

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

**Seventy-Sixth Session
March 25, 2011**

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 8:03 a.m. on Friday, March 25, 2011, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, 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/76th2011/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
Assemblywoman Irene Bustamante Adams, Vice Chair
Assemblyman Elliot T. Anderson
Assemblywoman Teresa Benitez-Thompson
Assemblyman John Ellison
Assemblywoman Lucy Flores
Assemblyman Ed A. Goedhart
Assemblyman Pete Livermore
Assemblywoman Dina Neal
Assemblyman Lynn D. Stewart
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

Assemblyman Harvey J. Munford (excused)
Assemblywoman Peggy Pierce (excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Richard Daly, Washoe County Assembly District No. 31
Assemblyman Pat Hickey, Washoe County Assembly District No. 25

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst
Cynthia Carter, Committee Manager
Jenny McMenemy, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

John Madole, Executive Director, Associated General Contractors of America, Inc., Nevada Chapter
Fred Reeder, President, Reno-Tahoe Construction
Jack Mallory, representing the International Union of Painters and Allied Trades, District Council No. 15
Ted J. Olivas, Director of Administrative Services, City of Las Vegas
P. Michael Murphy, representing Clark County
Cadence Matijevich, representing the City of Reno
Gustavo Nunez, Manager, State of Nevada Public Works Board
Kathy Clewett, representing the City of Sparks
Michael Tanchek, State Labor Commissioner, State of Nevada Department of Business and Industry
Steve Walker, representing Truckee Meadows Water Authority and Lyon and Douglas Counties and Carson City
Lisa Foster, representing the Nevada League of Cities and Municipalities
Patti Chipman, representing Nye County
Javier Trujillo, representing the City of Henderson
Jason King, State Engineer, Division of Water Resources
John P. Sande IV, representing the Reno-Tahoe Airport Authority
Marlene Lockard, representing the Nevada Women's Lobby
Jan Gilbert, representing the Progressive Leadership Alliance of Nevada

Chair Kirkpatrick:

[Roll was called.] We will go a little out of order from the agenda as well as the work session. We are going to do the work session last. Assembly Bill 248 will not be voted on today. It will be put onto a work session for next week. Assembly Bill 312 will not be heard today.

Assembly Bill 312: Revises provisions governing public works. (BDR 28-692)

[The bill was not heard.] Our schedule is very full. We will now start at 8 a.m. on Mondays and 7:30 a.m. on days after that. We will be hearing anywhere

from five to ten bills every day. We will open up the hearing on Assembly Bill 413.

Assembly Bill 413: Revises provisions governing public works. (BDR 28-718)

Assemblyman Richard Daly, Washoe County Assembly District No. 31:

This bill deals with retention on public works projects. I will explain what retention is. When a contract is billed, the progress payments withhold or retain a percentage of the total amount owed until the work progresses further. Under current law, that amount is 10 percent per billing. This bill proposes to lower that to 5 percent. When 50 percent of the job is completed, if there are no other issues or complaints worth addressing, they generally will cut the amount of retention in half. Currently, it would be 10 percent cut to 5 percent. This bill would propose to cut that to 2.5 percent if the maximum that can be retained is 5 percent. There are a couple of issues. I spoke with Mr. Nunez, the Manager of the Public Works Board earlier. Protocol was followed. He has a few questions on this bill. I will go through the bill quickly on the way it is. People have their concerns. I am aware of some of them. We are working to get this amended and get this bill quickly back to your Committee.

On page 2, the new language on line 2 increases the amount that can be paid from 90 percent to 95 percent, thereby lowering the retention from 10 percent to 5 percent. Page 2, line 6, subsection 2 says that, "After 50 percent of the work required by the contract has been performed, the public body may pay any of the remaining progress payments without withholding additional retainage if, in the opinion of the public body, satisfactory progress is being made in the work." That is permissive language. The public body may lower the retention or stop collecting the retention at all. One of the issues that comes up starts on line 11. That language states that if the public body holds retention at all they can only hold it at 2.5 percent. It has to give back all of the money that was previously held if everything is going smoothly at that point. That is where there are a couple of issues that we are working on. My intention was to have it give back half of the money that it has already taken. That would be one change I would bring. Currently, the law states that the public body has to give back all of the money that it has held, up to 50 percent of the job. The rest in section 1 is number changing.

In section 2, the same changes are made as in section 1. However, the first section is between the awarding body and the general contractor. The awarding body is retaining 10 percent now; this bill would make it 5 percent. Page 4 has the same language and same procedure for the general contractor down to the subcontractors. In section 5, it gives the same procedures from the subcontractors to the suppliers or lower-tiered subcontractors, and so on.

That is the bill in a nutshell. You will have some testifiers that will tell you why these changes are needed. Profits are down even at 10 percent. Some of the contractors can give you their issues. There is no uniformity on how different public bodies hold the retention and how their process works. We need to try to make that process uniform. Contractors are not making 10 percent profit. If you are a subcontractor early on in a two-year job, they hold that money for the whole length of the job. Someone could be off the job for 18 months or longer before the job is finalized and he receives his retention. These contractors basically have to use money out of their pockets to help finance the job. Contractors have to make their payroll, pay their suppliers, and meet overhead. These contractors have to float that money for a substantial period of time, in some cases. The 10 percent retention requirement is making it difficult for contractors in the current environment. We think 5 percent will meet the needs of everyone in order to keep contractors on track in performing as they should. An extra benefit is it will cause general contractors to look at the quality of their subcontractors. If there is a subcontractor that is a little shaky or they are worried about, they will not list or utilize that subcontractor. This means we will get better contractors on public works jobs. That is a possible extra benefit.

Assemblywoman Benitez-Thompson:

Can you tell me why there is a change from 90 to 95 percent in the progress payments once 50 percent of the work has been completed? What difference does 5 percent make?

Assemblyman Daly:

The language where it goes from 90 to 95 percent is the amount that the organization contracting the job is allowed to pay. For instance, say there is a million-dollar job that is ten months long. It would be billed every month at \$100,000. They will withhold 10 percent because the law states that they cannot pay the contractor more than 90 percent. The bill changes that. That means that the contracting entity can only withhold 5 percent. The language needs to change from 90 percent to 95 percent to say that the contracting entity cannot pay more than 95 percent.

