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PUBLIC WORKS BOARD

April 3, 2003

Senator Ann O'Connell, Chairman
Senate Committee on Government Affairs
Nevada State Legislature
Capitol Complex, Carson City, Nevada

Subject: Testimony on SB 491, Qualification of Bidders Process

Dear Chairman O'Connell and Members of the Committee:

I am writing you today to explain and request support for the passage of Senate Bill No. 491. The intent of this bill is to help the State facilitate successful construction projects. As the Manager of the State agency that is responsible for the construction of millions of dollars worth of State facilities, it is very important to me that we have all the tools necessary to successfully complete our projects on time, within budget and in the most cost efficient manner. One of those tools is the Qualification of Bidders provision of NRS 338.1375.

Currently, as adopted, the Qualification of Bidders provisions of NRS do not require that subcontractors who work for the General Contractor on State construction projects be qualified through the State's Qualification of Bidders process. The first items contained within this bill propose changes to NRS 338.1375 regarding including subcontractors in the State's pre-qualification process. The remaining proposed changes provide for the clarification of the process's requirements and provides for a more efficient operation and processing of the Qualification of Bidders applications.

There are five general areas relating to the pre-qualification of bidders that the SPWB believes needs to be addressed by statutory changes.

The first issue relates to the SPWB proposal that certain subcontractors be pre-qualified. **Section 1, Page 1, Line 5** relates to this issue. Currently, pursuant to NRS 338.1375(1), only the "Bidder" (the prime contractor) must be pre-qualified to bid on public works projects. The SPWB was requesting that a prime contractor must be required to use only pre-qualified subcontractors, under certain conditions, when submitting a bid. The SPWB believed that subcontractors providing over 5% of the work on any State public works project, should be required to be pre-qualified. This would help ensure that the State of Nevada is protected, therefore allowing only responsible subcontractors to be used on State public works projects. The figure of 5% was taken from NRS 338.141(1)a which requires contractors to specify with their bid any subcontractor who will perform more than 5% of the work on a project. Currently

many "subcontractors" are already pre-qualified because they are bidding on projects that require only a specialty contractor, i.e. a mechanical contractor for HVAC work only.

Since the original bill was requested, the SPWB has reevaluated the process of qualifying subcontractors. We have determined that there are many problems associated with having all the required subcontractors pre-qualified prior to any bid being submitted to the Board, therefore we are requesting that the provisions relating to subcontractors in our bill be amended as follows:

Proposed Change No 1:

Amend Section 1 to read as follows:

NRS 338.1375 State public works board: Acceptance of bids from qualified bidders only; adoption and use of criteria for qualification of bidders.

1. The state public works board shall not accept a bid on a contract for a public work unless the person who submits the bid has qualified pursuant to NRS 338.1379 to bid on that contract.
2. *The State Public Works Board may use the criteria set forth in NRS 338.1375 to object to a subcontractor pursuant to NRS 338.141 who has been named or is performing work on a contract for a public work and regarding whom the Board has received a written complaint or has otherwise become aware of performance or other issues regarding the subcontractor.*
3. *A person may appeal an objection based on a complaint pursuant to subsection 2, in the manner provided for a hearing pursuant to NRS 338.1381.*
- [2] 4. The state public works board shall by regulation adopt criteria for the qualification of bidders on contracts for public works of this state. The criteria adopted by the state public works board pursuant to this section must be used by the state public works board to determine the qualification of bidders on contracts for public works of this state.
- [3] 5. The criteria adopted by the state public works board pursuant to this section:
 - (a) Must be adopted in such a form that the determination of whether an applicant is qualified to bid on a contract for a public work does not require or allow the exercise of discretion by any one person.
 - (b) May include ~~only~~, *but is not limited to*:
 - (1) The financial ability of the applicant to perform a contract;
 - (2) The principal personnel of the applicant;
 - (3) Whether the applicant has breached any contracts with a public agency or person in this state or any other state;
 - (4) Whether the applicant has been disqualified from being awarded a contract pursuant to NRS 338.017 or 338.1387; and
 - (5) The performance history of the applicant concerning other recent, similar contracts, if any, completed by the applicant.
 - (6) *The truthfulness and completeness of the application.*
6. *The State Public Works Board shall, by regulation, establish criteria consistent with subsection 5 to object to a subcontractor pursuant to subsection 2.*
7. *A bid of a contractor shall be deemed non-responsive if a subcontractor listed pursuant to NRS 338.141 is currently disqualified by the State Public Works Board.*

These changes allow all subcontractors to be presumptively pre-qualified, and will only have their qualification evaluated upon receiving a written complaint or if the Board has otherwise become aware of performance or other issues regarding the subcontractor.

Proposed Change No 2:

Amend **Section 2** to read as follows:

NRS 338.1379 Application to qualify as bidder; investigation of applicant; determination; confidentiality of certain financial information concerning applicant.

