And do you believe that's what's bringing this issue to the forefront at this time, the cost of the project? [AM2629 TO LB727]

THOMAS INGRAM: Well, absolutely. Absolutely. For the most part, the projects that I've been associated with, if there's wiggle room of tens of thousands, hundreds of thousands, or even, you know, some small number of millions of dollars, it's able to be absorbed and it acts as no impediment to the project. This is the biggest one I've ever worked on. You know, half a billion dollars. And it is just the magnitude of that portion of cost that would be taxes that has raised this issue. [AM2629 TO LB727]

SENATOR FISCHER: You would agree with previous statements that the project would be delayed? [AM2629 TO LB727]

THOMAS INGRAM: Yes, ma'am. It already has been. [AM2629 TO LB727]

SENATOR FISCHER: It already has been. To what extent? [AM2629 TO LB727]

THOMAS INGRAM: I think my... [AM2629 TO LB727]

LARRY SAND: My name is Larry Sand, S-a-n-d. I'm the project manager for the Corps of Engineers, so I can answer some of those. It's been delayed by approximately four months so far. [AM2629 TO LB727]

SENATOR FISCHER: And if this was resolved, that the state, the Legislature would decide not to make any changes, what would the delay be for the entire project? What would your estimate be? [AM2629 TO LB727]

LARRY SAND: Let me stop and say, first off, let me caveat where we're at in the process, in the process of selecting contractors. We've received proposals in from contractors. It's in source selection. It's the best value, RFP-type. Because of that and where we are in the selection, it's quiet. We're all sworn to secrecy. We've all signed confidentiality. And so what I can say is somewhat limited. And so I may not be able to

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answer all your questions. [AM2629 TO LB727]

SENATOR FISCHER: I appreciate that. [AM2629 TO LB727]

THOMAS INGRAM: I'm his watchdog. (Laugh) [AM2629 TO LB727]

SENATOR FISCHER: And you will make sure that he doesn't. Yeah. [AM2629 TO LB727]

LARRY SAND: I can say that there are some overriding cost factors that have delayed the project, one of those being the state sales tax. This would help us resolve our overriding list of concerns. And, in fact, it would help us...some of the things that are on the table to be cut are some of the essential capabilities of the project itself, some of their key features. And if we would get this savings, we could forgo some of those other cuts. [AM2629 TO LB727]

SENATOR FISCHER: Have you seen this issue surface in other states? [AM2629 TO LB727]

LARRY SAND: I've worked quite a bit in Colorado and it's easy there. They have it written right in. We pay the local tax only and that's it. It's written right into their law. [AM2629 TO LB727]

SENATOR FISCHER: Okay. Thank you. And then just a clarification, sir, on your statement. In the third paragraph, where you say "No agency is authorized to make a contractor an agent of the government with agency..." Or should it be without? [AM2629 TO LB727]

THOMAS INGRAM: Yeah, and it should be without. That is a... [AM2629 TO LB727]

SENATOR FISCHER: So... [AM2629 TO LB727]

THOMAS INGRAM: I apologize for the error. [AM2629 TO LB727]

SENATOR FISCHER: Okay, thank you. So the Corps would have leeway to sign state forms with agency head review and approval. They just have chosen never to take that step, correct? [AM2629 TO LB727]

THOMAS INGRAM: That's correct. To the best of my knowledge it's never happened. And it has not happened because of people like me, but much higher up in the food chain, have said that the liability issues make that unwise. [AM2629 TO LB727]

LARRY SAND: No, I know there is another military project that was on Offutt and they

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took this tack. Instead of coming to the state Legislature, they worked it back through our headquarters all the way to D.C., and they got as far as they could. Our headquarters said no, you will not sign...you will not designate them an agent of the government. That killed it from that perspective. [AM2629 TO LB727]

SENATOR FISCHER: So even though the provision is in law, the Corps chooses not to take that route. Is that correct? [AM2629 TO LB727]