Assemblywoman Benitez-Thompson:

Why is it detrimental to the contractors not to have that additional 5 percent right now? How will it be beneficial to the contractor? Is this preventing them from financing? Is it preventing them from paying down to their subcontractors? Will that extra 5 percent allow them to make payments that they otherwise could not make?

Assemblyman Daly:

Everyone understands retention. It is a well-known concept. It is beneficial. We are not trying to get rid of it. During good economic times, people were maybe making 10 percent or more, but only in certain circumstances. Different subcontractors make different amounts. Now, no one is making 10 percent. When a project is built and supplies are bought, the bill has to be paid. The contractors do not get to hold retention. If you are lucky enough to make a profit, a contractor might not see that profit until two years later. Contractors are essentially financing the public works jobs. In this environment when the profit is 3 percent or less, they are paying 7 percent out of their pocket. They do receive a small amount of interest. It is less than 1 percent right now. Some contractors cannot float that money anymore. It is very difficult.

Chair Kirkpatrick:

I will give an example to help some of those that are not in the construction trade and are having a hard time with the concept of retention. If you have a \$100 contract, the awarding body would hold \$10 out of that \$100 for two years. Instead of putting that money back into the economy and turning it around to bond on more jobs, they are asking to have them hold a smaller portion of that money back. So, to continue the example, the awarding body will hold \$5, which should cover the cost of any retention money.

Assemblyman Daly:

It is held for a variety of reasons. It is basically to ensure compliance. It is also to ensure that if subcontractors do not pay their bills that the general contractor is ultimately responsible. They want to have a little insurance money to make sure that things are progressing as they should on the job. You want to retain a little bit of money. You want to have the appropriate amount of leverage to have a successful project. The money could also be used if the correction needs to be made by another contractor without any extra money being set aside. Sometimes, if there is too much of that, the coercive nature of that causes some public bodies to go out of bounds and coerce more than they would otherwise. I do not want to disparage any public bodies.

Chair Kirkpatrick:

At the same time, the public bodies can draw on that money and, at the end of the job, the 10 percent has to be left in a separate account so that if things are not fixed or there is some dispute over what a contractor should have done, that money is there to protect.

Assemblyman Daly:

Yes, and also, if there is a wage claim. There is separate language that the public bodies would be ordered to hold that money if there was a prevailing

wage claim. In this economic environment, we think that 5 percent is going to be enough. Ten percent is causing problems. There are contractors here that brought this issue to me. In case he did not make it, the issue was with the general contractor for the Molecular Science Building at the University of Nevada, Reno (UNR). This particular gentleman was the dirt subcontractor. He was the first one on site. He was doing the various things required to build the foundation and move on with the building. His job was approximately \$3 million. They hold 10 percent of the \$3 million: \$300,000. Hopefully, at 50 percent of completion of the total job, they will lower that retention. If the contractor has done a good job, his work is done. Now, this contractor has been done for six months because they are halfway through a two-year job. They will give him back half his money if everything is good. They will still hold onto that money at the end because they do not know what is going to happen with the building. The contractor is now holding \$150,000 of the money, if that is the scenario. Then, when the job is completed, he has now been off the job 18 months. In this particular instance, they lowered the retainage down, and he was not getting any more taken out. That means that 24 months after he started the job, he will get his last \$90,000 out of that job. He had to pay all that money out. He had to pay the cash flow and his entire payroll. That was paid 18 months ago. He is now out that money. Some contractors cannot bankroll that money for that length of time anymore. We are just trying to lower it to help the contractors. If the general contractor is worried about a subcontractor not being able to do that, he might put a more careful eye on the subcontractor he picks. We want to make sure that we are getting the highest quality and most viable contractors on public work projects.

Assemblyman Ellison:

The supply houses are tightening things down on these contractors. To finance a job that far out is almost impossible. These contractors have to get money from other projects to pay for a public works project. I was on the State Contractors' Board, and I have watched some of the best contractors in the State of Nevada go down because they would be extended out so far that they could not bring all of the money in that they needed. It finally ended up taking them out. This is a good bill. It might need some amendments. It is at least giving us something to work with on this issue.

Assemblywoman Bustamante Adams:

In my few years in construction, this mechanism used by the industry always puzzles me. I agree with Assemblyman Ellison. It is very hard to finance a project up front. I wanted some clarity on page 2. What you described applies to the whole supply chain in construction. It starts with the public body on page 2, and on page 4, the same process also applies to the general contractors

as well as subcontractors. On page 5, it applies to the subcontractors and to the suppliers. Did I understand that correctly?

Assemblyman Daly:

Yes.

Assemblywoman Bustamante Adams:

Everyone in the chain is held accountable.

Chair Kirkpatrick:

Will you clarify the proposed amendment? What are you trying to fix? Section 2, subsection 2, of section 3 and section 5 all say the same thing, but you want to clarify the language within all three sections. Is that correct?

Assemblyman Daly:

Yes. There is some language put in by the Public Works Board that I saw last night. We are close on this. The change would be in the part where they have to give back. It would be in paragraph (b), line 15, on page 2. It says, "Except as otherwise provided in NRS 338.525, before withholding any amount pursuant to paragraph (a), the public body must pay to the contractor the amount of any retainage that was withheld from progress payments pursuant to subsection 1." *Nevada Revised Statutes* (NRS) 338.525 is another section on why the public body would hold money. This language states that the public body has to give all the money back to the contractors. I would change it to say "50 percent of the amount." That would go on line 17 between "contractor" and "the." That is one thing I would change. We are, of course, going to work with the Public Works Board, Associated General Contractors of America, Inc. (AGC), and everyone else that might have concerns. We will get it figured out. We have to make sure we clarify what the intent is.

Chair Kirkpatrick:

I will now call up those that would like to testify on A.B. 413. If you support the bill, as written, come up during support. If you have an amendment, come up during neutral. If you are against the bill, as written, come up during opposition. I find that people are supportive but want amendments. We need to keep our record clear.

Assemblyman Daly:

We have here John Madole and Fred Reeder, who brought the idea to me. We worked on this together. There are no simple bills. We need input from the Committee as well. It is not just us; you are making the decision. We want to give you the bill. This is the reason I went through it as written. These

gentlemen will be able to give you some background better than I could on the problem. We will work out the exact language.

