

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-Fifth Session
February 24, 2009**

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 8:02 a.m. on Tuesday, February 24, 2009, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Marilyn K. Kirkpatrick, Chair
Assemblyman David P. Bobzien, Vice Chair
Assemblyman Paul Aizley
Assemblyman Kelvin Atkinson
Assemblyman Chad Christensen
Assemblyman Jerry D. Claborn
Assemblyman Ed A. Goedhart
Assemblywoman April Mastroluca
Assemblyman Harvey J. Munford
Assemblywoman Peggy Pierce
Assemblyman James A. Settlemeyer
Assemblywoman Ellen B. Spiegel
Assemblyman Lynn D. Stewart
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

None

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst
Scott McKenna, Committee Counsel
Cynthia Carter, Committee Manager
Renee Ekleberry, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Gustavo Nuñez, Manager, State Public Works Board, Carson City, Nevada
Ron Lynn, representing Nevada Organization of Building Officials,
Las Vegas, Nevada
Nicole Rourke, Director Intergovernmental Relations, Government Affairs,
Clark County School District, Las Vegas, Nevada
Lisa Connor, Director/Building Official, Inspection Services, Clark County
School District, Las Vegas, Nevada
James M. Wright, Chief, State Fire Marshal Division, Department of
Public Safety
Ted Olivas, Director, Government and Community Affairs City of
Las Vegas, Las Vegas, Nevada
Brad Jerbig, City Attorney, City of Las Vegas, Las Vegas, Nevada
Karen Storms, City Clerk, City of North Las Vegas, North Las Vegas,
Nevada
Sabra Smith-Newby, Director, Department of Administrative Services,
Clark County, Las Vegas, Nevada
Lisa Foster, Foster Consulting, representing City of Boulder City,
Boulder City, Nevada
Gary Milliken, GEM Consulting, representing Associated General
Contractors, Las Vegas Chapter, Las Vegas, Nevada
Tom Collins, Private Citizen, Logandale, Nevada
Marlene Lockard, Capital Strategies, Reno, Nevada, representing
Subcontractors' Legislative Coalition, Reno, Nevada

Chair Kirkpatrick:
[Roll taken.]

Welcome to Government Affairs. This morning we open the hearing with Assembly Bill 40.

Assembly Bill 40: Revises provisions governing the review and approval of plans for the construction or alteration of school buildings. (BDR 34-322)

Welcome Mr. Nuñez. We have already seen you several times this session. This is your third time in three weeks. You are doing well.

Gustavo Nuñez, Manager, State Public Works Board, Carson City, Nevada:

The purpose of A.B. 40 is to remove the requirement that the State Public Works Board (SPWB) plan-check school district projects in Clark County. The reason for this request is that, in our opinion, the plan-check can best be provided at the local level. We do not do these plan-checks in-house—we out-source this service. Under current law, we are required to plan-check but not to inspect. In our opinion, this is not good policy. If we are required to plan-check, we should also follow through with the inspections. You could say we are half in the process and half out of the process. It would not be prudent for us to gear up for the inspections. The best route for us would be to not be required to plan-check.

You may recall in the 2007 session, under Senate Bill No. 499 of the 74th Session, the SPWB responsibility for plan-checks was removed from all counties except Clark County. This bill provides that Clark County will follow the same requirements as the rest of counties in the state. I have been informed that the Clark County School District will be proposing an amendment. I read their proposed amendment. Since it still keeps the SPWB outside of plan-checking school projects, we therefore do not have any objection to their proposed amendment.

That concludes my presentation, and I can take any questions.

Chair Kirkpatrick:
Thank you. Are there any questions?

Assemblywoman Pierce:
Has everything been running smoothly in the other counties since we removed the other counties from this requirement?

Gustavo Nuñez:

As far as I know, the answer is yes. We have not been advised of issues cropping up in other counties.

Assemblyman Stewart:

Right now the SPWB does not check the plans in other counties?

Gustavo Nuñez:

We are currently checking school plans only in Clark County. Since the 2007 Session, all the other counties have developed a process to check their own plans and do their own inspections at the local level. This is true for all counties except Clark County.

Assemblywoman Mastroluca:

Why was Clark County originally left in?

Gustavo Nuñez:

That is a good question. The original bill had Clark County included in the bill during the 2007 session. For some reason, at the end of the session, it was taken out. I could not answer why.

Chair Kirkpatrick:

Are there any questions? Every session I have been here, we have seen this bill. I think it has been here about six times. I recently found out this is not in your budget for the next biennium. Is that true?

Gustavo Nuñez:

I could not tell you one way or the other. It is based on fees. We collect a fee from Clark County to cover the plan-check fee we outsource. In addition, we charge a 10% administrative fee for that plan-check process.

Chair Kirkpatrick:

If it was not within your staff budget would you still be able to provide this plan-check service?

Gustavo Nuñez:

Yes. We could do it by getting authority from the Interim Finance Committee (IFC) to receive the money and to spend it. We do that from time to time for other agency projects. Agencies come to us and request that we do projects. They have the funding—federal, in-house, fees, whatever—and they need us to do the project for them. We typically go to the IFC and ask for authority to receive the money and spend it. We then proceed with the project. It would not be any different than those projects.

