

**MINUTES OF THE CONTRACTOR
SENATE COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-fifth Session
February 23, 2009**

The Senate Committee on Government Affairs was called to order by Chair John J. Lee at 1:35 p.m. on Monday, February 23, 2009, in Room 2144 of the Legislative Building, Carson City, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator John J. Lee, Chair
Senator Terry Care, Vice Chair
Senator Steven A. Horsford
Senator Shirley A. Breeden
Senator William J. Raggio
Senator Randolph Townsend
Senator Mike McGinness

STAFF MEMBERS PRESENT:

Heidi Chlarson, Committee Counsel
Michael Stewart, Committee Policy Analyst
Cynthia Ross, Committee Secretary

OTHERS PRESENT:

Kimberlee Tarter, Deputy Administrator, Division of Purchasing, Department of Administration
James Sala, Political Director, Southwest Regional Council of Carpenters
Gus Nunez, Manager, State Public Works Board
Steve Weaver, Chief, Planning and Development, Division of State Parks, State Department of Conservation and Natural Resources
Richard J. Nelson, P.E., Assistant Director, Operations, Nevada Department of Transportation
Lisa Schettler, P.E., Supervisor, Department of Wildlife
Susan K. Stewart, Deputy Attorney General, Office of the Attorney General;
Construction Law Counsel, State Public Works Board
Renny Ashleman, State Public Works Board

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Marlene Lockard, Subcontractors Legislative Coalition
Keith Lee, State Contractors' Board
Clara Andriola, President, Sierra Nevada Chapter, Associated Builders and Contractors, Incorporated
Nicole J. Lamboley, Chief Deputy, Office of the Secretary of State

CHAIR LEE:

I now open this hearing with Senate Bill 31.

SENATE BILL 31: Revises provisions governing certain independent contractors with the State. (BDR 27-305)

KIMBERLEE TARTAR (Deputy Administrator, Division of Purchasing, Department of Administration):

This is a housekeeping bill. We want to transfer the provisions in Nevada Revised Statutes (NRS) 284.173 and NRS 284.174 over to NRS 333, which relates to state purchasing. Our proposed changes are sections 2 and 3. The new sections authorize the State Board of Examiners to determine the relevant amount rather than have that amount specific in statute with regard to specific authority to approve contracts. Also, a change is made requiring the Board of Examiners to prescribe a minimum amount of dollars under which such a contract is not required to be written or filed with the Legislative Council Bureau and the Clerk of the Board of Examiners. The dollar amount now is \$2,000. It allows the Board of Examiners to set a dollar amount as deemed appropriate within policy as opposed to making a change in statute any time the threshold would be considered for revision. We currently have agencies signing purchase orders for dollar amounts over \$2,000, and when an agency needs to contract for a service, they must get approval from the head of the agency for contracts \$2,000 or less. The contracting authority would be in compliance with the purchase order authority within agencies.

JAMES SALA (Political Director, Southwest Regional Council of Carpenters):

We do not have a problem with the intent of this bill, but one of our concerns is on page 3 that references independent contractors. Subsection 6 talks about higher education; subsection 7 talks about the Nevada Department of Transportation (NDOT) and the State Public Works Board (SPWB). The bill implies one can use an independent contractor, not necessarily a licensed contractor, to do this work. To do construction either as a competitive bidder or

a Construction Manager at Risk (CMAR), one has to be a licensed contractor. The provision causes concern.

MS. TARTER:

This statute does define independent contractors. The NRS 284.173 clearly defines those agencies exempt from NRS 333. Moving NRS 284.173 into NRS 333 makes sense because it specifically carves out those who will be doing business with the NDOT, SPWB and the Nevada System of Higher Education. These are set outside of NRS 333 and only apply to contracts that are let and procured through NRS 333, which is for services such as normal operations. It has no relevance to the construction of a building or road projects.

SENATOR RAGGIO:

The language is the same in NRS 333 as it is in NRS 284 other than the mentioned changes.

MS. TARTER:

Correct.

SENATOR TOWNSEND:

We need to make sure that independent contractors operating in a field in which the State requires a license are appropriately licensed. Being an independent contractor does not allow one to go outside of our licensing provisions. The language might not be correct.

