

SENATE BILL NO. 491—COMMITTEE ON GOVERNMENT AFFAIRS

(ON BEHALF OF THE PUBLIC WORKS BOARD)

MARCH 24, 2003

Referred to Committee on Government Affairs

SUMMARY—Makes various changes regarding bidding on contracts for public works of this state. (BDR 28-487)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

~

EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to public works; requiring certain subcontractors to become qualified to be subcontractors on contracts for public works; providing that those subcontractors are presumed to be qualified except under certain circumstances; authorizing the Board to disqualify subcontractors under certain circumstances; providing for a process to appeal such a disqualification; revising the criteria that the Board is required to adopt for the qualification of bidders on contracts for public works; authorizing the Board and the governing body of a local government to issue subpoenas relating to hearings on denials of applications for qualification to bid on or be subcontractors on contracts for public works; specifying the burden of proof in such hearings; revising the provisions governing the awarding of design-build contracts; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:



* S B 4 9 1 R 3 *

1 **Section 1.** Chapter 338 of NRS is hereby amended by adding
2 thereto a new section to read as follows:

3 1. *Each subcontractor whose name is required to be included*
4 *in a bid pursuant to NRS 338.141 must, to be eligible to provide*
5 *labor or a portion of the work or improvement to a contractor to*
6 *whom the State Public Works Board awards a contract pursuant*
7 *to this chapter, be qualified in accordance with criteria established*
8 *by regulation by the State Public Works Board. The criteria*
9 *established by the State Public Works Board pursuant to this*
10 *subsection must be made applicable to a subcontractor but must*
11 *otherwise be substantively identical to the criteria set forth in*
12 *paragraph (b) of subsection 3 of NRS 338.1375.*

13 2. *A subcontractor shall be presumed to be qualified pursuant*
14 *to subsection 1 unless the State Public Works Board has received*
15 *information that:*

16 (a) *The State Public Works Board determines to be sufficient*
17 *and verifiable; and*

18 (b) *Indicates the subcontractor does not meet the criteria*
19 *established by regulation pursuant to subsection 1.*

20 3. *Upon receipt of sufficient and verifiable information of a*
21 *type described in subsection 2, the State Public Works Board shall*
22 *require a subcontractor regarding whom such information is*
23 *received to submit to the State Public Works Board, on a form*
24 *prescribed by the State Public Works Board, an application for*
25 *qualification in accordance with the criteria established by*
26 *regulation pursuant to subsection 1. After receiving such an*
27 *application, the State Public Works Board shall determine*
28 *whether the subcontractor is qualified in accordance with the*
29 *criteria established by regulation pursuant to subsection 1. Except*
30 *as otherwise provided in subsection 4, if the State Public Works*
31 *Board determines that the subcontractor does not meet such*
32 *criteria, the State Public Works Board may disqualify the*
33 *subcontractor, for a period set by the State Public Works Board,*
34 *from participating in public works projects which are sponsored*
35 *by the State Public Works Board. The State Public Works Board*
36 *shall provide written notice to the subcontractor of any such*
37 *disqualification.*

38 4. *A subcontractor may appeal a disqualification pursuant to*
39 *subsection 3 in the manner set forth in NRS 338.1381.*

40 **Sec. 2.** NRS 338.1373 is hereby amended to read as follows:

41 338.1373 1. A local government shall award a contract for
42 the construction, alteration or repair of a public work pursuant to the
43 provisions of:

44 (a) NRS 338.1377 to 338.139, inclusive; or

45 (b) NRS 338.143 to 338.148, inclusive.



1 2. The provisions of NRS 338.1375 to 338.1383, inclusive, *and*
2 *section 1 of this act* and 338.139 do not apply with respect to
3 contracts for the construction, reconstruction, improvement and
4 maintenance of highways that are awarded by the Department of
5 Transportation pursuant to NRS 408.313 to 408.433, inclusive.

6 **Sec. 3.** NRS 338.1375 is hereby amended to read as follows:

7 338.1375 1. The State Public Works Board shall not accept a
8 bid on a contract for a public work unless the person who submits
9 the bid has qualified pursuant to NRS 338.1379 to bid on that
10 contract.

11 2. The State Public Works Board shall by regulation adopt
12 criteria for the qualification of bidders on contracts for public works
13 of this state. The criteria adopted by the State Public Works Board
14 pursuant to this section must be used by the State Public Works
15 Board to determine the qualification of bidders on contracts for
16 public works of this state.

