

Assembly Bill No. 39—Assemblyman Parks

CHAPTER.....

AN ACT relating to government; providing a procedure for a bidder to file a notice of protest regarding certain contracts; expanding the criteria that may be used to select the lowest responsive and responsible bidder on certain contracts; expanding the types of contracts which by nature are not adapted to award by competitive bidding; requiring the Attorney General to defend a state officer or employee alleged to have committed an ethical violation under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides a procedure for bidders on state purchasing contracts and public works contracts to appeal or protest the awarding of the contract. (NRS 333.370, 338.142)

This bill provides a procedure for bidders on certain local governmental purchasing contracts to file a notice of protest with the governing body of the local government or its authorized representative concerning the awarding of the contract.

Under existing law, the Local Government Purchasing Act provides procedures and requirements for the purchase of supplies, materials, equipment and services by the governing body of a local government. (Chapter 332 of NRS) In relevant part, the Act provides criteria for awarding purchasing contracts and exempts certain types of purchasing contracts from the requirements of competitive bidding. (NRS 332.065, 332.115)

This bill authorizes a governing body to establish additional criteria for the awarding of a contract in the advertisement or request for bids for the contract. This bill also provides that contracts relating to systems of communication are not subject to the requirements of competitive bidding.

Existing law authorizes the Chief of the Purchasing Division of the Department of Administration, on behalf of the State of Nevada and certain local governments in Nevada, to purchase supplies, materials and equipment from a vendor who has entered into an agreement with the United States General Services Administration or another governmental agency. (NRS 333.480)

This bill provides notice in the Local Government Purchasing Act that the State of Nevada has authority to enter into purchasing contracts with local governments within and outside Nevada.

This bill also provides that if a request for an opinion from the Commission on Ethics has been submitted to or initiated by the Commission against a present or former state officer or employee, unless the state officer or employee retains his own legal counsel to defend himself or the Attorney General tenders the defense of the state officer or employee to an insurer, the Attorney General is required to defend the state officer or employee or employ special counsel to defend the state officer or employee in any proceeding relating to the request for the opinion. The Attorney General's duty to defend the state officer or employee only arises if the state officer or employee submits a written request to the Attorney General and the Attorney General determines that the act or omission on which the alleged violation is based appears to be within the course and scope of public duty or employment of the state officer or employee and appears to have been performed or omitted in good faith. The Attorney General is also required to create a written record setting forth the basis for his determination of whether to defend the state officer or

employee. The written record is not admissible in evidence at trial or in any other judicial or administrative proceeding in which the state officer or employee is a party, except in connection with an application to withdraw as the attorney of record.

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

Section 1. Chapter 332 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A person who submits a bid on a contract that is required to be advertised pursuant to paragraph (a) of subsection 1 of NRS 332.039 may, after the bids are opened and within the period specified by the governing body or its authorized representative, file with the governing body or its authorized representative a notice of protest regarding the awarding of the contract.

2. A notice of protest must include a written statement setting forth with specificity the reasons the person filing the notice believes the applicable provisions of law were violated.

3. A person filing a notice of protest may be required by the governing body or its authorized representative, at the time the notice of protest is filed, to post a bond with a good and solvent surety authorized to do business in this State or submit other security, in a form approved by the governing body or its authorized representative, to the governing body or its authorized representative who shall hold the bond or other security until a determination is made on the protest. A bond posted or other security submitted with a notice of protest must be in an amount equal to the lesser of:

(a) Twenty-five percent of the total value of the bid submitted by the person filing the notice of protest; or

(b) Two hundred fifty thousand dollars.

4. A notice of protest filed in accordance with the provisions of this section operates as a stay of action in relation to the awarding of any contract until a determination is made by the governing body or its authorized representative on the protest.

5. A person who submits an unsuccessful bid may not seek any type of judicial intervention until the governing body or its authorized representative has made a determination on the protest and awarded the contract.

6. A governing body or its authorized representative is not liable for any costs, expenses, attorney's fees, loss of income or other damages sustained by a person who submits a bid, whether or not the person files a notice of protest pursuant to this section.