MS. TARTER:

Correct. This is within the State's procurement requirements. In order to do business with the State, there are certain obligations. If there are license requirements, we ensure independent contractors are adequate in the appropriate license and insured.

CHAIR LEE:

We will now close the hearing on S.B. 31 and open the hearing on S.B. 42.

SENATE BILL 42: Transfers final authority over the acceptance of certain public buildings and structures from the State Public Works Board to the deputy manager for compliance and code enforcement. (BDR 28-326)

GUS NUNEZ (Manager, State Public Works Board):

Senate Bill 42 is to clarify the intent of S.B. No. 387 of the 74th Session. One of the provisions created a deputy manager for code enforcement who would provide a third-party oversight for plan check and inspection. Prior to S.B. No. 387 of the 74th Session, the SPWB Manager served as both building official and project management official. This created one person wearing both hats. The intention of S.B. 42 was to exclude and remove the agents of a certificate of occupancy from the provisions of NRS 341.145, which is delegated by the Board under law while maintaining oversight by the board. Our proposed amendment ([Exhibit C](#)) to S.B. 42 is to ensure consistency within the statutes regarding what authority may be delegated and what authority may not be delegated. It will maintain the SPWB ultimate authority to accept all State buildings, to require reporting obligations for the building official similar to those reporting obligations required by the manager and it will eliminate language that requires the Board to report to the building official.

STEVE WEAVER (Chief, Planning and Development, Division of State Parks, State Department of Conservation and Natural Resources):

I am representing Dave Morrow, Administrator of the Division of State Parks, and I am speaking on behalf of NDOT and the Nevada Department of Wildlife (NDOW). All three agencies have concerns regarding this bill, specifically the "without limitation" clause in section 1, subsection 9, paragraph (b). We have proposed several amendments to NRS to take care of this language. An Attorney General's opinion dated November 15, 2007, goes beyond legislative intent. The opinion was our agencies must obtain plan reviews and inspection services from the SPWB for verification of compliance with State building codes for all construction projects. In NRS 341, the words "buildings and structures" is repeated throughout, yet, the Attorney General's opinion says "all projects." We question whether the SPWB should be involved with boat ramps, campgrounds, picnic areas and the like. There should be limitations on the SPWB's involvement.

SENATOR RAGGIO:

I am looking at the proposed amendment and your concerns are addressed. I am looking at section 1, subsection 9. The amendment puts back in "... final authority to accept each building or structure, or any portion thereof" This amendment is from the SPWB.

CHAIR LEE:

Do you have an amendment in front of you?

MR. WEAVER:

We do have recommendations for the SPWB but today, we have nothing in writing.

SENATOR TOWNSEND:

You reference the term "without limitations" as one of your concerns. The proposed amendment removes this language in section 1, subsection 9.

MR. WEAVER:

I have not viewed the amendment.

SENATOR TOWNSEND:

Mr. Nunez can give you a copy of the SPWB amendment. It may allay some concern. The amendment adds language in section 2 but eliminates the language "without limitations." The amendment might address other concerns.

MR. NUNEZ:

To further clarify intent, this amendment would apply only to things covered by the building code. Roads and highways and other outside improvements are not covered. The SPWB adopted the building codes related to the construction of buildings. There are provisions that apply to on-site work with respect to parking and Americans with Disabilities Act accessibility. Roads, utilities and the like are exempt from those projects.

CHAIR LEE:

Concerning small bridges, canopy areas and those things built in a park, do these fall under the building code?

MR. NUNEZ:

Any building or structure meant for occupancy by the general public typically would be covered by the building code.

MR. WEAVER:

My understanding is the NRS 341.145 only applies to buildings. I question whether it should apply to prefabricated picnic shelters and vault toilets. Regarding large buildings, we have no disagreement with the SPWB. The

disagreement comes down to the Attorney General's opinion. An amendment is needed to provide clarity regarding legislative intent and without amending, we are stuck with the AG's opinion stating "all construction." This could possibly include roads and highways for NDOT and roads, bridges, boat ramps and docks for NDOW. The AG's opinion goes beyond legislative intent.

MR. NUNEZ:

The SPWB is happy to meet with representative from NDOT and NDOW to work out concerns.

RICHARD J. NELSON, P.E. (Assistant Director, Operations, Nevada Department of Transportation):

I agree with Mr. Weaver and look forward to working with Mr. Nunez and the SPWB to clarify language.