Chair Kirkpatrick:

If we know for sure that Clark County has a building department, why are we putting the language "if there is no county building department or any other appropriate local building department" in this bill? What does that do for the other counties we took out of the plan-check process last session?

Gustavo Nuñez:

This is the same language for all of the counties. We did not write the proposed language in our BDR request, nor did we review the language prior to introduction. The BDR request simply pointed out that we wanted Clark County to be the same as all of the other counties. The drafters used that language in the last session for all of the other counties, so it remained the same in this bill. I believe that is the way it was written.

Since Clark County does have a building department, I have no problem with amending that.

Chair Kirkpatrick:

I would ask Legal to respond to that. My question is if it is already working so well in the sixteen other counties, why are we just not changing the language? Mr. McKenna will you speak about that?

Scott McKenna, Committee Counsel:

With respect to the question presented, what I can tell you, insofar as I am aware, when we were asked to draft BDR 322, which became A.B. 40, the instructions were to duplicate what had been done in the previous versions of this bill. As you noted, this is about the fifth or sixth time it has come up in committee. In past research we discovered that in some of the rural counties there was not a specific building department. In fact, I believe in some cases building departments may be shared and some rural counties may use the resources of other rural counties. That is the reason, to the best of my understanding, for the inclusion of the "or other appropriate" language.

Chair Kirkpatrick:

Are there any other questions?

Gustavo Nuñez:

I would just like to state for the record, I have no objection to striking out in A.B. 40, lines 25, 26, 27, 28, 29, 30, and to the end of the sentence on line 31 of page 3. Clark County School District has their own building department which recently received International Code Council (ICC) certification. Very few building departments in the country have achieved that certification.

Chair Kirkpatrick:

Are there any questions? Mr. Nuñez, at this time you have some support here, so we are going to invite them up to speak in favor.

Ron Lynn, representing Nevada Organization of Building Officials, Las Vegas, Nevada:

[From Las Vegas] Good morning. Just for clarification purposes, I am also Vice President of the International Code Council. I am looking at the amendment to A.B. 40 as proposed by the Clark County School District. I think the amendment probably clarifies the bill, and I have been advised it is a good addition. Regarding the word "appropriate," part of the problem is that the word was put in to cover not only counties but cities as well. In Clark County there are a number of incorporated cities. The feeling is that an individual jurisdiction such as the county may not be the right jurisdiction under the circumstances. Perhaps if a school was being built in North Las Vegas or in Henderson the "appropriate" language would accommodate that kind of flexibility from the beginning. I agree it is not necessary. I think "appropriate" in this case should be directed back to the school district. It is relatively unique in the nation that a school district has its own building department. The Clark County School District is fully accredited under the international accreditation service. They are competent to do their own work and to contract, if they feel it is necessary. If it is necessary to contract with a local jurisdiction, whether it is an incorporated city or Clark County, they, of course, would pay the requisite posted fees.

I am here to help in any way.

Chair Kirkpatrick:

Thank you. Does anyone have any questions for Mr. Lynn? [There were none.] Thank you. Does anyone from Carson City want to testify in support of A.B. 40? [There were none.] Anyone want to testify in opposition to A.B. 40? [There were none.] Anyone want to speak who is neutral? Please come speak on neutral and tell us about your amendment. Good morning.

Nicole Rourke, Director Intergovernmental Relations, Government Affairs, Clark County School District, Las Vegas, Nevada:

Good morning, Madame Chair and members of the Committee. Today I have with me Lisa Conner who is our Director of Inspection Services. She is the expert in this field. She will be giving the testimony on our amendment. Thank you.

Lisa Connor, Director/Building Official, Inspection Services, Clark County School District, Las Vegas, Nevada

Good morning, Madame Chair and members of the Committee. [Read in part from prepared testimony ([Exhibit C](#)).] I am the Director of Inspection Services and the Building Official for Clark County School District. The district would like to submit this proposed amendment to A.B. 40, ([Exhibit D](#)) which you have before you, to allow the district's building department to operate as an independent authority relating to school construction. The district's building department is certified by the International Accreditation Service (IAS), and we are the second school district in the nation to receive this honor. We are one of only eleven building departments in the United States that holds this certification. This accreditation process provides documented proof from an independent body that the department operates effectively, maintains high standards, and offers enhanced life safety and property protection within the jurisdiction it serves.

The district established this building department in 1986—twenty three years ago. Since that time, we have built over 200 schools. Having our own building department allows us to place inspectors at each construction site. This means that errors or potential code violations are discovered early in the process. This helps to reduce cost by preventing mistakes rather than finding them after the fact and causing work to be torn down and rebuilt. One of the biggest advantages of the system in place is that, in addition to inspecting for compliance, our inspectors also assure quality. The quality assurance provided by the district's building department is one of the reasons we have been able to build or rebuild 101 schools with 1998 bond funds rather than the 88 originally planned. Most of these schools have been built ahead of schedule and under budget.