John Madole, Executive Director, Associated General Contractors of America, Inc., Nevada Chapter:

We support this bill. Assemblyman Daly talked to us about the amendments. We understand and respect the fact that this language needs to be cleaned up. Mr. Reeder will go into more detail. As Assemblyman Ellison and Assemblywoman Bustamante Adams have said this morning, this bill comes from the fact that you occasionally will see engineering contractors that are in the early stages of a long job, that have that retention held for perhaps 18 to 24 months. It is quite a hardship. We do support the bill.

Fred Reeder, President, Reno-Tahoe Construction:

We were the side contractor on the project that Assemblyman Daly talked about. As a smaller contractor, our business is about cash flow. Current retention laws allow public agencies to hold 10 percent upfront. It is creating a hardship on us to try and operate in today's business. I will not currently bid on a public works building contract because I cannot handle the cash flow. I have had a difficult year. Last year, I was at death's door. I was down to about 12 people on my staff. I have turned it around since then. I have about 50 people on my payroll. I am going out and buying more equipment these days.

When the construction market was booming, we were doing about \$25 to \$30 million a year in annual revenue. Because of this volume of work, my accounting always showed about \$2 million held in retention accounts. I carried a \$2 million credit line at my bank. I carried about 5 percent to 6 percent interest and received less than half a percent on the other end. It was not a smart move to be doing public works when I had this kind of retention tied up.

On the Molecular Science Building, my contract was \$1.9 million, to clarify for Assemblyman Daly. We broke ground on that project in December of 2008. By June of that year I was 85 percent complete with my job. I was still having 10 percent retention held on that building. I am the person that digs the hole. There is really nothing that was going to go wrong with my part of the construction, unless the hole filled back in. My job was done. I finally received my retention once the building was halfway completed. I did not have control of the building. I did receive 50 percent of my retention. Once the job was finally completed, they had some roofing issues that I had nothing to do with. I did not get my retention until November of 2010. That is almost two years to the date from when I broke ground that I received my final retention.

I understand that there will be some concerns from public agencies and general contractors regarding the control that they will have over the subcontractors and general contractors. The way our progress billings work, if I started this job on March 1, I do not bill until March 30; I do not get paid until 30 days after that billing. You have 60 days on me already. By the time I get paid my first progress billing, I have another 30 days of work that I have completed that I have to bill. I will get that money 60 days from that date. There is always a month of holdback plus the retention that we are dealing with. I understand the concerns of the general contractors that are going out of business daily. If a contractor goes belly up, the contract commissioner needs to hold enough money so that he can complete the job with another contractor. This is going to create an issue where general contractors are going to have to be more careful as far as selecting their subcontractors and making sure they are financially stable and they are competent. This will improve the general contractor's selection of subcontractors and the subcontractors that are selected for these jobs.

Assemblywoman Bustamante Adams:

When that money was put upfront for the Molecular Science Building, were you able to bid on any other projects? How did you manage your cash flow to do other projects?

Fred Reeder:

We were doing other projects. However, that money is always held out. We were borrowing from the bank in order to cash flow our jobs. We have a revolving credit line with the bank. Right now, that credit line is getting tighter. Another issue that is getting worse is that was a state public works job, as a subcontractor we had to bond it. When you tie up a bond for two years, it ties up my aggregate bonding limit. I have an individual job limit and an aggregate limit. When both of those are tied up, it eats up my aggregate limit for two years. Someone has to think twice about bidding a long-term job in this economic climate. Bonding is very difficult currently. Our financial situations are going down, and bonding is based on financial situation.

Assemblyman Livermore:

Generally retentions happen because of work that needs to be up to the owner's satisfaction. It is a warranty, so to speak. Did you have any issues where the owner required you to do additional work during the project you spoke of earlier?

Fred Reeder:

No. We started that contract around \$1.7 million. We had some soil issues where the owner changed the scope of the work. We were then awarded about

\$200,000 in change orders. That was performed early on in the project. There was really no conflict between me and the state or between me and the general contractor on the project. It was a well-run job. It is just the nature of the beast. It takes two years to get my money.

Assemblyman Livermore:

I understand. I am trying to see it from the owner's perspective. Were there any subcontractors that had claims that they were not paid on time during the project?

Fred Reeder:

I do not believe so. I did not hear of any complaints. I know that they had some difficulties that prolonged the job. There were some vibrations in the building in the mechanical systems. It was a molecular science building so they had some laboratory work that would be done inside the building. They had to limit the vibrations as much as possible. I believe the general contractor had some change orders to fix minor vibrations in the boiler rooms. They had some issues with a roof that was perforated. There were no arguments. It was just warranty issues that needed to be handled.

Assemblyman Livermore:

In that job you had to post bonding; what amount of bond did you have to post?

Fred Reeder:

For any state public works job, we have to post performance and payment bonds.

Assemblyman Livermore:

I support this bill. It is good policy to make sure that payments are made to contractors in a timely fashion. I just wanted to put those questions on the record.

Fred Reeder:

It is not an issue of us just getting paid. It is an issue of reducing the retention to a reasonable amount. We are not making 10 percent profit on these jobs. A 2 percent or 3 percent profit would be good in today's market.

Chair Kirkpatrick:

Local governments have signed in, in force in opposition to this bill. We will ask them what their problems with the bill are. Is there anyone else that would like to testify in support of A.B. 413? [There was no one.] Is there anyone who is in opposition to A.B. 413? [There was no one.] Is there anyone who is

neutral on A.B. 413? [There was no one.] For all the local governments, if you are in opposition to this bill, it is the only time we will hear it. We are moving bills. We need to know what the problems are so we can fix them.

Jack Mallory, representing the International Union of Painters and Allied Trades, District Council No. 15:

We are supportive of the concept of reducing retention on projects. The trades council contractor partners are typically subcontractors. In many situations, subcontractors are effectively forced to finance projects. Our main concern with this provision is that sometimes subcontractors or contractors do not pay their bills. They do not pay their vendors, trust fund contribution obligations, or appropriate wages in some cases. If retention funds are depleted and the contractor that has those obligations cannot pay those bills, liability is then passed to the bonding companies. If all of the obligations are not met by those bonds then, ultimately, the deficiency is passed to the general contractor. They have a tremendous amount of liability.