LISA SCHETTLER, P.E. (Supervisor, Department of Wildlife):

We have similar concerns. We have been exempt from the authority of the SPWB. There is concern that all projects would have to go through the SPWB because of the AG's opinion regarding language.

CHAIR LEE:

We will now close the hearing on S.B. 42 and address S.B. 43.

SENATE BILL 43: Revises the criteria that the State Public Works Board is required to adopt to determine the qualification of bidders on contracts for public works. (BDR 28-323)

SUSAN K. STEWART (Deputy Attorney General, Office of the Attorney General; Construction Law Counsel, State Public Works Board):

Pursuant to NRS 338.1375 when prequalifying contractors, the SPWB can consider financial ability, principal personnel, prior breach of contract, performance history and the truthfulness of the application. The Board cannot consider whether someone has been fined or disciplined. For example, if a contractor has been fined for hiring an unlicensed subcontractor, the SPWB cannot consider that in the prequalification process. The intent of S.B. 43 is to allow the SPWB to consider fines or discipline as criteria for qualifying contractors. The NRS 338.1377 allows local government to do this. The proposed amendment (Exhibit D) deletes the reference to settlements. The SPWB does not want to discourage settlements and believes this is not relevant

to whether one is qualified to do public works projects. The proposed amendment also adds language that mirrors the language applicable to local governments, which ties in the fines or disciplinary action to one's ability to perform work. The implementation of this statute would go through open meetings, hearings and the like.

SENATOR CARE:
Did a specific event trigger this amendment?

MS. STEWART:
Yes.

SENATOR CARE:
What was this event?

MS. STEWART:
We had retained the services of a CMAR and after we retained the services of the contractor, we discovered they had been fined by the State Contractors' Board.

SENATOR CARE:
What is the status of this arrangement?

MS. STEWART:
We have retained them. We were precluded from considering their fine with the State Contractors' Board.

SENATOR CARE:
If we adopt the amendment, can you terminate the arrangement?

MS. STEWART:
It would not have retroactive application.

SENATOR MCGINNESS:
Is one precluded for life from getting another contract if one has been fined by the States Contractors' Board?

MR. NUNEZ:

The process is a points system adopted by the Contractors' Board. Each infraction has certain deductions approved by our Board. If this particular provision passes, a scoring system would be developed. It can be a pass-fail or a point-deduction system. A contractor could lose a designated amount of points before becoming disqualified. This is to be determined.

CHAIR LEE:

Is a time period considered?

MR. NUNEZ:

Yes. On all scoring systems, we only look back five years.

SENATOR TOWNSEND:

You have two bills today, and both have amendments. Did you have the opportunity to review your bill draft requests (BDRs) after they were drafted by the Legislative Counsel Bureau?

Mr. Nunez:

No.

SENATOR TOWNSEND:

The BDRs are prefiled based on what you submit?

MR. NUNEZ:

Yes. We called to view the write-ups in order to make any necessary revisions; however, by the time we saw them, there was no opportunity.

SENATOR TOWNSEND:

Leadership should address this issue of BDR review. We need to help State agencies have the opportunity to review their bills once submitted, allowing them to come back once. We want to ensure that committee chairs and the natural prefiling process do not accelerate bills so quickly that we end up with a large number of amendments that need explanation. Many times, there are other parties involved in these bills, and a simple review of the original BDR can clear up confusion or problems regarding a bill's intent.

SENATOR CARE:

An intent of the proposed amendment is the SPWB wants to encourage settlements, not discourage them; therefore, the amendment "eliminates the language that would allow for the use of settlements" Does it ever occur that a contractor, who is sued, finds it in his best interest to enter into a settlement agreement, and the underlying allegations of that lawsuit are never brought before the State Contractors' Board to see whether there is something they might want to discipline that contractor for? Does the Contractors Board look at infractions or do they wait for the resolution of litigation?

MR. NUNEZ:

Unless one files a complaint with the State Contractors' Board, I do not believe they investigate and hold hearings. I have never witnessed the Board looking at how court cases are settled. In my experience, they only investigate filed complaints.

SENATOR CARE:

Is there anything that would prohibit a contractor, who is a defendant in a lawsuit, from settling, and the language mutually agreed to be that the plaintiff agrees not to go to the State Contractors' Board?