17 3. The criteria adopted by the State Public Works Board
18 pursuant to this section:

19 (a) Must be adopted in such a form that the determination of
20 whether an applicant is qualified to bid on a contract for a public
21 work does not require or allow the exercise of discretion by any one
22 person.

23 (b) May include only:

24 (1) The financial ability of the applicant to perform a
25 contract;

26 (2) The principal personnel of the applicant;

27 (3) Whether the applicant has breached any contracts with a
28 public agency or person in this state or any other state;

29 (4) Whether the applicant has been disqualified from being
30 awarded a contract pursuant to NRS 338.017 or 338.1387; ~~and~~

31 (5) The performance history of the applicant concerning
32 other recent, similar contracts, if any, completed by the applicant ~~;~~
33 *; and*

34 (6) *The truthfulness and completeness of the application.*

35 **Sec. 4.** NRS 338.1381 is hereby amended to read as follows:

36 338.1381 1. If, within 10 days after receipt of the notice
37 denying ~~his application,~~ *an application pursuant to NRS*
38 *338.1379 or disqualifying a subcontractor pursuant to section 1 of*
39 *this act*, the applicant *or subcontractor, as applicable*, files a
40 written request for a hearing with the State Public Works Board or
41 the governing body of the local government, the Board or governing
42 body shall set the matter for a hearing within ~~10~~ *20* days after
43 receipt of the request. The hearing must be held not later than ~~20~~
44 *45* days after the receipt of the request for a hearing ~~;~~ *unless the*
45 *parties, by written stipulation, agree to extend the time.*



1 2. The hearing must be held at a time and place prescribed by
2 the Board or governing body. At least 10 days before the date set for
3 the hearing, the Board or governing body shall serve the applicant
4 *or subcontractor* with written notice of the hearing. The notice may
5 be served by personal delivery to the applicant *or subcontractor* or
6 by certified mail to the last known business or residential address of
7 the applicant ~~or~~ *or subcontractor*.

8 3. *The applicant or subcontractor has the burden at the*
9 *hearing of proving by substantial evidence that the applicant is*
10 *entitled to be qualified to bid on a contract for a public work, or*
11 *that the subcontractor is qualified to be a subcontractor on a*
12 *contract for a contract for a public work.*

13 4. *In conducting a hearing pursuant to this subsection, the*
14 *Board or the governing body of a local government may:*

15 (a) *Administer oaths;*

16 (b) *Take testimony;*

17 (c) *Issue subpoenas to compel the attendance of witnesses to*
18 *testify before the Board or governing body;*

19 (d) *Require the production of related books, papers and*
20 *documents; and*

21 (e) *Issue commissions to take testimony.*

22 5. *If a witness refuses to attend or testify or produce books,*
23 *papers or documents as required by the subpoena issued pursuant*
24 *to subsection 4, the Board or governing body may petition the*
25 *district court to order the witness to appear or testify or produce*
26 *the requested books, papers or documents.*

27 6. The Board or governing body shall issue a decision on the
28 matter within 5 days after the hearing and notify the applicant, in
29 writing, of its decision within ~~5~~ *15* days after it is issued. The
30 decision of the Board or governing body is a final decision for
31 purposes of judicial review.

32 **Sec. 5.** NRS 338.1387 is hereby amended to read as follows:

33 338.1387 1. A public body awarding a contract for a public
34 work shall not award the contract to a person who, at the time of the
35 bid, is not properly licensed under the provisions of chapter 624 of
36 NRS or if the contract would exceed the limit of his license. A
37 subcontractor named by the contractor who is not properly licensed
38 for that portion of the work *, or who, at the time of the bid, is on*
39 *disqualified status with the State Public Works Board pursuant to*
40 *section 1 of this act*, shall be deemed unacceptable. If the
41 subcontractor is deemed unacceptable, the contractor shall provide
42 an acceptable subcontractor before the award of the contract.

43 2. If, after awarding the contract, the public body discovers that
44 the person to whom the contract was awarded is not licensed, or
45 that the contract would exceed his license, the public body shall



1 reject the bid and may accept the next lowest bid for that public
2 work from a responsive bidder who was determined by the public
3 body to be a qualified bidder pursuant to NRS 338.1379 or was
4 exempt from meeting such qualifications pursuant to NRS 338.1373
5 or 338.1383 without requiring that new bids be submitted.