Assemblywoman Benitez-Thompson:

In the situation that you laid out, if the retention funds were insufficient and the contractor cannot pay it, then the subcontractors get stuck with the debt. How often does that happen in the industry? You probably cannot site a specific number, but I would like to get a feel for how often this occurs.

Jack Mallory:

It is difficult to give you specific numbers. I can only speak directly to the trades that I represent. I can also only speak to the trust funds that I sit on and the collection activities that we have to engage in. I think that, because of the economy being what it is and the difficulties that everyone experiences in securing financing, contractors have trouble getting financing in order to pay their bills. On a monthly basis, we have collection committee meetings. We are typically pursuing collection actions against anywhere from one to five contractors. We are continuously updating those things. In some cases, the contractor is able to meet those obligations through a direct payment from retention by the general contractor to the trust funds. In some cases, when the subcontractor does not have that retention available and he does not have the funds available, the first thing we do is go to the bonding company that was holding the bond at the time that the project was being performed. If there is an insufficient amount of funds available from that bond, it goes to the bond that is posted with the Contractors' Board. If that does not meet the financial obligation, the liability is then passed to the general contractor.

Chair Kirkpatrick:

This is something that was discussed in 2005. It was discussed again in 2007. Whether times are good or not, I do not understand what the compelling reason is for holding 10 percent of the money. That would be like if I took someone's paycheck and held 10 percent of that for two years. Could someone explain why there is that long of a time frame? Could someone also explain why, if there are bad contractors out there, why we are not taking them off the bid list the next time around? It seems as if we are not addressing those issues. This is something we have discussed for a long time. I will speak from a vendor perspective; sometimes we are waiting 153 days to get our money. We still have to pay payroll, we still have to pay for fuel, and we have to pay all these other things. If someone in the process goes bankrupt, we are out of luck. I understand holding some retention money but, at the same time, even when times are good you could limit a smaller company from bidding because it does not have bonding capabilities. Its money is tied up. I need to understand what the reasoning is for the elongated process. In the bill it states that interest is paid to the contractor, but they have nothing to leverage, so the interest does not do him any good. He has no work in between. I want to hear what the reason is for holding it and why we are not getting rid of the bad apples. We need to address this issue. For those local governments that did not come up and speak but signed in, in opposition, that is not good.

Ted J. Olivas, Director of Administrative Services, City of Las Vegas:

I appreciate those comments. We agree with the comments that you have made, Chair Kirkpatrick. We do not like that contractors and subcontractors are not paid. Let me give you some history. We went through great pains in 1999 to create the Progress Payments statute. That is NRS 338.400 to NRS 338.645. Prior to that time it was similar to the Wild West. There was not a procedure to make sure that we, as the public body, were paying the contractor and that contractor was paying the subcontractors. This statute was enacted in 1999. It has provisions about what it does and does not apply to. There are sections that talk about payments from the public body to the contractor, separate sections that speak to contractors to subcontractors, and then subcontractors to vendors. This statute is very specific on how this process works. You might have heard about some problems in the process. However, overall with the billions of dollars that have been spent on infrastructure throughout this state there are only a handful of problems. We have to get a handle on that. It is probably my fault that we signed in, as being in opposition. I have a solution. We should have signed in as neutral with an opportunity here.

I will only talk about sections 1 and 2. Those sections relate to payments between a public body and a contractor. When we pay the contractor what

happens after is between the contractor and the subcontractors and the subcontractors and the vendors. The current law states that we have to pay the contractors; we have to pay them within 30 days. In 1999, we made the decision that we have to quickly pay these contractors. As Assemblyman Daly mentioned, we can hold 10 percent up to the first 50 percent of the project completion. After that, we have the opportunity to do whatever we want to do. We can pay 100 percent of their progress payment after that period. We do not have to withhold anything, and most of the time we do not. We do this to protect your constituents' tax dollars. If a good contractor is performing well, we are willing to work with him after that first 50 percent is completed and reduce the amount of retainage. If a contractor is not good, we have a fiduciary obligation to hold that contractor's feet to the fire. There are always going to be a few bad apples.

Most of the contractors that we work with are great. If these contractors are bad apples, we will protect the taxpayers' dollars. They are proposing to reduce the amount that we can retain. I do not think that we need to do that. We need to make sure that the contractors are performing as provided for in that contract. No one put a gun to their head when they signed that bid form that said that they were willing to fulfill the obligations set forth under those terms and conditions in the contract. This bill could help a handful of bad contractors. This is not helpful for the good contractors. We do not want to put contractors out of business. There has been plenty of that already in private industry. We are dependent on the contractors to build the infrastructure that is necessary for our taxpayers. We work very closely with the contracting community. We talk about these issues. The contractors must put a certain amount of money in their contracts for the cost of the money that we are going to retain. We, as taxpayers, are paying for this service.

The 10 percent retainage being equal to profit has nothing to do with anything. We know that a contractor's margin is very small. It has nothing to do with the retainage. They are two separate things. We want to reward good contractors for good performance. We want those contractors that are not performing well to take responsibility. The law allows us to do that currently. We have an obligation to do that. If any of us wanted to build an addition onto our house or a pool, would we give that contractor the full \$20,000? No. We wait; we hold back money until that addition is completely finished. This is no different from that situation, other than the fact that we are talking about taxpayers' dollars. I cannot propose what should happen between a contractor and a subcontractor and further on down the line. The solution for local governments is, in section 2 on page 2, line 2, if you change the 95 percent back to 90 percent, and you delete lines 11 through 18. This gets us back to our responsibility for paying the general contractors.

Chair Kirkpatrick:

I understand that people sign up to take on these public works projects. However, what will end up happening is that Nevada contractors are not going to sign up anymore, and we have then given all of our work away. I do not want us to be in that situation either. It is a tough situation. We have to make good policy for the long term. I understand both sides. You said that you wanted to change section 2, subsection 2?

Ted Olivas:

I am sorry. It is actually section 1, subsection 1, on page 2. We changed that back to 90 percent and deleted lines 11 through 18.

Chair Kirkpatrick:

That just states that you have to pay them within 30 days and hold the retention.

Ted Olivas:

It takes us back to the current statute that says that we retain 10 percent up to 50 percent completion. We do not have to hold retention after that.

Assemblyman Goedhart:

The way that it is in statute currently is 10 percent retainage until 50 percent completion, at which point in time you can make a determination about what is an appropriate level to give the contractor his money in order to support a fiduciary responsibility to the taxpayers. How does this relate or compare to other states? How does this compare to what is standard industry practice between the public works body and the contractors?