MR. NUNEZ:

In a settlement, whatever the agreement, it is between the two parties.

RENNY ASHLEMAN (State Public Works Board):

We have had cases where settlements led to discipline or fines by the Labor Commissioner and others, and they have been brought to our attention. In such a case, we did not look to the settlement but looked behind the facts. Was it true? Was it egregious? It was the fact of having been fined by another state or federal agency that brought it into our purview. We disagree that the fact somebody has entered into a consent decree or settlement agreement should automatically cause us to examine their fitness to serve as a contractor. Someone can bring an egregious act to our attention, but we would then have to hear it as an independent matter, deciding the truth or falsity and the severity under regulations we have set up. We have done this in the past, but to tell people the consequence of settling—you will always be in front of us for your fitness to serve—is entirely too strong. It also does not apply to anything else that happens to somebody.

SENATOR CARE:

The existing language in section 1, subsection 3 states: "The performance history of the applicant concerning other recent, similar contracts, if any, completed by the applicant" Is there other existing language that allows the SPWB to look at a consent decree, settlement agreement or a complaint without having language stricken from the proposed amendment?

MR. ASHLEMAN:

Our opinion has been that is true, but we do not only use entering into a consent decree or settlement as grounds. This language appears that this is the grounds to take action. This is why we are apprehensive. It is adding more to our powers. The fact one has consented or settled does not mean he should be disqualified. It is the predicate that is of importance. What was the offense? This is the element we should be addressing.

MARLENE LOCKARD (Subcontractors Legislative Coalition):

We agree, as written, this legislation would discourage settlements, and if there was a settlement for a nominal action, it could disqualify a contractor from consideration when they have ability to perform. Section 6 does cover the ability to consider the track record of the contractor when awarding a contract.

MR. SALA:

In 1998, when the Clark County School District could not complete a project on time, we began to work with them and other contracting agencies such as the Associated General Contractors of America and the Associated Builders and Contractors, Incorporated. Together, we helped draft the first prequalification language in the State and contracting has improved. We worked with other large cities, Clark County and the SPWB to put procedures into place. Eight years ago, the Labor Commissioner's Office made settlements in regard to prevailing wage and contract violations that were kept confidential from the employees and other awarding bodies. We helped pass legislation to ensure those settlements were open to the people for those involved as well as for other agencies. We have tried to make this process transparent. The Clark County Detention Center would have been an issue if prequalification had been in place prior to rewarding the contract. Time, energy and money would have been saved. As mentioned earlier, CMAR entered into a settlement agreement with the State Contractors' Board for hiring two separate, unlicensed out-of-state contractors. The unlicensed contractors were fined \$22,000. The other contractors were fined and disciplined through a settlement agreement. Both the

Labor Commissioner and the Contractors' Board use settlements frequently. We want to ensure settlements, which are findings of violations, do not become excluded in this process. If the SPWB had this information prior to rewarding this contract, it may or may not have made an impact, but this information should certainly be considered. In general, we support the bill. We do not have a problem with the amendment. If there are violations of the Contractors Board, NRS 610 or NRS 338 violations with the Labor Commissioner—whether they are adjudicated at a hearing or resolved and the violation is admitted in the settlement—those should still be accounted for in the point system for prequalification. We support making the contracting process transparent and fostering communication among agencies. It is healthy for the consumer and taxpayer. We also want to see discipline fines by the Contractors' Board included.

KEITH LEE (State Contractors' Board):

We will do what you want us to do in regulating contractors. We are constrained by the amount of staff and time to investigate. Clearly, the mandate for the Board to add to or delete from the disciplinary categories is something we will certainly work with.

CLARA ANDRIOLA (President, Sierra Nevada Chapter, Associated Builders and Contractors, Incorporated):

I have not viewed the amendment, but the shared spirit of the bill is to move forward on prequalification. We do not want a situation where the weight of something will tilt in an unfavorable fashion for a contractor. Information should be available for the SPWD and the Contractors' Board, and they should consider all of it when rewarding a contract. It is in the best interests of Nevadans.

CHAIR LEE:

We now are in work session. Our first bill is Senate Bill 53, which makes various changes relating to the Office of the Secretary of State.