Passage of A.B. 40, as amended, will allow us to continue to build and rebuild schools with maximum efficiency and effective use of taxpayer money. Thank you.

Chair Kirkpatrick:

Does anyone have any questions? Ms. Conner, I have one question for you regarding the last section of your amendment. What is it that the Fire Marshal does for you?

Lisa Conner:

Currently, the Fire Marshal does our plan review for fire, life safety issues, fire suppression, and fire alarms.

Chair Kirkpatrick:

Good Morning. I know I am always beating up on you but I am trying to figure out what you guys do.

James M. Wright, Chief, State Fire Marshal Division, Department of Public Safety:

Good morning, Madame Chair and members of the Committee. I wanted to speak here today to answer any questions you may have and also to let you know we support this amendment. You heard comments earlier regarding the effects that were the result of S.B. No. 499 being passed last session. As a result, there have been some problematic issues that came up for the Fire Marshal's office. Because of our coordination with the State Public Works Board, we were involved in the review and plan-check for schools regarding the fire and life-safety issues in the plans. When the State Public Works Board was removed from checking plans, we were also removed. It caused some issues in the smaller, rural counties that preferred to retain our services. If the governing body of the school district in counties without the capacity to perform fire and life-safety plan-checks requested our services, then I would continue to provide those services through a written agreement. That approach was consistent with the prior legislation.

In the case of Clark County, we continued that service and we will continue to provide that plan-check for fire and life-safety issues. We appreciate the long-standing relationship and work we have done with the county schools, and we feel they will be best served by keeping us involved in the fire and life safety portion of the plan-check. We can provide the county school districts with consistency in plan-review checks and cost-effectiveness.

Chair Kirkpatrick:

Does anyone else have questions? [There were none.] Thank you. Is there anyone who would like to speak neutral on A.B. 40? [There were none.] With that, we are going to close the hearing on A.B. 40.

We are going to open the hearing on Assembly Bill 48. Mr. Olivas, good morning.

Assembly Bill 48: Allows a public body to resolve disputes in a contract for a public work by way of processes other than arbitration. (BDR 28-405)

Ted Olivas, Director, Government and Community Affairs, City of Las Vegas, Las Vegas, Nevada:

Good morning, Madame Chair and members of the Committee. I am joined today by Brad Jerbig, our City Attorney, and we have provided a one-page

handout for your review ([Exhibit E](#)). It is not an amendment for A.B. 48, so I am still following the rules. This simply talks about the bill. This Committee, over the last three or four sessions, has done more to change and streamline the public works bidding rules than has been done in the prior 30 years. You have been very diligent in describing how certain steps need to be accomplished in that process. This is particularly true regarding the method of submitting bids, submitting certified payrolls, and submitting subcontractor lists. All of that is appropriate legislation. It helps each jurisdiction follow the same rules. Contractors know if they submit a bid in Winnemucca, it will be the same process as submitting a bid for the City of Las Vegas. The process has been very well defined by this Committee. That distinguishes us from private industry. If a contractor bids on a construction project for Steve Wynn, the process will be different from bidding on a contract for public works. The process has to be different. We are talking about taxpayers' money.

Nevada Revised Statutes (NRS) 338.150 describes how we settle disputes on construction contracts. I want to give you a little history. This statute was created in 1969. It is about 40 years old. We have made a number of changes recently. In the 2003 Legislative Session, we made changes to ensure that the terminology used throughout NRS Chapter 338 was consistent. The terms "public body" and "local government" were used consistently throughout. What you see in this first section are changes appropriate for NRS 338.150.

In the 2005 Legislative Session we made a number of additional changes to NRS Chapter 338 having to do with design build, how subcontractor lists were submitted, and several different items. It was another wholesale change in the bill. One of the changes stated that public bodies shall include in their specifications a clause requiring arbitration of a dispute. From 1969 to 2005, the language stated we were permitted to include a clause for arbitration. Now it states we are required to insert a clause for arbitration. It also states that we are not prohibited from using alternate dispute resolution methods. We have found this clause to be restrictive.

When we conduct business, there is a question of whether we should be like private industry. In some cases, perhaps we should be different from private industry. In the bidding process, we need to be different than private industry. For resolving disputes, we need to have the same tools that private industry has when there is a dispute on one of our construction projects. Why should the way we deal with disputes be any different than in private business? What we are requesting is very simple. We would like to, again, have the opportunity to settle contract disputes like we did prior to 2005, which is consistent with private industry.

The change we have in A.B. 48 is very simple. Instead of stating we "shall" include in the specifications a clause that requires us to arbitrate, it states we "may" include that clause. It gives us flexibility. You may ask what kind of flexibility that gives us? Sometimes, we may need to go to court—plain and simple. Sometimes, it is better to involve two lawyers, a judge, and jurors. We need to present our case and the contractor needs to present his case. The judge and jury need to make the decision. Sometimes, that method is appropriate. Clearly, it is not always appropriate. We need to have flexibility. That is what this bill does. With that, I will turn this over to Mr. Jerbig.

Chair Kirkpatrick:

Good morning, and welcome to Carson City.