Ted Olivas:

I do not have the answer for that currently. I would be willing to do some research on that issue.

Assemblywoman Benitez-Thompson:

What percentage of your contracts do you give the retainage back after 50 percent of work is done? To help me get a handle on how big this problem is, I need to know how often that happens. Is it 90 percent or 10 percent of contracts that you given those retainage monies back right after 50 percent of the project has been completed?

Ted Olivas:

Our city engineer said that a huge majority of our contracts, which I would assume to be over 80 percent, go just fine. We are willing to work with the contractor on the second half of the project. If this was a huge issue for

contractors throughout the state, they would be lined up out the front door to testify. We are able to work with contractors in most of the contracts that we have. They do fine. There are some bad apples out there and we do the best that we can to deal with them under the constraints that we have.

Chair Kirkpatrick:

I would assume it is on an entity-to-entity basis how those dollars are returned. Is that correct?

Ted Olivas:

Yes. I cannot say that there is any consistency amongst the jurisdictions and their success rate that the City of Las Vegas has had.

Assemblyman Livermore:

As an elected county official for 12 years, I have approved a lot of contracts and a lot of project finalization payments. There is one that sticks in my mind, as you described when you described a bad contractor. We had a swimming pool built at Mills Park. From the beginning, that project was difficult. The city had to eventually evict the contractor by court order and hire a new contractor to complete the project. The quality of work by the first contractor was not good. This situation strung out for several years. Carson City wound up in a long and very contentious court battle. There was finally a settlement out of court. If we had not had that retention, we could not have completed that project. That project would have remained uncompleted until the court ruled if we did not have that retention. I understand where you are coming from. That is the only situation that is in my mind that is of the nature that you just described.

Assemblyman Ellison:

I appreciate your comments. I knew there would be some amendments to this bill. There are checks and balances in this process. The general contractors have to get these subcontractors to sign off on performance as they go. I have been doing construction in the city and county for 18 years. You can get somebody from public works who can take a general contractor and hold him out for a long time on punch lists. Some of these can never be satisfied. There are checks and balances that need to be adhered to. My biggest fear is to watch the good contractors go down with the bad ones. This is a loophole. I think the language will help tighten this up. There are going to be some amendments on this bill. The checks and balances are there to protect the cities and the contractors. That is why there are bid and performance bonds.

Chair Kirkpatrick:

Is there a time frame that is consistent throughout the state on how long retention money is held? Is it based on contract length?

Ted Olivas:

There is not a consistent time frame. The duration of each contract is different. Sometimes we have a six-month contract, a 12-month contract, and a two-year contract. The 50 percent completion moves depending on the scope of work and the construction project.

Chair Kirkpatrick:

Could the process not be shortened at least for the retention money as far as how long it is held? It seems that every local government might have a different issue but, within the private sector, they only hold the money for one year.

Ted Olivas:

If a contract is going really well and we hold 10 percent for the first 50 percent and we do not hold anything after that, we are holding 5 percent of the money. We need to have something at the end of the day to get through that entire project. Things could be going well until the last two or three months. Assemblyman Ellison mentioned punch lists. This means that we will not pay until something particular in the project is completed. That is what the contract states. There are things that can hold up that process of giving the money to the contractor. We are paying 5 percent in the contract. That is to minimize the risk to the taxpayer. We are not asking that much.

P. Michael Murphy, representing Clark County:

Mr. Olivas has stated everything that we would like to do. We would like to reiterate the concept that we are protecting taxpayers. Please remember, when these projects go well, they go very well, but when they go badly, they go very badly. I understand the need to protect everyone on both sides. I could not have stated it any better than Mr. Olivas already did.

Jack Mallory:

In the 2010 Legislative Session in Colorado there was a bill introduced that addressed this same subject. They maintained 10 percent for the first 50 percent of the project. It then dropped to 5 percent, and at 75 percent completion it dropped to 2.5 percent. I will do some research to see if the bill achieved final passage. I do not believe that it did. That may be a better fit for this legislation. In most cases, the bad apples are not being disqualified. If they are put out of business because their contract bond with the State Contractors' Board has been attached, they lose their license and cannot bid on work.

However, because of the lowest and most responsive responsible bidder's laws that are in Nevada, the bad apples still have an opportunity to participate in these projects. That is an area of concern.

Cadence Matijevich, representing the City of Reno:

We are one of the local governments that initially signed in as being opposed to the bill. I do not want to belabor the issue; Mr. Olivas did a fantastic job of describing local government concerns on this bill. We are willing to work on amendments that address local government concerns and the issue of liability for the taxpayers.

Chair Kirkpatrick:

We cannot fix problems if we do not know what the issues are. Can you tell me how long the City of Reno holds the retention money? Can you get me that information?

Cadence Matijevich:

I would be happy to get you that information. It varies depending upon the complexity and nature of the project. I will get that information for you.

Gustavo Nunez, Manager, State of Nevada Public Works Board:

I apologize. I signed in as being in opposition to this bill. Based on your description, I should have been neutral. As has been stated, retention is a tool provided to the public agency and the state in order to manage some of the risk that is associated with this type of work. I have had a chance to do some research to see if the 5 percent that is being suggested would become a problem. Based on recent history, every issue that we have had has not come close to 5 percent. With respect to managing risk while reducing the retention at the beginning of a job from 10 percent to 5 percent, I cannot tell you that it will be a problem. We are not in opposition to the 5 percent stipulation. We have always been able to resolve issues with 5 percent.

With respect to the other parts of the bill, in reducing beyond that 5 percent, we would like to keep it the way it is right now in the way that we reduce 10 percent to 5 percent after 50 percent job completion. That is based on the discretion of the agency. It is allowed, but it is not mandatory. If we have a good contractor that is performing, we can then stop withholding retention. By the end of the job we could be at 2.5 percent. We would still like it to be optional. Our suggestion is that in section 1, subsection 2 which is on page 2, lines 11 through 18 be deleted. We then do not have a concern with this bill. I want to say also that prime contractors are screening subcontractors more and prequalifying them before they accept bids from them. It may be recently with the economic conditions and people going out of business. Contractors want to

make sure that, when they sign a contract with a subcontractor, he is going to be able to perform. If you pass this bill, my guess would be that this will increase even more. There is going to be more scrutiny on the general contractor's part as far as subcontractors are concerned. That will result in getting better subcontractors on the job.