6 **Sec. 6.** NRS 338.139 is hereby amended to read as follows:

7 338.139 1. A public body may award a contract for the
8 construction, alteration or repair of a public work pursuant to NRS
9 338.1375 to 338.1389, inclusive, to a specialty contractor if:

10 (a) The majority of the work to be performed on the project to
11 which the contract pertains consists of specialty contracting for
12 which the specialty contractor is licensed; and

13 (b) The project to which the contract pertains is not part of a
14 larger public work.

15 2. If a public body awards a contract to a specialty contractor
16 pursuant to NRS 338.1375 to 338.1389, inclusive, all work to be
17 performed on the project to which the contract pertains that is
18 outside the scope of the license of the specialty contractor must be
19 performed by a subcontractor who ~~is~~ :

20 (a) *Is licensed to perform such work ~~is~~; and*

21 (b) *At the time of the performance of the work, is not on*
22 *disqualified status with the State Public Works Board pursuant to*
23 *section 1 of this act.*

24 **Sec. 7.** NRS 338.141 is hereby amended to read as follows:

25 338.141 1. Except as otherwise provided in subsection 2 ~~is~~
26 *and NRS 338.1727*, each bid submitted to any officer, department,
27 board or commission for the construction of any public work or
28 improvement must include:

29 (a) The name of each subcontractor who will provide labor or a
30 portion of the work or improvement to the contractor for which he
31 will be paid an amount exceeding 5 percent of the prime
32 contractor's total bid. Within 2 hours after the completion of the
33 opening of the bids, the contractors who submitted the three lowest
34 bids must submit a list containing the name of each subcontractor
35 who will provide labor or a portion of the work or improvement to
36 the contractor for which he will be paid an amount exceeding 1
37 percent of the prime contractor's total bid or \$50,000, whichever is
38 greater, and the number of the license issued to the subcontractor
39 pursuant to chapter 624 of NRS. ~~is~~ *Except as otherwise provided*
40 *in this paragraph, if a contractor ~~fails~~ :*

41 (1) *Fails to submit ~~such a~~ the list within the required time*
42 *~~is~~; or*

43 (2) *Submits a list that includes the name of a subcontractor*
44 *who, at the time of the submission of the list, is on disqualified*



1 *status with the State Public Works Board pursuant to section 1 of*
2 *this act,*
3 *the contractor's bid shall be deemed not responsive. A contractor's*
4 *bid shall not be deemed not responsive on the grounds that the*
5 *contractor submitted a list that includes the name of a*
6 *subcontractor who, at the time of the submission of the list, is on*
7 *disqualified status with the State Public Works Board pursuant to*
8 *section 1 of this act if the contractor, before the award of the*
9 *contract, provides an acceptable replacement subcontractor in the*
10 *manner set forth in subsection 1 of NRS 338.1387.*

11 (b) A description of the portion of the work or improvement
12 which each subcontractor named in the bid will complete.

13 2. The contractor shall list in his bid pursuant to subsection 1
14 the name of a subcontractor for each portion of the project that will
15 be completed by a subcontractor.

16 3. A contractor whose bid is accepted shall not substitute any
17 person for a subcontractor who is named in the bid, unless:

18 (a) The awarding authority objects to the subcontractor, requests
19 in writing a change in the subcontractor and pays any increase in
20 costs resulting from the change; or

21 (b) The substitution is approved by the awarding authority or an
22 authorized representative of the awarding authority. The substitution
23 must be approved if the awarding authority or authorized
24 representative of the awarding authority determines that:

25 (1) The named subcontractor, after having a reasonable
26 opportunity, fails or refuses to execute a written contract with the
27 contractor which was offered to the subcontractor with the same
28 general terms that all other subcontractors on the project were
29 offered;

30 (2) The named subcontractor files for bankruptcy or becomes
31 insolvent; or

32 (3) The named subcontractor fails or refuses to perform his
33 subcontract within a reasonable time or is unable to furnish a
34 performance bond and payment bond pursuant to NRS 339.025.

35 4. As used in this section, "general terms" means the terms and
36 conditions of a contract that set the basic requirements for a project
37 and apply without regard to the particular trade or specialty of a
38 subcontractor, but does not include any provision that controls or
39 relates to the specific portion of the project that will be completed
40 by a subcontractor, including, without limitation, the materials to be
41 used by the subcontractor or other details of the work to be
42 performed by the subcontractor.