LARRY SAND: Correct. [AM2629 TO LB727]

SENATOR FISCHER: Okay. Thank you. [AM2629 TO LB727]

LARRY SAND: And that's from on high. [AM2629 TO LB727]

THOMAS INGRAM: And because we've attempted it before and it has not yielded us... [AM2629 TO LB727]

SENATOR FISCHER: So the Corps or the federal government would rather the state make changes than they make any changes in their operating procedure. Is that correct? [AM2629 TO LB727]

THOMAS INGRAM: I can only speak for the Corps of Engineers who...and the Omaha district, at that. We've attempted to avail ourselves as the FAR directs us of the exemptions that are allowed. But the only vehicle to avail ourselves of it is one that our hierarchy will not allow us to pursue. [AM2629 TO LB727]

SENATOR FISCHER: Has there ever been a problem with liability in the past on any projects where the contractors or subcontractors are held liable for any construction mistakes that may happen? Any accidents? I'm just asking because the Corps obviously is very concerned about liability. So has there been major liability problems in the past that they're trying to avoid? [AM2629 TO LB727]

THOMAS INGRAM: Well, I know that accidents, you know, have happened. The contractors, you know, have, you know, caused damage. And we have effectively been able to avoid liability because we've maintained that arm's length relationship. I think what people are afraid of is if you open the door to making your contractor your agent for any purpose, that you start to erode or diminish that arm's length distance, and then it becomes easier for them to say, well, I was acting on your behalf and therefore you should share or have all of the liability. And we don't want to...institutionally we would not want to take that first step. [AM2629 TO LB727]

SENATOR FISCHER: Does the Corps do inspections... [AM2629 TO LB727]

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THOMAS INGRAM: Oh, yes, ma'am. [AM2629 TO LB727]

SENATOR FISCHER: ...of the contractors? But then they are not held liable even though they're doing inspections as the project moves along? Since you don't sign the forms, then you're not liable if there's a problem after you approve a certain segment of a project. If the Corps approves it, it's still the contractor who is ultimately liable if there's a problem? [AM2629 TO LB727]

THOMAS INGRAM: That's governed by the contract and so that would control the acceptance of pieces and also the acceptance of some material submittals, those kinds of things. But those are strictly contractual issues. [AM2629 TO LB727]

SENATOR FISCHER: Okay, thank you. [AM2629 TO LB727]

SENATOR CORNETT: One moment. Very quickly, with the agreement that we think that we have in regards to stipulating on the form for the Department of Revenue and then with the amendment language on agent that we have talked about, do you believe that you would be able to move forward with the project? [AM2629 TO LB727]

THOMAS INGRAM: Yes, ma'am. [AM2629 TO LB727]

SENATOR CORNETT: Senator Brasch, then Senator Schumacher. [AM2629 TO LB727]

SENATOR BRASCH: That was my question. It seemed like we were, Chairman... [AM2629 TO LB727]

SENATOR CORNETT: Oh. No, we can move forward with what we have proposed. Senator Schumacher. [AM2629 TO LB727]

SENATOR SCHUMACHER: Just one quick question, 48 C.F.R. Part 29, I guess is what we're talking about. That applies not only to the Corps but to all federal agencies, doesn't it? [AM2629 TO LB727]

THOMAS INGRAM: If you're talking about the Competition in Contracting Act and the... [AM2629 TO LB727]

LARRY SAND: No, the FAR itself. [AM2629 TO LB727]

SENATOR SCHUMACHER: We're talking about... [AM2629 TO LB727]

THOMAS INGRAM: ...(inaudible) enabled in the FAR? [AM2629 TO LB727]

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SENATOR SCHUMACHER: Yeah. Or I guess they call it the FAR but I think technically it's 48 in the code of federal...or Chapter 48 in the Code of Federal Regulations I think. That applies to all federal agencies? [AM2629 TO LB727]