Brad Jerbig, City Attorney, City of Las Vegas, Las Vegas, Nevada:

Thank you, Madame Chair and members of the Committee. I am in support of A.B. 48. The reason this bill is before you is largely a result of a very difficult experience the Las Vegas City Council and the City of Las Vegas had involving a contract dispute. At the time this bill was amended in 2005, I do not think any one of us could have anticipated what a run-away train arbitration could become for some contract disputes. I want to emphasize this only affects some contract disputes. We are not seeking a provision that would require us to go to court in every case, or mediation in every case, or arbitration in every case. We are seeking the flexibility to choose the exact method of conflict resolution based on the size of the contract or the type of award. This will be placed in the contract up-front. Again, we all hope there is no dispute.

A recent contract dispute involved a lot of technical information and a lot of expert data, and took a lot of destructive investigation to get to the bottom of it. There was a huge cost involved in the arbitration proceeding alone. The citizens of the cities and the state already paid for a judicial system, which is largely overtaxed, and we are aware of that. So we seek every opportunity we can to resolve disputes short of going to court. We use mediators many times. We have gone to arbitration where it has been to everyone's advantage to do so. In this case, the members of the city council were shocked to learn that when a dispute goes to arbitration they must pay for the judges, unlike the judges already paid for with taxpayer dollars in the court system. This arbitration case involved three judges. These judges charged about \$300 to \$350 per hour. For every hour of testimony, regardless of who wins or loses, it may cost \$1,000 per hour, split between the parties.

This particular case has been going on for almost two years, and the arbitration has cost the City of Las Vegas, alone—not the contractor—\$2.5 million. This is the cost so far for a \$7 million dispute. I do not think that was the intent when

this law was amended in 2005. I do not think anyone could have anticipated that this particular arbitration would have gone this long. I certainly do not mean to insinuate that those costs are all attributable to the arbitrators (the judges) involved, but a large portion of that expense is for the arbitrators. The process itself, as we found out, unlike the judicial process, does not seem to lend itself to negotiation once the parties are into it. Participants are either all into it or, at some point, they have so much money invested into it that neither can back out. In this case, I want to emphasize, we did not initiate the arbitration. It was initiated by the other party. I am not going to argue the merits of the case one way or the other. I am not going to argue the outcome. There is no outcome yet. This has been under submission for the last couple of months. With respect to one of the arbitrators, I believe in the last two months alone they have billed about \$43,000. I intend no insult to any of the arbitrators or their good intentions. This can be a very long, drawn out, and very, very expensive process. Keep in mind the contractor in this case was asking for about \$7 million or \$8 million from the city. It has now cost the city about \$2.5 million or \$3 million dollars to arbitrate. With that said, I will be happy to answer any questions.

Chair Kirkpatrick:

Thank you, Mr. Jerbig. Are there any questions?

Assemblyman Settlemeyer:

Are you saying that under this bill both parties will have the ability to state they just do not want to do arbitration, and then either party can move forward with a lawsuit, or are you saying if you agreed to arbitration in the contract, you must go through with arbitration?

Brad Jerbig:

It says both. The contract, when it goes out to bid, will state what the dispute resolution method will be. Some will say that disputes will be settled in a court of law in the jurisdiction of the State of Nevada; some might require arbitration within the State of Nevada. What the bill says is that the contract, itself, will specify up front—before it is put out for bid—what the dispute resolution method will be. It also states that if you pick arbitration as the resolution method, that does not mean at the end of the contract you cannot both mutually decide to do something else.

Assemblyman Settlemeyer:

Just for clarification, you said mutually decide. Is that correct?

Brad Jerbig:

That is correct.

Assemblyman Stewart:

Can you tell us the reason for the 2005 change? Does anyone remember the reason?

Ted Olivas:

Mr. Stewart, I probably am the best person to answer that. I looked at the legislative history on this change, and I looked at the testimony provided at that time. This section was never referenced. It was never brought up in the testimony. Clearly, we were working with the construction industry, and beyond that, I could not find any history on this particular section.

Assemblyman Stewart:

So, these are unintended consequences?

Ted Olivas:

That is correct, sir.

Chair Kirkpatrick:

Are there any questions? If it currently states you "shall" include a clause and you want to change this to "may"—is that not going backwards?

Ted Olivas:

The intent in going from "shall" to "may" is that it gives us the option. We determine the dispute resolution method on each individual contract depending on the scope of the contract.

Chair Kirkpatrick:

I do not understand your request. If it says "shall" now, do you not already have that clause within your scope?

Ted Olivas:

Yes, Madame Chair, currently we have to include a provision that states we will go to arbitration. By making this change we can determine up front what the dispute resolution method will be for that particular contract. Right now it has to be arbitration. In the future we want to tailor the dispute resolution clause to the specific contract.

Chair Kirkpatrick:

Do you think this might hamper bidding opportunities because people will not want the conflict resolution process determined up front? I see it like a development agreement. Not everyone wants to sign on to get involved in that process. Do you think it will take the competition away?