7. If the protest is upheld, the bond posted or other security submitted with the notice of protest must be returned to the person

who posted the bond or submitted the security. If the protest is rejected, a claim may be made against the bond or other security by the governing body or its authorized representative in an amount equal to the expenses incurred by the governing body or its authorized representative because of the unsuccessful protest. Any money remaining after the claim has been satisfied must be returned to the person who posted the bond or submitted the security.

Sec. 2. NRS 332.039 is hereby amended to read as follows:

332.039 1. Except as otherwise provided by specific statute:

(a) A governing body or its authorized representative shall advertise all contracts for which the estimated amount required to perform the contract exceeds \$25,000.

(b) A governing body or its authorized representative may enter into a contract of any nature without advertising if the estimated amount required to perform the contract is \$25,000 or less.

(c) If the estimated amount required to perform the contract is more than \$10,000 but not more than \$25,000, requests for bids must be submitted *or caused to be submitted* by the governing body or its authorized representative to two or more persons capable of performing the contract, if available. The governing body or its authorized representative shall maintain a record of all requests for bids and all bids received for the contract for at least 7 years after the date of execution of the contract.

2. This section does not prohibit a governing body or its authorized representative from advertising for or requesting bids regardless of the estimated amount to perform the contract.

Sec. 3. NRS 332.045 is hereby amended to read as follows:

332.045 1. The advertisement required by paragraph (a) of subsection 1 of NRS 332.039 must be published at least once and not less than 7 days before the opening of bids. The advertisement must be by notice to bid ~~[]~~ and must be published in a newspaper ~~{published and having}~~ *qualified pursuant to chapter 238 of NRS that has a* general circulation within the county wherein the local government, or a major portion thereof, is situated. ~~{If no such newspaper is published in the county, then publication must be in any newspaper published in the State having general circulation in the county.}~~

2. The notice must state:

(a) The nature, character or object of the contract.

(b) If plans and specifications are to constitute part of the contract, where the plans and specifications may be seen.

(c) The time and place where bids will be received and opened.

(d) Such other matters as may properly pertain to giving notice to bid.

Sec. 4. NRS 332.047 is hereby amended to read as follows:

332.047 1. A governing body or its authorized representative may use on-line bidding to receive bids submitted in response to a request for bids. The governing body *or its authorized representative* shall not use on-line bidding as the exclusive means of receiving bids for the request for bids.

2. A request for bids for which bids may be submitted pursuant to subsection 1 must designate a date and time at which bids may be submitted and may designate a date and time after which bids will no longer be received.

3. A governing body or its authorized representative may require bidders to:

(a) Register before the date and time at which bids may be submitted; and

(b) Agree to terms, conditions or requirements of the request for bids to facilitate on-line bidding.

4. The procedures established by a governing body or its authorized representative for the purposes of conducting on-line bidding must not conflict with the provisions of this chapter.

5. As used in this section, "on-line bidding" means a process by which bidders submit bids for a contract on a secure website on the Internet or its successor, if any, which is established and maintained for that purpose.

Sec. 5. NRS 332.061 is hereby amended to read as follows:

332.061 1. Except as otherwise provided in this subsection, proprietary information ~~[regarding a trade secret]~~ does not constitute public information and is confidential. A person shall not disclose proprietary information ~~[regarding a trade secret unless the]~~ *unless:*

(a) *The* disclosure is made for the purpose of a civil, administrative or criminal investigation or proceeding ~~[, and the]~~ ;
and

(b) *The* person receiving the information represents in writing that protections exist under applicable law to preserve the integrity, confidentiality and security of the information.

2. A bid which contains a provision that requires negotiation or evaluation by the governing body or an evaluator may not be disclosed until the bid is recommended for the award of a contract.