1. Except as otherwise provided in NRS 338.1383, a person who wishes to qualify as a bidder on a contract for a public work must submit an application to the state public works board or the governing body.
2. Upon receipt of an application pursuant to subsection 1, the state public works board or the governing body shall:
 - (a) Investigate the applicant to determine whether he is qualified to bid on a contract; and
 - (b) After conducting the investigation, determine whether the applicant is qualified to bid on a contract. The determination must be made within [30] 45 days after receipt of the application.
3. The state public works board or the governing body shall notify each applicant in writing of its determination. If an application is denied, the notice must set forth the reasons for the denial and inform the applicant of his right to a hearing pursuant to NRS 338.1381.
4. The state public works board or the governing body of a local government may determine an applicant is qualified to bid:
 - (a) On a specific project;
 - (b) On more than one project over a period of 12 months; or
 - (c) On more than one project over a period of 24 months.
5. The state public works board shall not use any criteria other than criteria adopted by regulation pursuant to NRS 338.1375 in determining whether to approve or deny an application.
6. The governing body of a local government shall not use any criteria other than the criteria described in NRS 338.1377 in determining whether to approve or deny an application.
7. Financial information and other data pertaining to the net worth of an applicant which is gathered by or provided to the state public works board or a governing body to determine the financial ability of an applicant to perform a contract is confidential and not open to public inspection.

This change removes the references to subcontractors.

The second issue relates to the "truthfulness" and "completeness" of an application. **Section 1, Page 2, Line 30**, which is subsection 6 in the requested amendment, addresses this issue. The SPWB would like NRS 338.1375(3) to clarify that "truthfulness" and "completeness" of an application may be used as criteria when evaluating an application for pre-qualification. See NRS 338.250(5) (a falsified or incomplete application may be grounds for denial or revocation of pre-qualification).

The third issue relates to the time period allowed for the governing body to make its initial determination as to whether an applicant should be pre-qualified to bid on public works projects. **Section 2, Page 2, Line 44**, which is now the only change in NRS 338.1379, addresses this issue. In the opinion of the SPWB, 30 days is not sufficient time to render such a decision. It must be considered that the governing body may have to request documents from a myriad of outside sources. Compiling and analyzing the information is critical to a proper decision being rendered. Additional time should be allowed for consideration and investigation of the application, therefore, the 45 day time period is being requested.

The fourth issue relates to the short time period in which a hearing must be held if an applicant appeals a decision regarding pre-qualification status. **Section 3, Page 3, Line 29** is the beginning of the provisions addressing this issue. Currently a hearing must be set within 20 days after a request for a hearing. This is not sufficient time to prepare for a complex administrative hearing. In fact, every case involving opposing counsel has so far been continued by stipulation. The administrative hearings involve complex issues surrounding various public works projects. Further, the parties need time to cooperate in discovery efforts. In the opinion of the SPWB, the 20 days is not nearly enough time to adequately prepare for a hearing, therefore 45 days is being requested. Further, 5 days is not adequate time to prepare a written decision of the appeals board, it may take a week just to get a transcript of the hearing therefore, 15 days is being requested. In addition, because of the time to process, the SPWB is requesting that a hearing be set within 20 days after a request and not 10 days.

The fifth issue relates to the "burden of proof". **Section 3, Page 3, Line 39** addresses this issue. The statutes do not specify which party has the burden of proof in an appeal. The SPWB has recently argued that the applicant has the burden of proof during an appeal of a decision denying its application for pre-qualification. It is clear that the appeals board has to make a determination based upon "substantial evidence". However, it should be clarified whether the SPWB or the applicant has the burden of proof at the appeals board level. The SPWB believes that the burden of proof is upon the applicant.

The sixth issue relates to subpoena power. **Section 3, Page 3, Line 43** addresses this issue. The SPWB does not have subpoena power with respect to hearings relating to pre-qualification appeals. The SPWB is concerned that all parties have the opportunity to present relevant testimony and documents to the appeals board. Without subpoena power, the parties cannot require the attendance of witnesses or production of documents. This may be critical in cases that may be complex and involve a review of a multitude of public works projects. Further, failure to grant the appeals board subpoena power may submit the process to a challenge on due process grounds.

The seventh issue relates to clarifying that the prime contractor, who is a member of a design-build team, must be pre-qualified. **Section 8, Page 10, Line 31** addresses this issue. A prime contractor, who is required to be pre-qualified pursuant to NRS 338.1379, would have to meet those requirements if they are a member of a design-build team.

The eighth issue relates to clarifying that the prime contractor must be pre-qualified prior to submitting a preliminary proposal. **Section 9, Page 11, Line 13** addresses this issue. It would be a tremendous waste of time and money to go through the design-build process, select a finalist and then find out that the prime contractor can not get qualified.

The ninth and final issue relates to the minimum number of design-build finalists required when one or more finalists are either disqualified or withdrawn. **Section 9, Page 12, Line 13** addresses this issue. This provision allows for the public body to select a team from the remaining finalists as long as there are at least two remaining finalists.

The proposed changes in SB 491 are intended to provide the State with better provisions to address the Qualification of Bidders process. Therefore, I request your approval of this bill and submit this testimony for your consideration.

Thank you for the opportunity to comment on this matter and I will be available for questions at the hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan O'Brien", written over the word "Sincerely,".

Daniel K. O'Brien, P.E.
Manager

cc: Perry Comeaux, Director, Department of Administration
Governor's Office
SPWB Board Members
Gus Nunez, Deputy Manager
Bob Bryant, Senior Deputy Attorney General