Ted Olivas:

I believe this worked for thirty years prior to being changed. The good thing is, in our construction projects and the bidding process, we have a pre-bid on each of those projects, and we allow discussion on the contract. Dispute resolution would be a discussion point. The appropriate dispute resolution method must be determined for each project. If it will unreasonably raise the cost, we need to know that. There would be dialog up front. Each contract can be looked at, and we can get input from the contracting community.

Chair Kirkpatrick:

Does anyone else have any questions? I am trying to make sure our freshmen understand. We often see the same bills and it is simply a matter of which way we decide to go each session. I am simply trying to provide a little history for you.

Assemblyman Settlemeyer:

Prior to putting in a bid, would the individuals know the remedy beforehand? If they knew which remedy would be utilized, that would theoretically affect how much the bid would be.

Brad Jerbig:

I believe it would be in the bid specifications. When the bid went out to bid, people would know up front exactly what dispute resolution remedy would be employed. If that needs to be included to make sure it is clear in the bill, we have no objection to doing that. I think bidders should know what they are bidding on before they bid on a project.

Assemblywoman Spiegel:

By doing that, it would preannounce the method to potential bidders. You stated in your testimony the decision would be made based on the size of the bidder and the size of the project. The dispute resolution method you were just discussing would be included in the bid packet?

Brad Jerbig:

That is correct. I think we would be looking at it on a case-by-case basis. To answer the Chair's question regarding the possibility of eliminating some bidders, it did not happen before; I do not imagine it would happen in the future. If it did happen, we would change the method and go out to rebid.

Chair Kirkpatrick:

I have another follow-up question. How do we get consistency across the state? How did the consistency work before?

Brad Jerbig:

I cannot speak about other cities or counties. I know we have done a little bit of everything in the City of Las Vegas. We have used mediators to settle some disputes. We have used arbitration very successfully. We are not saying either mediation or arbitration is always a bad thing. I am not saying, in this particular case, all the costs attributed to it were because of the cost of the arbitrators. I know that sometimes consistency is not the best policy. Sometimes, it is better to have options. All I am saying is we would like to have the ability to choose the best option for each particular situation.

Chair Kirkpatrick:

Does anyone else have a question?

Ted Olivas:

The local governments and the state award thousands of construction contracts—thousands—worth billions of dollars. This problem does not happen very often. It really does not. However, we need to have flexibility. As Mr. Jerbig mentioned, we thought about whether there should be some type of threshold, but in construction, one size does not fit all. A bridge is different than a building. That was something we considered, and we want you to be aware that we did consider these issues.

Chair Kirkpatrick:

I need to ask one more question. In general, what are the basic reasons for going to arbitration? Let me elaborate a little. My husband is in construction. It seems like times have changed since 1995 in construction. Now it seems everything goes to court. Most disputes involve change orders. Is there a consistent problem on the local government level? What are they fighting over?

Brad Jerbig:

I do not know. I cannot say there is any one thing in particular. Quite often the dispute is regarding change orders. Quite often it is due to not building to specifications. It is quite often regarding delays and liquidated damages. It can be a combination of factors. It depends on the project.

Chair Kirkpatrick:

I would just bet there is probably some consistency in the nature of the problems. I could go down Las Vegas Boulevard and describe the lawsuits for every hotel—what they were fighting over at the end. I am curious to understand if there are consistencies across local government projects. I need a little research on this. Is it a bigger problem with design-builds? Where is our problem? I will ask all local governments; I will not just put it on you. I think it would be beneficial for the Committee to understand where the problem lies.

Because we see these bills like A.B. 48 all the time, maybe next time we can try to address the source of the problem.

Assemblywoman Spiegel:

Are alternate forms of dispute resolution like arbitration and mediation generally less expensive than other forms? Is there a mechanism in place to make sure we preserve cost-efficient and effective means of settling disputes?

Brad Jerbig:

Quite often, arbitration and mediation are less expensive. If this Committee were to pass this language and it were to be adopted, I think we would still use arbitration quite often in many disputes. I would like to point out some information about this particular case. I will compare what happened here with what might have happened had it gone to court. When a case goes to court, there is discovery. That will happen in arbitration as well. There will be an exchange of information. Eventually, the case will appear in a courtroom. Generally speaking, after a trial begins, it is finished fairly quickly. Judges like to employ economy. They like to get things done. They will drive it through. In this particular case, we have been in arbitration for almost two years. There may be a session lasting a week or so, and then a recess may take up to a month. Everyone has to clear their schedule because there are a lot of people to get together to hear the next arbitration session. Then, at that session, information may be presented leading to another delay. We found in this case these delays have gone on and on and on. The parties can drag it out even more. With all due respect to the arbitrators, courtroom judges have a tendency to make the lawyers move the case along because the judges need to decide the case. Delays have been a problem with this particular arbitration. Again, I do not believe delays are a problem with all arbitrations. In smaller cases, I believe arbitration is a wonderful way to solve disputes. In complex, big situations, we may decide we want another option.

Chair Kirkpatrick:

I know for a fact that two hotel properties were in litigation in the court system for over five years, causing 14 companies to go out of business. My husband's company was one of those that went out of business while they were waiting for their case to be resolved. It took seven years. It was finalized this past year. It is unfortunate.

