

## ASSEMBLY BILL NO. 574—COMMITTEE ON WAYS AND MEANS

MAY 30, 2011

Referred to Committee on Government Affairs

SUMMARY—Revises Assembly Bill No. 144 of this session and provides for related study. (BDR S-1309)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: Contains Appropriation not included in Executive Budget.

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

AN ACT relating to breaches of contracts for public works; revising the provisions of Assembly Bill No. 144 of this session relating to a material breach of certain contracts; providing for a study of the availability of sureties for parties entering into such contracts; appropriating money for a consultant for such a study; and providing other matters properly relating thereto.

**Legislative Counsel's Digest:**

Existing law requires that, for a contractor, applicant or design-build team to receive a preference in bidding for a contract for a public work, the contract must include a provision which requires the contractor, applicant or design-build team to comply with five specified conditions and provides that failure to comply with any of those five conditions is a material breach of the contract that entitles the public body to damages in the amount of 10 percent of the cost of the contract. (Section 2 of Assembly Bill No. 144 of the 2011 Legislative Session) **Section 1** of this bill provides that the public body is entitled to liquidated damages in the amount of 10 percent of the contract or subcontract for the public work entered into by the party that caused a failure to comply with any of the five specified conditions or \$50,000, whichever is less. **Section 1** also allows the public body to recover the damages directly from the party that caused a failure to comply with any of the five specified conditions. Finally, **section 1** provides that the condition which requires that at least 25 percent of the suppliers of materials for the public work be located in this State does not apply when the public body requires the acquisition of materials or equipment that cannot be obtained from a supplier located in this State.

**Section 3** of this bill requires the Legislative Commission to appoint a committee to study the availability of sureties for parties entering into contracts governed by section 2 of Assembly Bill No. 144 of the 2011 Legislative Session. **Section 2** of this bill appropriates \$10,000 for a consultant for this study.



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

1     **Section 1.** Section 2 of Assembly Bill No. 144 of this session  
2 is hereby amended to read as follows:

3         Sec. 2. 1. To qualify to receive a preference in bidding  
4 pursuant to subsection 2 of NRS 338.1389, subsection 2 of  
5 NRS 338.147, subsection 3 of NRS 338.1693, subsection 3 of  
6 NRS 338.1727 or subsection 2 of NRS 408.3886, a  
7 contractor, an applicant or a design-build team, respectively,  
8 must submit to the public body sponsoring or financing a  
9 public work a signed affidavit which certifies that, for the  
10 duration of the project:

11         (a) At least 50 percent of all workers employed on the  
12 public work, including, without limitation, any employees of  
13 the contractor, applicant or design-build team and of any  
14 subcontractor engaged on the public work, will hold a valid  
15 driver's license or identification card issued by the  
16 Department of Motor Vehicles;

17         (b) All vehicles used primarily for the public work will  
18 be:

19             (1) Registered and partially apportioned to Nevada  
20 pursuant to the International Registration Plan, as adopted by  
21 the Department of Motor Vehicles pursuant to NRS 706.826;  
22 or

23             (2) Registered in this State;

24         (c) At least 50 percent of the design professionals  
25 working on the public work, including, without limitation,  
26 any employees of the contractor, applicant or design-build  
27 team and of any subcontractor engaged on the public work,  
28 will have a valid driver's license or identification card issued  
29 by the Department of Motor Vehicles;

30         (d) At least 25 percent of the suppliers of the materials  
31 used for the public work will be located in this State ~~and~~  
32 *unless the public body requires the acquisition of materials*  
33 *or equipment that cannot be obtained from a supplier*  
34 *located in this State;* and

35         (e) The contractor, applicant or design-build team and any  
36 subcontractor engaged on the public work will maintain and  
37 make available for inspection within this State his or her  
38 records concerning payroll relating to the public work.

39         2. Any contract for a public work awarded to a  
40 contractor, applicant or design-build team who submits the



affidavit described in subsection 1 and who receives a preference in bidding described in subsection 1 must:

(a) Include a provision in the contract that substantially incorporates the requirements of paragraphs (a) to (e), inclusive, of subsection 1; and

(b) Provide that a failure to comply with any requirement of paragraphs (a) to (e), inclusive, of subsection 1 is a material breach of the contract and entitles the public body to liquidated damages ~~in the amount of 10 percent of the cost of the contract.~~ *only as provided in subsections 5 and 6.*

3. A person or entity who believes that a contractor, applicant or design-build team has obtained a preference in bidding as described in subsection 1 but has failed to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 may file a written objection with the public body for which the contractor, applicant or design-build team is performing the public work. A written objection authorized pursuant to this subsection must set forth proof or substantiating evidence to support the belief of the person or entity that the contractor, applicant or design-build team has failed to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1.

4. If a public body receives a written objection pursuant to subsection 3, the public body shall determine whether the objection is accompanied by the proof or substantiating evidence required pursuant to that subsection. If the public body determines that the objection is not accompanied by the required proof or substantiating evidence, the public body shall dismiss the objection. If the public body determines that the objection is accompanied by the required proof or substantiating evidence or if the public body determines on its own initiative that proof or substantiating evidence of a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 exists, the public body shall determine whether the contractor, applicant or design-build team has failed to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 and the public body or its authorized representative may proceed to award the contract accordingly or, if the contract has already been awarded, seek the remedy authorized in subsection 5.