SENATE BILL 53: Makes various changes relating to the Office of the Secretary of State. (BDR 18-415)

MICHAEL STEWART (Committee Policy Analyst):

We heard S.B. 53, which provides for the creation of the Nevada Lockbox within the Office of the Secretary of State that allows for a secure online registry of electronic legal documents. One amendment proposed would amend

section 8 by deleting the word "shall" and inserting "may," essentially making the provisions permissive. This, according to testimony, will alleviate the need for a fiscal note as indicated by the Office of the Secretary of State. Existing law provides the Secretary of State to maintain a Registry of Advance Directives for Health Care in which a person can post a digital copy of an advance directive concerning his or her health care. This is an extension of this Registry as it relates to other legal documents.

SENATOR RAGGIO MOVED TO AMEND AND DO PASS AS AMENDED
S.B. 53.

SENATOR TOWNSEND SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR LEE:

Senate Bill 76 addresses the summary suspension of licenses.

[SENATE BILL 76](#): Revises provisions governing the administrative procedures for the summary suspension of licenses issued by certain state agencies. (BDR 18-263)

MR. STEWART:

Since we looked at this bill, an amendment has been proposed by the Attorney's General's Office, with the collaboration of Senator Maggie Carlton. The proposed amendment would amend section 1, subsection 3 to require the summary suspension be issued by the agency or the chairman of the governing body of the agency. Note the handwritten correction replacing "a member" with "the chairman." It reads, "An agency's order of summary suspension may be issued by the agency or the chairman of the governing body of the agency." The second amendment concerns the timing of a summary suspension and proposes to change the time of issuance from 60 days to 45 days. Attached is a letter ([Exhibit E](#)) from the Attorney General's Office describing the two amendments and noting that the fiscal notes for the Department of Business and Industry Real Estate Division expenses and the Board of Dispensing Opticians have been withdrawn. The proponent of the legislation did speak with both agencies, and they determined there would not be fiscal notes.

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SENATOR TOWNSEND MOVED TO AMEND AND DO PASS AS AMENDED S.B. 76.

SENATOR RAGGIO SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR LEE:

Senate Bill 92 is our last bill in the work session and relates to the regulations of notaries public.

[SENATE BILL 92](#): Makes various changes relating to the regulation of notaries public. (BDR 19-414)

MR. STEWART:

Senate Bill 92 enacts the Electronic Notary Public Authorization Act which allows the Office of the Secretary of State to appoint notaries public who are authorized to notarize electronic documents. There were no specific amendments offered and for clarification, we did include a handout of frequently asked questions of an electronic notary program. This handout was provided by the Office of the Secretary of State.

SENATOR CARE:

I have a question to a reference in section 23. It has to do with the creation of a Category C felony and a Category D felony for certain unlawful conduct. Chapter 240 of NRS governs notaries public. It states crime penalties are gross misdemeanors. To me, this is a public policy issue. We have an issue of overcrowding in the prisons and funding prisons, prosecutors and judges. Why should crime penalties in section 23 be Category C and D felonies as opposed to gross misdemeanors?

CHAIR LEE:

I question whether there have been many instances of serious crimes with notaries public.

NICOLE J. LAMBOLEY (Chief Deputy, Office of the Secretary of State):

I do not know why the crime penalties would be Category C or D felonies. I conferred with our Office, and they indicated to me that this is based on law. If it were the Committee's choice to move them back to gross misdemeanors, this is acceptable to our Office. If needed, we can return and ask for a change. Most of the violations we see are civil. Our few criminal penalties have been the use of the notario publico language. In some countries, when someone advertises as a notary public, it requires one to be an attorney and a member of the bar. This is not allowed in Nevada unless one is a practicing member of the State Bar. In this instance, as criminal penalty, a fine is administered and paid, and the situation is remedied by making corrections in advertising.

SENATOR CARE:

I will make a motion with an amendment. This amendment is in section 23; Category C felony and Category D felony are deleted, and the language "gross misdemeanor" is inserted.

SENATOR CARE MOVED TO AMEND AND DO PASS AS AMENDED
S.B. 92.

SENATOR HORSFORD SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR LEE:

This work session is now closed. The meeting of the Senate Committee on Government Affairs is adjourned at 2:30 p.m.

RESPECTFULLY SUBMITTED:

Cynthia Ross,
Committee Secretary

APPROVED BY:

Senator John J. Lee, Chair

DATE: _____