Assemblyman Claborn:

Do we have any opposition to this bill? I am curious.

Chair Kirkpatrick:

It is coming. I am just trying to make sure both sides get heard.

Assemblyman Aizley:

Mr. Jerbig, if you know, can you explain more about why arbitration did not work in this case? Why did this one go so much longer than other ones?

Brad Jerbig:

I would not like to go into a lot of details. I think it would hurt a lot of feelings and this is still under submission to the arbitrators. Again, I have observations not necessarily related to the arbitrators but more about the arbitration process. Arbitration is more subject to manipulation—not in a bad, sinister way—simply in a way that lawyers can sometimes use the process to their advantage. It has been my experience that when you have a judge running the show, they tend to run the show. They tend to move things along and bring things to finality. That is not always the case, as the Chair observed. There is no crystal ball here. If we choose a particular method, I am not telling you there will not be a horror story that comes from it as well. All we are saying is we would like to have the options back that we used to have. In this particular case, by taking the option away, it has cost a lot of money.

Chair Kirkpatrick:

With that, I am going to call those who are in support of this bill to testify.

Karen Storms, City Clerk, City of North Las Vegas, North Las Vegas, Nevada:

The City of North Las Vegas strongly supports A.B. 48. We concur with the City of Las Vegas on the need for the change to NRS 338.150. The city recognizes that under some circumstances arbitrations can result in a quicker and cheaper resolution of disputes. However, there are many instances in which arbitration is not the most desirable or efficient mechanism for resolving disputes. Moreover, in the city's experience, arbitration is often not the most efficient or cost-effective method to use with public works contractors. As a result, in order to make the best use of taxpayer resources, local governments should have the option of including an arbitration clause where appropriate and not including one where it is inappropriate. Thank you.

Chair Kirkpatrick:

Does anyone have any questions for Ms. Storms?

Assemblywoman Spiegel:

I am a little confused. When a dispute goes to court, the county or the city is paying for the judge presiding over that matter? If the case goes to arbitration, then the fees are split. Is that correct?

Karen Storms:

I believe that is what Mr. Olivas said.

Chair Kirkpatrick:

Mr. McKenna, do you want to help Ms. Storms out? Do you know the process?

Scott McKenna

While I cannot speak to the specifics of what the given governmental entities are currently doing, the question posed surprised me a little bit. It was my understanding the purpose of arbitration and alternative dispute resolution was to avoid going to court.

Assemblywoman Spiegel:

Mr. McKenna, that also was my understanding about arbitration and mediation. However, if there would be a shift and there would be more matters being taken to court than going to arbitration or mediation, what impact would that have on the court system and associated costs?

Scott McKenna:

Ms. Spiegel, I take it you are speaking to the terms of A.B. 48 as written?

Assemblywoman Spiegel:

Yes.

Scott McKenna:

The best answer I could give you on that is if the procedures for arbitration and alternate dispute resolution worked at least as they are supposed to work, as people would hope they work, fewer cases should actually wind up in court.

Chair Kirkpatrick:

I bet you can go to Judiciary and ask any attorney how it works, and they would be more than happy to tell you that they would probably ask the other person to pay their attorney fees if it did not work out.

Assemblywoman Spiegel:

I think my confusion is I am reading this bill to say it would allow more lawsuits and less use of mediation and arbitration.

Chair Kirkpatrick:

Ms. Sabra Smith-Newby, please come up.

**Sabra Smith-Newby, Director, Department of Administrative Services,
Clark County, Las Vegas, Nevada:**

I am representing Clark County in support of A.B. 48. There are a number of reasons why we believe, in some cases, going to court may be a better option for us than arbitration. Mr. Jerbig went over some of the issues relating to cost and the enormous cost, sometimes, of having arbitrators involved. There is the additional cost of renting the room. The costs mount up.

Another reason has to do with third parties. Often, acts of a third party are related to the allegations a contractor may make in a construction claim. When a case goes to court, there is a mechanism through the rules of civil procedure for naming a third party. This provides the county or other governments with leverage in holding a third party accountable. This mechanism is not available in arbitrations. It is also more likely that the third party, through their insurers, will defend the government in a court action pursuant to indemnity clauses in a contract between the county and the third party.

However, in arbitration, the third party is not a party to that arbitration. It is difficult to obtain recovery against that third party unless a court action is filed and prosecuted after the arbitration. What ends up happening is that, after the arbitration has ended, we must then go through a court case to address the issue with the third party. That adds more expense and does not get us to the goal of having fewer court cases.

Another good thing about the possibility of going to court is the appeals process. In arbitration, rounds for appeals and review of an arbitration award are very limited. However, in court cases, jury verdicts and court rulings have much broader grounds for appeal and review by the Nevada Supreme Court. Another advantage is dealing with frivolous claims. They are probably less likely to occur in a court action than in arbitration.

Finally, there is discovery. In court cases there are well established rules of civil procedure regarding discovery. Discovery disputes are handled by a discovery commissioner paid for by the court system. In arbitration cases, discovery tends to be amorphous. It is largely determined by the arbitration panel and the attorneys representing the parties. Discovery disputes are handled by the arbitrators who must be paid. Arbitrators do not have the leverage the discovery commissioner has over attorneys who may not comply with the rules. Therefore court cases tend to work more efficiently with respect to discovery and there is recourse available against attorneys who do not comply with the rules.