43 **Sec. 8.** NRS 338.1721 is hereby amended to read as follows:

44 338.1721 To qualify to participate in a project for the design
45 and construction of a public work, a design-build team must:



- 1 1. Obtain a performance bond and payment bond as required
- 2 pursuant to NRS 339.025;
- 3 2. Obtain insurance covering general liability and liability for
- 4 errors and omissions;
- 5 3. Not have been found liable for breach of contract with
- 6 respect to a previous project, other than a breach for legitimate
- 7 cause;
- 8 4. Not have been disqualified from being awarded a contract
- 9 pursuant to NRS 338.017, 338.1387, 338.145 or 408.333; ~~and~~
- 10 5. Ensure that the members of the design-build team possess
- 11 the licenses and certificates required to carry out the functions of
- 12 their respective professions within this state ~~and~~; *and*
- 13 *6. If the project is for the design and construction of a public*
- 14 *work of the State, ensure that the prime contractor is qualified to*
- 15 *bid on a public work of the State pursuant to NRS 338.1379.*
- 16 **Sec. 9.** NRS 338.1723 is hereby amended to read as follows:
- 17 338.1723 1. A public body shall advertise for preliminary
- 18 proposals for the design and construction of a public work by a
- 19 design-build team in a newspaper of general circulation in this state.
- 20 2. A request for preliminary proposals published pursuant to
- 21 subsection 1 must include, without limitation:
- 22 (a) A description of the public work to be designed and
- 23 constructed;
- 24 (b) Separate estimates of the costs of designing and constructing
- 25 the public work;
- 26 (c) The dates on which it is anticipated that the separate phases
- 27 of the design and construction of the public work will begin and
- 28 end;
- 29 (d) The date by which preliminary proposals must be submitted
- 30 to the public body, which must not be less than 30 days after the
- 31 date that the request for preliminary proposals is first published in a
- 32 newspaper pursuant to subsection 1; ~~and~~
- 33 (e) A statement setting forth the place and time in which a
- 34 design-build team desiring to submit a proposal for the public work
- 35 may obtain the information necessary to submit a proposal,
- 36 including, without limitation, the information set forth in subsection
- 37 3 ~~and~~; *and*
- 38 *(f) If the proposal is for a public work of the State, a statement*
- 39 *setting forth that the prime contractor must be qualified to bid on*
- 40 *a public work of the State pursuant to NRS 338.1379 before*
- 41 *submitting a preliminary proposal.*
- 42 3. A public body shall maintain at the time and place set forth
- 43 in the request for preliminary proposals the following information
- 44 for inspection by a design-build team desiring to submit a proposal
- 45 for the public work:



- 1 (a) The extent to which designs must be completed for both
- 2 preliminary and final proposals and any other requirements for the
- 3 design and construction of the public work that the public body
- 4 determines to be necessary;
- 5 (b) A list of the requirements set forth in NRS 338.1721;
- 6 (c) A list of the factors that the public body will use to evaluate
- 7 design-build teams who submit a proposal for the public work,
- 8 including, without limitation:
 - 9 (1) The relative weight to be assigned to each factor pursuant
 - 10 to NRS 338.1727; and
 - 11 (2) A disclosure of whether the factors that are not related to
 - 12 cost are, when considered as a group, more or less important in the
 - 13 process of evaluation than the factor of cost;
- 14 (d) Notice that a design-build team desiring to submit a proposal
- 15 for the public work must include with its proposal the information
- 16 used by the public body to determine finalists among the design-
- 17 build teams submitting proposals pursuant to subsection 2 of NRS
- 18 338.1725 and a description of that information;
- 19 (e) A statement that a design-build team whose prime contractor
- 20 holds a certificate of eligibility to receive a preference in bidding on
- 21 public works issued pursuant to NRS 338.1389 or 338.147 should
- 22 submit a copy of the certificate of eligibility with its proposal; and
- 23 (f) A statement as to whether a design-build team that is selected
- 24 as a finalist pursuant to NRS 338.1725 but is not awarded the
- 25 design-build contract pursuant to NRS 338.1727 will be partially
- 26 reimbursed for the cost of preparing a final proposal and, if so, an
- 27 estimate of the amount of the partial reimbursement.

28 **Sec. 10.** NRS 338.1727 is hereby amended to read as follows:
29 338.1727 1. After selecting the finalists pursuant to NRS
30 338.1725, the public body shall provide to each finalist a request for
31 final proposals for the public work. The request for final proposals
32 must:

- 33 (a) Set forth the factors that the public body will use to select a
- 34 design-build team to design and construct the public work, including
- 35 the relative weight to be assigned to each factor; and
- 36 (b) Set forth the date by which final proposals must be
- 37 submitted to the public body.