THOMAS INGRAM: Certainly the executive. [AM2629 TO LB727]

SENATOR SCHUMACHER: Okay. And this is a half-billion-dollar project. Certainly the federal government has done half-billion-dollar projects before. [AM2629 TO LB727]

THOMAS INGRAM: Well, I'm certain they have, and especially in the defense realm. It's just that things like Cheyenne Mountain or, you know, the initial missile fields and like that. Those predate me and I don't know necessarily that, you know, anything that was decided then bears on my current reality, which is what my chain of supervision tells me to allow. [AM2629 TO LB727]

SENATOR SCHUMACHER: Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Just a quick follow-up to Senator Schumacher, and we are on a very limited time frame, that a lot of those projects that reached those dollar amounts may be in states like Colorado which do not tax except the local tax, or no tax at all, such as Maryland. Am I correct? [AM2629 TO LB727]

THOMAS INGRAM: Yes, ma'am. [AM2629 TO LB727]

SENATOR CORNETT: So there are...to be clear, there are states that do not tax these or tax them at a much reduced rate. Correct? [AM2629 TO LB727]

THOMAS INGRAM: Yes, ma'am. [AM2629 TO LB727]

SENATOR CORNETT: Senator Hadley. [AM2629 TO LB727]

SENATOR HADLEY: Senator Cornett, thank you. Just a quick question that I asked the General earlier. If it's a \$281 million and you had paid the tax in the past, in capital budgeting wouldn't you have included the sales tax then in that estimate? In capital budgeting, you try to get all your costs involved in there, and this isn't Colorado so you know what Nebraska's laws are. Wouldn't you have included the sales tax in your estimates? [AM2629 TO LB727]

LARRY SAND: It was included in the estimates coming forward. However, we're in a little different situation when you actually open prices and see... [AM2629 TO LB727]

SENATOR HADLEY: Well, I would guess what we're talking about here is you have the cost of the contracts are higher than you expect. And what you're looking for is, and

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we've got to be willing to help, you're looking places to find money to cut the contract is basically what it boils down to. Is that a fair statement? [AM2629 TO LB727]

THOMAS INGRAM: Yes, sir. I mean I think we are saying or what I understand you to be saying is, yes, we're looking for ways to reduce the...both reduce the cost of the contract and to enable it to go forward. So we are looking for places to save money. And if we can enable our exemption from the sales tax then, yes, sir, that would help us go forward. [AM2629 TO LB727]

SENATOR HADLEY: Then it would be a fair statement, if the contracts would come in at what you had expected the bids to be, we wouldn't be here today then. Is that a fair statement? [AM2629 TO LB727]

THOMAS INGRAM: Probably so, sir. [AM2629 TO LB727]

SENATOR HADLEY: Okay. [AM2629 TO LB727]

SENATOR CORNETT: Further questions? Seeing none, thank you. Next proponent. Good afternoon, and welcome, General...or I'm sorry. Wrong person. [AM2629 TO LB727]

DAVID PRESS: Good afternoon. I started as a private so that's okay. [AM2629 TO LB727]

SENATOR CORNETT: I just gave you a promotion. [AM2629 TO LB727]

DAVID PRESS: I appreciate that. I'm Colonel David C. Press, P-r-e-s-s, and I am the chief of the Military Construction Division of the Program Management Office at the United States Strategic Command. And the PMO, the Program Management Office, is an organization that synchronizes all user requirements of the new Command and Control Facility, from design and construction and supervising security at the construction site, along with the design and installation of the command and control and information technology systems. And I'd like to thank Senator Ben Nelson and the Senate Armed Services Committee for their support to this project which will greatly improve our nation's deterrence capabilities. As you may know, the new Command and Control Facility for the United States Strategic Command is a unique capability for the nation. For 56 years, SAC and StratCom focused primarily on nuclear deterrence. For the past ten years, StratCom experienced exponential mission growth, currently executing 16 Secretary of Defense and Presidentially assigned missions, including nuclear deterrence, space and cyberspace operations, and global missile defense, among others. I appreciate this committee's consideration regarding this tax issue and the opportunity to be here today. Simply put, using funds that might otherwise be used for taxes will greatly enhance the mission assurance of the nation's most critical