Kathy Clewett, representing the City of Sparks:

We would like to reiterate what everyone else has already stated. We agree with Mr. Olivas, Mr. Murphy, and Ms. Matijevich. I have been in contact with our purchasing manager. He also agrees with most of the statements that were made here today. The percentage of people that we do not have problems with is very high. The way it is written, if lines 11 through 18 are taken out, we agree. If someone is performing well, it goes right along. There is not a problem.

Assemblyman Anderson:

Does the State Public Works Board award 90 percent before 50 percent of a job is completed?

Gustavo Nunez:

In the area of retention, what our Board does is pursuant to the current law. We retain 10 percent for the first 50 percent of job completion. When the job is 50 percent complete, at that time, if the contractor is performing and he requests a reduction in the retention, he will get paid in full. There is no retention withheld. That means that, as time goes by, the 10 percent starts to slowly go down to 5 percent. By the time you get to the end of a job, because you are not withholding anymore retention for the last 50 percent, you are at 5 percent. It slowly goes from 10 percent to 5 percent. After substantial completion, we can reduce that 5 percent even more depending on the punch list. Upon final completion, we release the rest of the retention plus any other amounts that would be withheld as a result of that punch list. That is how the process works for us currently. We would basically do the same, but start at 5 percent. If this bill passes, we would do the same thing, but we would start at 5 percent instead of 10 percent.

Chair Kirkpatrick:

You are a state agency and some of the others are local, so they may do it differently. Is that correct?

Gustavo Nunez:

That is correct.

Michael Tanchek, State Labor Commissioner, State of Nevada Department of Business and Industry:

I have retention provisions related to unpaid workers in my line of work. I am neutral on the bill because it is not going to have any impact on our ability to protect the workers in this job.

Assemblyman Daly:

We have heard the testimony. I feel that Chair Kirkpatrick is leaning towards setting a date for some of the subcontractors that are early in the job process. That will only help a small percentage of people. We will try to work with all the parties and figure out a number. I am sure we can come to an agreement that will work with everyone to address the issue. I do not think this will help any bad contractors. I have heard testimony that the better subcontractors will rise to the top and be more appealing to the general contractors that are bidding the work. The lowest responsive and responsible bidder only applies to the general contractor for public works. The general contractor gets to pick his subcontractors without those criteria.

Chair Kirkpatrick:

We have a full schedule for the next three weeks. We are doing work sessions as well. If it cannot be resolved by next Wednesday, we have a problem. Those meetings need to take place. If the issue is not on an agenda, then it is going to get lost in the shuffle. We will close the hearing on A.B. 413. I will now open the hearing on Assembly Bill 228.

[Assembly Bill 228](#): Revises provisions governing contracts for public works.
(BDR 28-582)

Assemblyman Pat Hickey, Washoe County District No. 25:

I am here in support of A.B. 228 with an amendment ([Exhibit C](#)). I would like to give you a brief background. All of us strive to look for ways to streamline and minimize what the government has to do on behalf of the public and the taxpayers. This particular bill is seeking to simplify the language in public works contracts. It strives to find the core contract provisions or the common provisions. It is a consensus document for public works projects. In that process, with time being money, contractors and other vendors have to review long contracts. Much of the contracts are boilerplate matters that have to be in there. There are also always addendums, specific provisions given the nature of the contract or the project itself.

This bill and the amendment propose to have interested parties meet with the Nevada Public Purchasing Study Commission to study governmental purchasing. The Commission meets regularly and is charged with making recommendations

with respect to those laws in the next legislative body. Our amendment specifically asks that this Commission meet with entities like the Associated General Contractors of America, Inc. (AGC) and other interested contractors who typically bid or are involved with public works projects. We plan that, within the next year, these people will review the nature of those contracts and see if there is some consensus language. Our intention would not be to eliminate provisions that public bodies feel the need to be in those contracts. The purpose is to see if we can find a simpler base contract and arrive at what might be together.

In this process we can save money by not hiring governmental attorneys in creating these projects. We can also save money for vendors and private interests that go into the cost of the project and the cost of the taxpayers in arriving at an agreement in a contract. If this bill is approved we are calling for a study by a group of individuals that meet regularly anyway.

John Madole, Executive Director, Associated General Contractors of America, Inc., Nevada Chapter:

We would like to see some standardization in this respect. There are 40 or 45 public agencies in this state. They have contracts that cover the same provisions. We are not always 100 percent sure what a clause says until it is tested and proven in court. We do not see any reason why this could not be standardized so that the people that are bidding these contracts could look for the exceptions rather than have to parse every word in every contract to figure out what the language of the statute and contract say. I know that people are proud of their individual contracts that they have written over the years, but we would just like to see the process streamlined. We understand that this is a process that will take years. In order to minimize the financial impact, we are suggesting that we take some time and have some conversation. We can possibly come up with something to bring to the 2013 Legislative Session.

Assemblyman Goedhart:

By making it more uniform and easier for the contractor, we will encourage more people to bid on projects, and it will also have the positive effect of having more competitive bids coming in on those contracts. Would you agree?

John Madole:

Yes, I would agree.

Chair Kirkpatrick:

This is not an individual study. This is asking our Purchasing Commission, which we already have in place, to look at this issue. Is that correct?

John Madole:

Yes. It seems like these conversations go a little bit better when state officials are suggesting it rather than when we are.

Assemblywoman Benitez-Thompson:

Initially, with the bill as proposed, the Public Purchasing Commission had some concern with going through this avenue, as opposed to just mandating consensus documents being used. We want to look at those contracts and work through what would work best for both the contractors and the Public Purchasing Commission. Do you feel that those issues have been resolved or have you heard anything about that?

Assemblyman Hickey:

Yes. Seeking consensus rather than imposing consensus documents is the purpose of this bill. If that conversation could be held then, hopefully, they can arrive at some things and produce a piece of legislation before this body in 2013.

[Chair Kirkpatrick left the room. Assemblywoman Bustamante Adams assumed the Chair.]

Fred Reeder, President, Reno-Tahoe Construction:

As a contractor, I am looking for one fair document. I believe that with some effort we can tailor this. There will be some opposition because of the individual intricacies of specific jobs. I have seen other contracts that can do it and can address those intricacies of jobs. I would hope that we can work together and come to some even ground where we can all agree.