Sec. 6. NRS 332.065 is hereby amended to read as follows:

332.065 1. If a governing body or its authorized representative has advertised for or requested bids in letting a contract, the governing body or its authorized representative must, except as otherwise provided in subsection 2, award the contract to the lowest responsive and responsible bidder. The lowest responsive and responsible bidder may be judged on the basis of:

(a) Price;

(b) Conformance to specifications;

- (c) Qualifications;
- (d) Past performance;
- (e) Performance or delivery date;
- (f) Quality and utility of services, supplies, materials or equipment offered and the adaptability of those services, supplies, materials or equipment to the required purpose of the contract; ~~and~~
- (g) The best interests of the public ~~and~~; *and*
- (h) Such other criteria as may be set forth by the governing body or its authorized representative in the advertisement or request for bids, as applicable, that pertains to the contract.*

2. The governing body or its authorized representative:

- (a) Shall give preference to recycled products if:
 - (1) The product meets the applicable standards;
 - (2) The product can be substituted for a comparable nonrecycled product; and
 - (3) The product costs no more than a comparable nonrecycled product.
- (b) May give preference to recycled products if:
 - (1) The product meets the applicable standards;
 - (2) The product can be substituted for a comparable nonrecycled product; and
 - (3) The product costs no more than 5 percent more than a comparable nonrecycled product.
- (c) May purchase recycled paper products if the specific recycled paper product is:
 - (1) Available at a price which is not more than 10 percent higher than that of paper products made from virgin material;
 - (2) Of adequate quality; and
 - (3) Available to the purchaser within a reasonable period.

3. If after the lowest responsive and responsible bidder has been awarded the contract, during the term of the contract he does not supply goods or services in accordance with the bid specifications, or if he repudiates the contract, the governing body or its authorized representative may reaward the contract to the next lowest responsive and responsible bidder without requiring that new bids be submitted. Reawarding the contract to the next lowest responsive and responsible bidder is not a waiver of any liability of the initial bidder awarded the contract.

4. As used in this section:

- (a) "Postconsumer waste" means a finished material which would normally be disposed of as a solid waste having completed its life cycle as a consumer item.
- (b) "Recycled paper product" means all paper and wood-pulp products containing in some combination at least 50 percent of its total weight:

- (1) Postconsumer waste; and
- (2) Secondary waste,

➔ but does not include fibrous waste generated during the manufacturing process such as fibers recovered from wastewater or trimmings of paper machine rolls, wood slabs, chips, sawdust or other wood residue from a manufacturing process.

(c) “Secondary waste” means fragments of products or finished products of a manufacturing process which has converted a virgin resource into a commodity of real economic value.

Sec. 7. NRS 332.115 is hereby amended to read as follows:

332.115 1. Contracts which by their nature are not adapted to award by competitive bidding, including contracts for:

- (a) Items which may only be contracted from a sole source;
- (b) Professional services;
- (c) Additions to and repairs and maintenance of equipment which may be more efficiently added to, repaired or maintained by a certain person;
- (d) Equipment which, by reason of the training of the personnel or of an inventory of replacement parts maintained by the local government is compatible with existing equipment;
- (e) Perishable goods;
- (f) Insurance;
- (g) Hardware and associated peripheral equipment and devices for computers;
- (h) Software for computers;
- (i) Books, library materials and subscriptions;
- (j) Motor vehicle fuel purchased by a local law enforcement agency for use in an undercover investigation;
- (k) Motor vehicle fuel for use in a vehicle operated by a local law enforcement agency or local fire department if such fuel is not available within the vehicle’s assigned service area from a fueling station owned by the State of Nevada or a local government;
- (l) Purchases made with money in a store fund for prisoners in a jail or local detention facility for the provision and maintenance of a canteen for the prisoners;
- (m) Supplies, materials or equipment that are available pursuant to an agreement with a vendor that has entered into an agreement with the General Services Administration or another governmental agency located within or outside this State;
- (n) Items for resale through a retail outlet operated in this State by a local government or the State of Nevada;
- (o) Commercial advertising within a recreational facility operated by a county fair and recreation board; ~~and~~
- (p) Goods or services purchased from organizations or agencies whose primary purpose is the training and employment of handicapped persons ~~and~~; ~~and~~

(q) The design of, and equipment and services associated with, systems of communication,

↪ are not subject to the requirements of this chapter for competitive bidding, as determined by the governing body or its authorized representative.

2. The purchase of equipment for use by a local law enforcement agency in the course of an undercover investigation is not subject to the requirements of this chapter for competitive bidding, as determined by the governing body or its authorized representative, if:

(a) The equipment is an electronic or mechanical device which by design is intended to monitor and document in a clandestine manner suspected criminal activity; or

(b) Purchasing the equipment pursuant to such requirements would limit or compromise the use of such equipment by an agency authorized to conduct such investigations.