Regarding the previous question about judges, the state pays the salary for the judges, which is generally a fixed cost. Clark County pays for the staff and the facilities.

Assemblyman Bobzien:

Would you please provide examples of criteria that may be used to decide the method of dispute resolution—mediation, arbitration or going to court—written into the contract? There has been a lot of discussion on the relative merits and drawbacks of arbitration and going to court. Perhaps arbitration is not all it is cracked up to be. I know there is no crystal ball. I am just trying to get a sense of what exactly will happen if this bill is passed and we give local government the dispute resolution options you are asking for. What is the thinking going to be on the part of local government if they have those options?

Sabra Smith-Newby:

I honestly do not know the answer to the question: in which cases would you choose one dispute resolution method versus the other? I can get back to you with that information. I imagine it would involve a good level of strategic thinking on the part of the attorneys to determine which route they would choose and the expected outcome. I am sorry, that did not help.

[A written response ([Exhibit F](#)) to the previous question was provided on February 25, 2009.]

Lisa Foster, Foster Consulting, representing City of Boulder City, Boulder City, Nevada:

I would like to echo my associate's support of A.B. 48. Arbitration was designed to be a more efficient and cost saving process. According to the building officials in Boulder City, it has become very arduous and very expensive, taking some of those tax dollars away from the project and giving it to those who are hired to fight the project. They feel this flexibility of choosing dispute resolution methods up front may indeed be more efficient, now, for some projects.

Chair Kirkpatrick:

Does anyone have any questions for Ms. Foster? [There were none.] Is there anyone else who would like to testify in support of A.B. 48? Now we will move to opposition. If there is anyone else—I know there are a lot of you here—please sign up to speak, please do not be shy.

Gary Milliken, GEM Consulting, representing Associated General Contractors, Las Vegas Chapter, Las Vegas, Nevada:

I guess I have more questions than I have statements. I agree with a lot of what Mr. Jerbig said. However, I am not sure the current language says exactly what Mr. Jerbig implies it says. Arbitration can be very expensive. Many times the City of Las Vegas uses three arbitrators which makes it an expensive process. It is a lot less expensive if only one arbitrator or mediator is used. Associated General Contractors believes in using mediation prior to going to court. I thought Madame Chair was correct in her observation about some court cases. In the case she described, the owner of the property simply stayed in court long enough so that 14 construction companies went bankrupt and others settled for pennies on the dollar. In the long run, that court case cost a lot of construction companies a lot of money and cost some of them their businesses. Going to court and going to arbitration can both be a very expensive and a very lengthy process.

Mr. Howland and I worked with Mr. Leiberson for about a year trying to find the right language regarding going to court or going to arbitration or mediation. We would like to continue to work with the City of Las Vegas on this and see if we can get language more definite than this paragraph. Thank you, Madame Chair.

Chair Kirkpatrick:

Does anyone have any questions for Mr. Milliken? I am not exactly sure how the bid process works for a construction company. It may make them nervous to bid on a project without knowing what the recourse is going to be.

Gary Milliken:

Most construction companies know what is in the contract prior to making a bid and they adjust their bid accordingly. If they know the conflict resolution method will be to go to court, I would think a construction company would take that factor into consideration in their bid. If they realize they may have to go to court, they would set some money aside for that possibility. Again, if you know up front exactly what the bid entails, then you adjust your bid accordingly.

Chair Kirkpatrick:

Is everyone's bid going to be higher up front?

Gary Milliken:

I would tend to agree with you. If a contractor will be going directly to court in the event of a contract dispute, then yes, bids will be higher.

Tom Collins, Private Citizen, Logandale, Nevada:

Good morning, Madame Chair and members of the Government Affairs Committee, of which I am a former member. I would like it on the record that I am speaking for myself as a private citizen. This is a very interesting topic and I agree with some of the comments made that some things definitely need to be addressed. I want to address it differently. Do you remember the scene in *True Grit* where Kim Darby sat down with the horse trader and explained that her father had paid for the horses, they were now her horses, and she was going to sell them back. She told him here is the amount, and if you do not agree, then we will go to the lawyers. My lawyer will make money and your lawyer will make money, but you, mister, will not. It is that kind of thing. I am talking about a cowboy way of shaking hands and making a deal, and it is a done deal. That is the point of that scene, I believe.

In the construction industry, when bids go out, there needs to be a good, tight contract. There is responsibility on both sides. A better contract needs to be written before being sent out to bid. On the other side, the contractor needs to come in with good faith and good will and do the work they agreed to do. They need to realize most of these big jobs are not like building watches. They are not going to be precise and perfect. The contractor needs to make it work, make it functional, and comply with the codes and standards to build those projects. They need to avoid litigation and the nit-picking that comes up during mediation and arbitration. There is a little horse-trading going on with these projects. When a company finishes a small job, perhaps they finished three days late, but in exchange they provided an additional fifty yards of asphalt or something else. Contractors do a little horse-trading out in the field.