Vice Chair Bustamante Adams:

We will now take testimony of those that are in support of A.B. 228. [There was no one.] Is there any who would like to testify as neutral on A.B. 228?

Steve Walker, representing Truckee Meadows Water Authority:

We are neutral to the bill as amended. We have worked with the bill sponsors to get to the amendment, and we are now neutral.

Lisa Foster, representing the Nevada League of Cities and Municipalities:

We were in opposition to the bill as written. We still have some concerns with the amendment because it delays the timeline that we were looking at in the original bill. We are interested in working with the sponsor to see what we can do with this. The city attorneys feel that they are crafting agreements and

contracts that will best protect the cities. We want to make sure that nothing happens in this process that would jeopardize their ability to protect the cities' money. There are so many levels of local government. This will be a very difficult process should you choose to proceed with this legislation.

Patti Chipman, representing Nye County:

We originally signed in against this bill. With the amendment, we are now neutral, but we would like to work with the sponsor to come to an agreement.

Javier Trujillo, representing the City of Henderson:

We initially signed in as being in opposition to the bill as introduced. We would like to change that position to neutral. We would like to be part of the collective process of working together with the bill sponsor to address local government concerns.

Jack Mallory, representing the International Union of Painters and Allied Trades, District Council No. 15:

We are not unsympathetic to the construction industry. Contractors make significant investments when they are putting bid documents together. It runs upwards of thousands of dollars to submit a bid to perform a project. There is no guarantee that they are actually going to get the project. We are concerned with the provisions in the bill and amendment by Assemblyman Hickey that there is a national association that primarily represents the interest of private contractors. A better process would be to follow recommendations from the Nevada Public Purchasing Study Commission to develop consensus documents. It is a function of government and not necessarily private industry. I would think that the Commission would accept information recommendations from private industry but, ultimately, it is a function of government. They determine what goes in those bid documents.

Vice Chair Bustamante Adams:

Is there any other neutral testimony on the bill? [There was none.] Thank you for following protocol. I would like to call up those who oppose A.B. 228.

[Assemblywoman Kirkpatrick reassumed the Chair.]

Ted J. Olivas, Director of Administrative Services, City of Las Vegas:

I would like to thank Assemblyman Hickey and John Madole for talking about this bill with me and taking the time to help me understand what we are trying to do here. However, our position has not changed. We are still opposed to this bill. I have a summary of our opposition ([Exhibit D](#)). It is an outline of some of the things that we are going to talk about.

Firstly, we have worked very closely with the contracting community over the years. That is why NRS Chapter 338, which is for public works bidding and contracting, is the way that it is. We have worked out a lot of problems. We have some concerns with this. The City of Las Vegas is a proponent of standardization. We had Assembly Bill 494 of the 75th Session on consolidation and reorganization. We tried to figure out how we could make things better. We are working with the City of North Las Vegas, the City of Henderson, and Clark County on some opportunities. We worked on Assembly Bill 144 to streamline processes to make specific forms for contractors throughout the state. We are looking at our business licensing process currently. We are clearly proponents of standardization.

I would submit to the Committee that there is not a problem. The system is not perfect; however there have been thousands of public works contracts awarded throughout this state worth billions of dollars. We have been able to do that successfully for the taxpayers by using contracts in various forms. In NRS Chapter 338, there are four ways that you can bid contracts. We have the prequalification method. We have the traditional method which is design, bid, and build. We have the construction managers at risk, which I am sure you will hear more about this session. Finally we have design-build. There are four ways that we can do bids depending on what the particular public works project is. They do not lend themselves to one type of project. We use the bidding type that best fits the project that we are trying to construct. In this process we advertise in the newspaper; we distribute the bid and bid document, the contract, the plans, the specifications, et cetera. We hold a pre-bid conference where we bring in all the contractors bidding on the job. We go page by page through the contract and ask if there are any issues in each section. It is at that time that we identify if there are any problems with the contract or the plans and speculations. We seek their input because we want to make sure that we are all on the same page and that there is a level playing field when they submit that bid. After that, we issue an addendum. If there is anything that is brought up that we need to change, we change it. We open the bids in a public forum, we analyze the bids, and then we award the contract.

Each contract includes standard boilerplate terms and conditions just like any procurement. There are unique things that are specific to that particular construction project. Those clauses are in the contract to protect us. It is insurance to us. We have a fiduciary responsibility to the taxpayers. We have to make sure that the contract protects us. We do not force contractors to submit bids. We work with the contractors. There is no one-size-fits-all contract. A road construction project is different from a building project, which is different from a reconstruction project, which is in turn different from a pipeline project or a pool project. The list goes on. They are all unique.

Probably 95 percent of the terms and conditions are boilerplate concepts such as termination and contract information. We have worked closely with the construction industry in southern Nevada. We have worked with AGC and Associated Builders and Contractors (ABC). We meet to discuss and identify if there are issues with our contracts and how we can make changes to them. I would assume that if there was a problem in this regard that we would be hearing from them. They would be telling us. Our job is to seek that input. If the process is not broken, then we do not need to fix it. There were some comments that were submitted by the Nevada Public Purchasing Study Commission ([Exhibit E](#)). It does not have a representative here today. I am submitting it on the Commission's behalf. In the document, the Commission says that it welcomes dialogue with any state or local industry or organization to improve the procurement process. The members of the Commission have worked closely with southern Nevada AGC and ABC for many years to improve the public works bidding process. They are committed to working with a northern Nevada AGC representative or anyone else in the months and years to come to fix this problem. I do not know that we need legislation to fix it.

Assemblywoman Benitez-Thompson:

The bill and the amended language is simply asking for the conversation to happen about what might be out there and what kind of practices and policies work well in Nevada. I am sensitive to the situation. I do not want people coming to the state from national organizations and telling us what to do when they cannot even pronounce the name of our state, let alone know what is happening here. I just want to make sure that I understand you. You are opposed to even having the conversation about what some of these organizations might have in terms of better procedures and more streamlined contracts. Also, keep in mind that if this Committee brings the legislation back in 2013 and that legislation is not a good fit for us, then we can have that discussion then. You are opposed to even having the conversation?