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command and control systems. I'd be happy to answer any questions. [AM2629 TO LB727]

SENATOR CORNETT: From the previous testifiers... [AM2629 TO LB727]

DAVID PRESS: I beg your pardon, Senator. I forgot to tell the committee that I have a significant hearing problem; and one of my government-issued hearing aids failed me today, so I'm down to one, I apologize, after 33 years of wearing the uniform. [AM2629 TO LB727]

SENATOR CORNETT: I'll lean forward and try and speak a little louder. [AM2629 TO LB727]

DAVID PRESS: Thank you, ma'am. [AM2629 TO LB727]

SENATOR CORNETT: From the previous testifiers' statements that if we do not find a resolution to this issue, essential dollars, it would go back into the project, will be used for taxation purposes. Do you feel that those projects directly affect national defense? [AM2629 TO LB727]

DAVID PRESS: Absolutely. I do. The project...if those funds go back into the project, it will definitely help us with perhaps redundancies, additional redundancies, whether it's power, additional backup power, or cooling. We get the additional war fighting capability to keep this one-of-a-kind mission or this facility running for the missions that we have. Yes. So I agree. [AM2629 TO LB727]

SENATOR CORNETT: Thank you. Senator Pirsch. [AM2629 TO LB727]

SENATOR PIRSCH: I'm trying to get a sense of how...you know, there's obviously the BRAC has been in existence and that there's a competitive kind of framework here. The federal dollars are probably going to grow tighter, not looser. And so could you comment on, as your...does this have any bearing at all in a larger sense in terms of making StratCom a potential place of growth in terms of federal projects, or is this neutral, pretty well, in that respect? [AM2629 TO LB727]

DAVID PRESS: Well, StratCom needs to be prepared for any future assignments from the SecDef and the President. This facility needs to be able to adjust to missions that we don't currently have. We've got 16 missions at this time. But if you just go back ten years, we were at one primary mission: nuclear deterrence. So yes, we need to be prepared to absorb additional missions. Did I answer your question or...? [AM2629 TO LB727]

SENATOR PIRSCH: Yeah. I'm trying to say...would this...does this help distinguish our

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state from other states that don't have a mechanism that you're going to be paying a little bit extra to locate your federal projects there? In other words, does this have repercussions for economic development for future federal projects for the state of Nebraska, or is it really in that sense not a big factor of consideration? [AM2629 TO LB727]

DAVID PRESS: Well, I learned a long time ago to stay in your lane. As the division chief of the Program Management Office, I can talk to you about anything in that particular regard. I'm not even going to speculate on that, so. [AM2629 TO LB727]

SENATOR CORNETT: How about I ask you a question that is somewhat related to what Senator Pirsch is asking, but more in your lane, so to speak. When the federal government looks at BRAC, they look at a number of things, a waterfall basically of items when they look at a base for base realignment and closure. And one of the things that they look at is the missions and the number of missions that they have at the base. Is that correct? [AM2629 TO LB727]

DAVID PRESS: That's correct. Yes, from my understanding, yes. [AM2629 TO LB727]

SENATOR CORNETT: Would it be, in your opinion, that this would help us in the future in that process? [AM2629 TO LB727]

DAVID PRESS: Of course. Yes. [AM2629 TO LB727]

SENATOR CORNETT: Thank you. Seeing no further questions, thank you. [AM2629 TO LB727]

DAVID PRESS: Thank you very much. [AM2629 TO LB727]