38 2. *If one or more of the finalists selected pursuant to NRS*
39 *338.1725 is disqualified or withdraws, the public body may select a*
40 *design-build team from the remaining finalists if at least two*
41 *finalists remain.*

42 3. Except as otherwise provided in this subsection, in assigning
43 the relative weight to each factor for selecting a design-build team
44 pursuant to subsection 1, the public body shall assign, without
45 limitation, a relative weight of 5 percent to the possession of a



1 certificate of eligibility to receive a preference in bidding on public
2 works and a relative weight of at least 30 percent to the proposed
3 cost of design and construction of the public work. If any federal
4 statute or regulation precludes the granting of federal assistance or
5 reduces the amount of that assistance for a particular public work
6 because of the provisions of this subsection relating to preference in
7 bidding on public works, those provisions of this subsection do not
8 apply insofar as their application would preclude or reduce federal
9 assistance for that public work.

10 ~~[3.]~~ 4. A final proposal submitted by a design-build team
11 pursuant to this section must be prepared thoroughly ~~[.]~~ and be
12 responsive to the criteria that the public body will use to select a
13 design-build team to design and construct the public work described
14 in subsection 1 . ~~[and comply with the provisions]~~ *A final proposal*
15 *is exempt from the requirements* of NRS 338.141.

16 ~~[4.]~~ 5. After receiving the final proposals for the public work,
17 the public body shall:

18 (a) Select the most cost-effective and responsive final proposal,
19 using the criteria set forth pursuant to subsections 1 and ~~[2.]~~ 3; or

20 (b) Reject all the final proposals.

21 ~~[5.]~~ 6. If a public body selects a final proposal pursuant to
22 paragraph (a) of subsection ~~[4.]~~ 5, the public body shall, at its next
23 regularly scheduled meeting:

24 (a) Review and ratify the selection.

25 (b) Award the design-build contract to the design-build team
26 whose proposal is selected.

27 (c) Partially reimburse the unsuccessful finalists if partial
28 reimbursement was provided for in the request for preliminary
29 proposals pursuant to paragraph (f) of subsection 3 of NRS
30 338.1723. The amount of reimbursement must not exceed, for each
31 unsuccessful finalist, 3 percent of the total amount to be paid to the
32 design-build team as set forth in the design-build contract.

33 (d) Make available to the public a summary setting forth the
34 factors used by the public body to select the successful design-build
35 team and the ranking of the design-build teams who submitted final
36 proposals. The public body shall not release to a third party, or
37 otherwise make public, financial or proprietary information
38 submitted by a design-build team.

39 ~~[6.]~~ 7. A contract awarded pursuant to this section:

40 (a) Must specify:

41 (1) An amount that is the maximum amount that the public
42 body will pay for the performance of all the work required by the
43 contract, excluding any amount related to costs that may be incurred
44 as a result of unexpected conditions or occurrences as authorized by
45 the contract;



1 (2) An amount that is the maximum amount that the public
2 body will pay for the performance of the professional services
3 required by the contract; and

4 (3) A date by which performance of the work required by the
5 contract must be completed.

6 (b) May set forth the terms by which the design-build team
7 agrees to name the public body, at the cost of the public body, as an
8 additional insured in an insurance policy held by the design-build
9 team.

10 (c) Except as otherwise provided in paragraph (d), must not
11 require the design professional to defend, indemnify or hold
12 harmless the public body or the employees, officers or agents of that
13 public body from any liability, damage, loss, claim, action or
14 proceeding caused by the negligence, errors, omissions, recklessness
15 or intentional misconduct of the employees, officers and agents of
16 the public body.

17 (d) May require the design-build team to defend, indemnify and
18 hold harmless the public body, and the employees, officers and
19 agents of the public body from any liabilities, damages, losses,
20 claims, actions or proceedings, including, without limitation,
21 reasonable attorneys' fees, that are caused by the negligence, errors,
22 omissions, recklessness or intentional misconduct of the design-
23 build team or the employees or agents of the design-build team in
24 the performance of the contract.

25 ~~7.1~~ 8. Any provision of a contract that is in violation of
26 paragraph (c) of subsection ~~6.1~~ 7 is declared to be contrary to the
27 public policy of this state and is void.

28 ~~8.1~~ 9. A design-build team to whom a contract is awarded
29 pursuant to this section shall:

30 (a) Assume overall responsibility for ensuring that the design
31 and construction of the public work is completed in a satisfactory
32 manner; and

33 (b) Use the workforce of the prime contractor on the design-
34 build team to construct at least 15 percent of the public work.

35 **Sec. 11.** This act becomes effective upon passage and
36 approval.