3. The purchase of personal safety equipment for use by a local fire department or local law enforcement agency is not subject to the requirements of this chapter for competitive bidding, as determined by the governing body or its authorized representative, if:

(a) The personal safety equipment will be used by personnel of the fire department or law enforcement agency in responding to emergencies in which the health, safety or welfare of those personnel may be compromised, impaired or otherwise threatened; and

(b) The cost of the personal safety equipment is comparable to the cost of similar personal safety equipment that is available for purchase by the public.

4. The governing body of a hospital required to comply with the provisions of this chapter, or its authorized representative, may purchase goods commonly used by the hospital, under a contract awarded pursuant to NRS 332.065, without additional competitive bidding even if at the time the contract was awarded:

(a) The vendor supplying such goods to the person awarded the contract was not identified as a supplier to be used by the person awarded the contract; or

(b) The vendor was identified as a supplier but was not identified as the supplier of such goods.

↪ The governing body of the hospital shall make available for public inspection each such contract and records related to those purchases.

5. This section does not prohibit a governing body or its authorized representative from advertising for or requesting bids.

6. As used in this section, "personal safety equipment" means safety equipment that is worn or otherwise carried on a regular basis by personnel of a fire department or law enforcement agency. The

term includes, but is not limited to, firearms, boots, bulletproof vests or other types of body armor, protective garments, gloves and helmets.

Sec. 8. NRS 332.195 is hereby amended to read as follows:

332.195 1. A governing body or its authorized representative *and the State of Nevada* may join or use the contracts of ~~other~~ local governments located within or outside this State with the authorization of the contracting vendor. The originally contracting local government is not liable for the obligations of the ~~local government~~ *governmental entity* which joins or uses the contract.

2. A governing body or its authorized representative may join or use the contracts of the State of Nevada or another state with the authorization of the contracting vendor. The State of Nevada or other state is not liable for the obligations of the local government which joins or uses the contract.

Sec. 9. NRS 332.820 is hereby amended to read as follows:

332.820 1. Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition by agreement to bid a fixed price, or otherwise, shall render the bids of such bidders void.

2. Advance disclosures of *proprietary information or* any *other* information to any particular bidder which would give that particular bidder any advantage over any other interested bidder in advance of the opening of bids, whether in response to advertising or an informal request for bids, made or permitted by a member of the governing body or an employee or representative thereof, shall operate to void all bids received in response to that particular request for bids.

Sec. 10. Chapter 281 of NRS is hereby amended by adding thereto a new section to read as follows:

1. If a request for an opinion is submitted to or initiated by the Commission concerning a present or former state officer or employee, unless the state officer or employee retains his own legal counsel or the Attorney General tenders the defense of the state officer or employee to an insurer who, pursuant to a contract of insurance, is authorized to defend the state officer or employee, the Attorney General shall defend the state officer or employee or employ special counsel to defend the state officer or employee in any proceeding relating to the request for the opinion if:

(a) The state officer or employee submits a written request for defense in the manner provided in NRS 41.0339; and

(b) Based on the facts and allegations known to the Attorney General, the Attorney General determines that the act or omission on which the alleged violation is based:

(1) Appears to be within the course and scope of public duty or employment of the state officer or employee; and

(2) Appears to have been performed or omitted in good faith.

2. The Attorney General shall create a written record setting forth the basis for his determination of whether to defend the state officer or employee pursuant to paragraph (b) of subsection 1. The written record is not admissible in evidence at trial or in any other judicial or administrative proceeding in which the state officer or employee is a party, except in connection with an application to withdraw as the attorney of record.

Sec. 11. NRS 281.431 is hereby amended to read as follows:

281.431 As used in NRS 281.411 to 281.581, inclusive, *and section 10 of this act*, unless the context otherwise requires, the words and terms defined in NRS 281.432 to 281.4375, inclusive, have the meanings ascribed to them in those sections.

Sec. 12. The provisions of section 10 of this act do not apply to any present or former state officer or employee concerning to whom a request for an opinion was submitted or initiated by the Commission on Ethics pursuant to NRS 281.411 to 281.581, inclusive, before July 1, 2005.

Sec. 13. This act becomes effective on July 1, 2005.