SENATOR CORNETT: Are there any further testifiers? Senator Mello, you are recognized. Oh, I'm sorry I forgot the most important for the state. Commissioner Ewald. You didn't move quick enough. Just to remind the members of the committee, we can speak to the commissioner after we check in, but we do have to be on the floor of the Legislature by about 1:35. [AM2629 TO LB727]

DOUG EWALD: (Exhibit 6) Thank you, Chairwoman Cornett and members of the Revenue Committee. My name is Doug Ewald, E-w-a-l-d, Tax Commissioner of the Department of Revenue. I appear before you today in a neutral capacity to briefly highlight Nebraska law on this issue. The federal government is not subject to state or local sales tax. This is a longstanding and well-recognized legal principle. The federal government may always purchase building materials directly from a supplier and those purchases would be exempt from sales and use tax. The federal government would simply provide the supplier a Form 13, which is an exemption sales certificate, when

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making the purchase. The Form 13 is necessary in case the supplier is ever audited by the department. They need to be able to document why they did not collect sales tax on the purchase. Alternatively, the federal government may also issue a purchasing agency appointment. That's Form 17. You've heard a lot of testimony on that today. And that would be given to a contractor or subcontractor for the purpose of exempting from sales and use tax purchases made by the contractor or subcontractor for use on the federal project. Historically, the federal government has chosen not to appoint contractors as purchasing agents for construction projects in Nebraska. As a result, Option 2 and Option 3 contractors, which are the vast majority of all contractors in Nebraska, are considered under Nebraska law to be the consumers of all building materials they purchase, even if the purchase is made for use in a federal project. Without the federal government's appointment of a contractor as a purchasing agent, Option 2 and Option 3 contractors are required to pay the tax on all purchases of building materials. That's Nebraska Revised Statute 77-2701.10. There are also two U.S. Supreme Court cases on point on this issue that's been handed down, like I say, twice--once in 1941 and once in 1982. The federal government may purchase all building materials tax-free by purchasing materials directly using the Form 13 or appointing a purchasing agent using the Form 17. Now that being said, there's been a lot of testimony today. I know there's an amendment that was originally drafted to AM2629. There's some other language we've spoken about here that may work as well. I guess I would maybe entertain an option here of working with the Corps on a Form 17 that specifically designate...that they could sign that specifically designates a purchasing agent for the limited purposes of securing the sales and use tax exemption. No other liability, just the sales and use tax with respect to the project. I think that might be a little more straightforward than going in and changing a law. We're dealing with a proposed amendment right now that are we going to have time to adequately vet out from that standpoint and make sure we've dotted all the i's and crossed all the t's, but I would be interested if the Corps would be willing to work with us on this as opposed to changing the law with respect with that particular issue. With that, that concludes my testimony and I'd be more than happy to address any questions. [AM2629 TO LB727]

SENATOR CORNETT: Commissioner Ewald, I just want to reiterate on the record that the discussions between yourself, myself, and the Corps, that currently if we go in and stipulate on the form to what they are liable for and what you agree that this is just simply for the purpose of tax exemption from sales tax exemption, that we can move forward, and then we can look at the language...we have the language drafted that defines what agent is for the purpose of federal projects. Correct? [AM2629 TO LB727]

DOUG EWALD: Yes. I mean if we change the Form 17 to like a Form 17-G, have that option out there for them specifically. And I just need the purchasing agent appointment. As long as it satisfies the need that it limits their liability, I just...we just need the PAA from that standpoint. That's all we're really concerned about. If they're comfortable that the form would limit all other liability and we can specifically draft it that way, I'm

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completely comfortable with that. [AM2629 TO LB727]

SENATOR CORNETT: Senator Schumacher, then Senator Hadley. [AM2629 TO LB727]

SENATOR SCHUMACHER: Is there any regulation that prescribes this form that you have to go through a regulatory process, or is this just a form that's been promulgated under the department's general authority? [AM2629 TO LB727]

DOUG EWALD: This would be under our general authority. There's a statute in regulation that allows us to come up with these forms to administer the revenue statutes of the state. [AM2629 TO LB727]