Sometimes an arbitrator or mediator is a retired legislator, a retired professor from a university, or a retired labor executive. Perhaps they are a business person who has taken training to become an arbitrator or mediator. In multi-million dollar dispute cases, I believe you need to have legal expertise. On large multi-million dollar cases both sides are paying huge amounts of money in legal fees. In some arbitration settlements the arbitrators do not have, in my opinion, as clear an understanding of the law as a district court judge with much more legal training.

I agree with some of the things said previously that, in some cases, mediation and arbitration, or some other available alternative, works. The question is what the process will be going forward. When a case is three, four, or five million dollars or more, if the contract stipulates those disputes will go to district court, the court will not take the months and months it now takes to even choose an arbitrator. You need to choose an arbitrator before starting the hearing process.

In most cases, you would be able to settle a large case in court, legally and with proper settlements, more quickly than with an arbitration panel. That is just Tom Collin's two-cents worth.

The best way is if we could have a handshake deal, where the contractor says they can do it for a certain amount, they just go do it, and get it done. We only do that in a couple of places now. Until we can get back to that type of honesty, I think a large dispute should go right to district court and get settled. I think it would also be more cost-effective. We could make dispute settlements a lot better for taxpayers if we settled quicker. Thank you.

Assemblyman Settlemeyer:

Every time I have been involved in arbitration, there has only been one arbitrator. In these larger cases, why are there multiple arbitrators? Does that not just raise the cost? In that respect, would it not be easier to just go to court?

Tom Collins:

I think you would have to ask your legal staff that question.

Chair Kirkpatrick:

No, we are asking you. Are there any more questions or comments?

Assemblyman Claborn:

It is pleasant to see you in our meeting today. I know you have the cowboy grit and we respect that. I have been through many arbitrations. In a binding arbitration, it does take a little longer than going to court, but when you are finished with the arbitration, it is over. There is no appeal in the courts. It will not appear in the courts three or four times. It is over. You shake hands like the cowboys, you walk out, and it is over. It is a very interesting topic we are talking about, and I am open for suggestions. I am always looking for ways to save money in construction.

Chair Kirkpatrick:

Does anyone else have any questions or comments? Would anyone like to testify in opposition? Good morning.

Marlene Lockard, Capital Strategies, representing Subcontractors' Legislative Coalition, Reno, Nevada:

We have concerns with A.B. 48 for many of the reasons previously stated. We feel the arbitration process is more economical in many cases. The court system is already bogged down with a number of construction cases, lasting years. In addition, it was stated that flexibility was needed to include or not include the conflict resolution method in the contract in advance. The language was "where appropriate or where not appropriate not to include." That was not specified anywhere in the language of the bill. Who determines when it is appropriate and when it is not appropriate? We would like to work with the authors of the bill. Thank you.

Chair Kirkpatrick:

Does anyone have any questions? Is there anyone else who would like to testify in opposition to A.B. 48? Mr. Olivas, would you like to come back? If this was just changed in 2005, please let us know the process in place prior to that time.

Ted Olivas:

I am not sure exactly how it was done before 2005. I do know each of the jurisdictions has always included a provision addressing contract disputes. This is a huge issue for us, and it is a huge issue for contractors. They need to know beforehand what the contract dispute process will be for that contract. That has always been a provision in our contracts. An interesting observation I have is we are hearing that arbitration is one way to settle disputes in many cases. We are not hearing that arbitration is the only way to settle disputes in all cases. That is the problem.

Chair Kirkpatrick:

Does anyone else have any questions or comments?

Ted Olivas:

Thank you very much for hearing this bill this morning.

Chair Kirkpatrick:

Thank you. We are going to close the hearing on A.B. 48.

Is there anything from the public this morning?

To remind Committee members, floor is at 10:30 a.m. this morning. An information paper from Ms. Sabra Smith-Newby for clarification on Assembly Bill 49, which we discussed the other day, has been distributed this morning for Committee members. We will not have a Committee meeting on Friday, February 20th. We are trying to work on bills. Next week, we will probably get quite a few. Please get your bills in for our first work session. Is there anything else from the Committee? [There was nothing.]

[Meeting was adjourned at 9:08 a.m.]

RESPECTFULLY SUBMITTED:

J. Renee Ekleberry
Committee Secretary

APPROVED BY:

Assemblywoman Marilyn K. Kirkpatrick, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: February 24, 2009

Time of Meeting: 8:02 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Sheets
A.B. 40	C	Lisa Connor, Director/Building Official Inspection Services, Clark County School District	Prepared Statement
A.B. 40	D	Lisa Conner	Proposed Amendment to A.B. 40
A.B. 48	E	Ted Olivas, Director, Governmental & Community Affairs, City of Las Vegas, Nevada	Information Sheet for Assembly Bill No. 48
A.B. 48	F	Sabra Smith-Newby, Director, Department of Administrative Services, Clark County, Nevada	February 25, 2006 - Reply to Assemblyman Bobzien regarding February 24, 2006 Government Affairs Committee Meeting