5. A public body may recover , by civil action *against the party responsible for a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1*, liquidated damages as described in ~~paragraph (b) of~~ subsection ~~[2]~~ 6 for a breach of a contract for a public



work caused by a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1. If a public body recovers liquidated damages pursuant to this subsection for a breach of a contract for a public work, the public body shall report to the State Contractors' Board the date of the breach, the name of each entity which breached the contract and the cost of the contract. The Board shall maintain this information for not less than 6 years. Upon request, the Board shall provide this information to any public body or its authorized representative.

6. If a contractor, applicant or design-build team submits the affidavit described in subsection 1, receives a preference in bidding described in subsection 1 and is awarded the contract, *the contract between the contractor, applicant or design-build team and the public body*, each contract between the contractor, applicant or design-build team and a subcontractor *or supplier and each contract between a subcontractor and a subcontractor or supplier* must provide ~~for the apportionment of liquidated damages assessed pursuant to subsection 5 if a person other than the contractor was responsible for the breach of a contract for a public work caused by a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1. The apportionment of liquidated damages must be in proportion to the responsibility of each party for the breach.]~~ *that:*

*(a) If a party to the contract causes a material breach of the contract between the contractor, applicant or design-build team and the public body as a result of a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1, the party is liable to the public body for liquidated damages in the amount of 10 percent of the cost of the largest contract to which he or she is a party or \$50,000, whichever is less;*

*(b) The right to recover the amount determined pursuant to paragraph (a) by the public body pursuant to subsection 5 may be enforced by the public body directly against the party that causes the material breach; and*

*(c) No other party to the contract is liable to the public body for liquidated damages.*

7. A public body that awards a contract for a public work to a contractor, applicant or design-build team who submits the affidavit described in subsection 1 and who receives a preference in bidding described in subsection 1 shall, on or before July 31 of each year, submit a written report to the Director of the Legislative Counsel Bureau for



transmittal to the Legislative Commission. The report must include information on each contract for a public work awarded to a contractor, applicant or design-build team who submits the affidavit described in subsection 1 and who receives a preference in bidding described in subsection 1 , including, without limitation, the name of the contractor, applicant or design-build team who was awarded the contract, the cost of the contract, a brief description of the public work and a description of the degree to which the contractor, applicant or design-build team and each subcontractor complied with the requirements of paragraphs (a) to (e), inclusive, of subsection 1.

**Sec. 2.** 1. There is hereby appropriated from the State General Fund to the Legislative Commission the sum of \$10,000 to contract, through competitive bidding, with a qualified independent consultant:

(a) To review the provisions of Nevada law governing sureties, public works and contracting for public works;

(b) To review the availability of sureties for, and the use of sureties by, contractors and other persons entering into contracts for public works; and

(c) To make recommendations to the committee conducting the study pursuant to section 3 of this act concerning:

(1) The reviews described in paragraphs (a) and (b);

(2) The impact that limitations on amounts of liquidated damages for breaches of contracts for public works have on the availability and use of sureties described in paragraph (b); and

(3) Any other subjects as requested by the committee.

2. Any remaining balance of the appropriation made by subsection 1 to the Legislative Commission must not be committed for expenditure after June 30, 2013, by the entity to which the appropriation is made or any entity to which money from the appropriation is granted or otherwise transferred in any manner, and any portion of the appropriated money remaining must not be spent for any purpose after September 20, 2013, by either the entity to which the money was appropriated or the entity to which the money was subsequently granted or transferred, and must be reverted to the State General Fund on or before September 20, 2013.

**Sec. 3.** 1. The Legislative Commission shall appoint a committee to conduct an interim study concerning the availability of sureties for parties entering into contracts for public works using a preference governed by the provisions of section 2 of Assembly Bill No. 144 of the 2011 Legislative Session.



2. The committee appointed by the Legislative Commission pursuant to subsection 1 must be composed of six Legislators as follows:

(a) Three members appointed by the Majority Leader of the Senate, at least one of whom must be appointed from the membership of the Senate Standing Committee on Government Affairs during the immediately preceding session of the Legislature; and

(b) Three members appointed by the Speaker of the Assembly, at least one of whom must be appointed from the membership of the Assembly Standing Committee on Government Affairs during the immediately preceding session of the Legislature.

3. The study must include, without limitation:

(a) A review of:

(1) The laws of this State governing sureties, public works and contracting for public works; and

(2) The availability of sureties for, and the use of sureties by, contractors and other persons entering into contracts for public works;

(b) The impact that limitations on amounts of liquidated damages for breaches of contracts for public works have on the availability and use of such sureties; and

(c) Any other matters which the Legislative Commission deems relevant to the consideration of the issues.

4. In conducting the study, the committee shall consider the recommendations and testimony from experts in the surety industry and public works contracts, including, without limitation:

(a) The consultant retained pursuant to section 2 of this act;

(b) Representatives of sureties and the surety industry;

(c) Representatives of construction management and labor organizations;

(d) The State Public Works Board; and

(e) Local government public works officials.

5. The Legislative Commission shall submit a report of the results of the study and any recommendations for legislation to the 77th Session of the Nevada Legislature.

**Sec. 4.** This act becomes effective upon passage and approval.