SENATOR SCHUMACHER: Thank you. [AM2629 TO LB727]

SENATOR CORNETT: Senator Hadley. [AM2629 TO LB727]

SENATOR HADLEY: Just a quick point. I did spend some time looking at the state of Kansas, and they have a very interesting form where they exempt the federal government, and come up with a...and I guess next year I would hope we'll look at something like this, because obviously if we grant this exemption here, what the federal government is going to be in next year... [AM2629 TO LB727]

SENATOR CORNETT: Senator... [AM2629 TO LB727]

SENATOR HADLEY: You know, if they're going to build something someplace else, they're going to say, you know... [AM2629 TO LB727]

SENATOR CORNETT: Senator Hadley, the amendment that we are working on right now is based on Kansas's language. [AM2629 TO LB727]

SENATOR HADLEY: On Kansas language. Great minds must think alike. [AM2629 TO LB727]

SENATOR CORNETT: Senator Fischer. [AM2629 TO LB727]

SENATOR FISCHER: Thank you, Senator Cornett. Mr. Ewald, so you're suggesting we don't have an amendment. We do nothing statutorily this year and you'll be able to handle it hopefully with the Corps on the form. Is that right? [AM2629 TO LB727]

DOUG EWALD: Well, we would...I guess that would be maybe after reading the amendment and seeing...it is fairly broad from that standpoint and we are late in the game obviously from that perspective. I mean we're more than happy to work with the

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Corps and say, okay, if we can get a form that does this, this, and this, are you comfortable with that limits your liability from that perspective. Because like I say, as long as they're comfortable, I'm comfortable, because I just need the PAA. [AM2629 TO LB727]

SENATOR FISCHER: Thanks. [AM2629 TO LB727]

SENATOR CORNETT: Immediately adjourning we'll discuss that to make sure before we move forward with the bill. [AM2629 TO LB727]

DOUG EWALD: All right. Very good. [AM2629 TO LB727]

SENATOR CORNETT: Seeing no further questions, is there anyone else in a neutral capacity? Seeing none, Senator Mello. [AM2629 TO LB727]

SENATOR MELLO: Quickly. [AM2629 TO LB727]

SENATOR CORNETT: Quickly. Yes. [AM2629 TO LB727]

SENATOR MELLO: Thank you, Chairwoman Cornett, and thank you, members of the Revenue Committee, for spending your lunch hour today in going over this important tax and national security issue. As you just heard from Commissioner Ewald, as well as Senator Cornett, ultimately AM2629, which was based roughly on the Colorado state law regarding tax exemptions for federal government projects, we've discussed prior to the hearing today of looking at an alternative amendment that Senator Cornett mentioned and just discussed briefly with Commissioner Ewald which clarifies in statute liability issues, more than anything else as it regards to a purchasing agent. Commissioner Ewald and the Department of Revenue have offered, obviously, to work on the administrative end as well. Hopefully we can find some resolution to this issue prior to the advancement of LB727 later this afternoon. But I could only impress upon the committee that this issue, at the end of the day, deals...as Senator Hadley had mentioned to some extent, it's a tax policy issue. But as you've heard from the General as well as from the Colonel, as well as the Corps, this is also a national security issue that ultimately is at stake. It's not purely the construction of a building and having a significant economic impact in Nebraska. This has a significant national security effect on the future of StratCom as well as the opportunity to help ensure that the Strategic Air Command is BRAC-proof hopefully in the future as we move forward. So with that, I'd like to thank again Senator Cornett and her office for all of their work not just on AM2629 but fostering collaboration with the Department of Revenue as well as Senator Nelson's office for bringing this issue forward and being a partner in trying to find a solution that works both for the state and the federal government. Thank you, Madam Chair. [AM2629 TO LB727]

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SENATOR CORNETT: Thank you, Senator Mello. With that we are adjourned. [AM2629 TO LB727]