Ted Olivas:

I am sorry if I communicated that. We are absolutely not against having the discussion. We believe that there is not need for legislation to force this discussion. We will have this discussion through the Nevada Public Purchasing Study Commission. It does not need to be legislated.

Gustavo Nunez, Manager, State of Nevada Public Works Board:

We recently completed an update of our contract documents including the general conditions used in conjunction with our owner-contractor agreement. This work was done at the request of our Board over a period of two years. The development of these revisions included the services of a noted expert in

the field of construction contracting and risk management. We also coordinated with state risk management so that insurance requirements set forth in our contracts are adequate to protect the state from the risk that is inherent to any owner in construction. Finally, development of this document was subject to several public hearings held by our Board where industry representatives were present and provided input.

In addition to our Board holding these hearings, I took the time to talk to owners of various construction companies that do projects for us, as well as going out to construction sites and talking to superintendents and project managers. My conversation opened up by asking what problems our agency is causing for them and preventing them from getting their job done. It is amazing what kind of input you get at that point. Most of the time the complaints had nothing to do with general conditions or provisions of the contract. They mostly had to do with the way that our project managers were managing within those general conditions. Those things can be worked out outside of developing a brand new set of general conditions.

We have provided a fiscal note on this bill which was developed and calculated based on the recent effort that we made a couple of years ago. Included and attached to the fiscal note is a list of 93 documents. These documents will need to be updated with the adoption process of new contract documents as required by this bill. The existing contract documents are at the heart of every function we perform. A full revision of these documents is complex and time-consuming. Newly developed and untested contract language exposes the State of Nevada to significant risk. Our current contract language was developed with assistance from an expert. It was based on his analysis of case law. It carefully balances the rights of contractors and the state's goal of minimizing exposure to risk. This effort does not end with the adoption of new documents but continues through the training of project management staff who would be the ones responsible for managing projects through these documents. We do not have any problem with the concept of engaging people in the industry in discussion about our documents. We just do not see a benefit to incur this cost at this time. In the last ten years, I have received two complaints with respect to our contract documents.

Chair Kirkpatrick:

Why does the state have a fiscal note? The Public Purchasing Commission is composed of representatives of everyone in the state. They already meet.

Gustavo Nunez:

It is not just our construction documents that may need revisions.

Chair Kirkpatrick:

This bill is just stating that the Public Purchasing Commission will be asked to discuss standardization of forms. I have been before the Commission members. They meet often and they have representatives from across the state on their board. I do not understand where the fiscal note comes in to play. We are not telling anyone to change anything. I am just telling them that they have to have a conversation about this and bring legislation back for discussion in the next session. No one is changing anything until 2013, maybe even later. I appreciate that you have already tried to explain this. I understand if the state and local governments are not on the same page.

Gustavo Nunez:

We looked at what it took to revise our documents the last time we did that. It was recently. That is the effort that it took to go through those documents and bring them up to date. If we were to go through the process again, I see where the fiscal note is needed. The only thing that I can rely on is what it took the last time we went through that process. If we were to do that process again we are looking at funding for it.

Chair Kirkpatrick:

From my perspective, I could have everyone give me a copy of their forms and I can figure out how to standardize them. We are asking to have the discussion only. I would not need a fiscal note to do this. I do not understand. We are just asking you to give the Commission a copy of the forms and then they would have the discussion to streamline them. They are very smart people, and they represent the whole state.

Gustavo Nunez:

We have had disagreement on just one of the clauses of our general conditions between two of our Board members. It took close to two months and two hearings to come to an agreement as to that particular clause, what the risk was with respect to managing the clause, and then settling the final language. Most of the complaints I have seen are people managing projects and actually managing outside the provisions of the contract documents, or mismanaging what is included in the contract. I get more complaints of that than I do the actual contract documents. I have had two complaints about our documents in the last ten years. Having gone through that effort, I do not see the benefit at this time to the state and the Public Works Board in going through that effort again.

Chair Kirkpatrick:

A state legislator could go through it. I could pick which form to use. If we do not have the discussion now, then we will have it next session.

P. Michael Murphy, representing Clark County:

We will echo the comments that were made by Mr. Olivas and add that the Clark County Department of Aviation was extremely concerned about this bill, specifically because of the uniqueness of the work that it does. The Department works with the Federal Aviation Administration and other agencies in reference to its contracts. We believe that there is a process in place that would handle this. There is not a need for a state law. We can work together to make that happen.

Chair Kirkpatrick:

Is there anyone else that would like to testify as neutral on A.B. 228? [There was no one.] During the legislative session all the agencies say that they have no problem working together but; outside the legislative session, we seem to get back on our own turfs. I do not want to do this anymore. I have asked for information during the legislative session and cannot even get it. We do need to legislate this to have the conversations. You can have the conversation amongst yourselves, but outside of this legislative building, it is very hard get everyone to work together. I am over the fact that everyone says that they are going to work together but, after the session is over, everyone seems to have amnesia about that.

Assemblyman Hickey:

Thank you for holding the hearing and your approach to this bill. We are just asking to have a conversation with the force of this study behind it as was indicated. Tens of thousands of dollars are spent in the process of reviewing documents. If we can save some money in the end, the government in general, will save some money. Everyone will be better served. We are happy to work with whomever.

Assemblyman Anderson:

Please do look at this bill in good faith. Anything that we can do to make the business environment better will help economic development in the long run. That is a goal that all of us have agreed is worth going towards. I do not know if it will all work out or if everyone will be able to come to an agreement, but I would ask all the local governments to look at it in good faith.

Assemblyman Ellison:

Do you think that we would save time if we could get everyone together with all of their documents? Do you think it would save the cities and the counties money?

Assemblyman Hickey:

I think so. Time is money, as everyone knows. While it is difficult to budge the bureaucracy, in this sense, I think that it is a budge that is worthwhile. I think both sides could potentially find a way to save money in reviewing contracts if there is a consensus about the common elements.

Chair Kirkpatrick:

Sometimes it is as simple as putting all of the clauses at the top of the first page so that people know where to find things. Sometimes it is that simple. It took me four months to get a copy of a bidding document from our State Public Works Board. I literally had to go down and pretend I was going to bid on a job to get one. That is where my frustration lies.

Assemblywoman Benitez-Thompson:

There seems to be a handful of organizations that really have done a lot of national work on consensus documents. I want to make sure that we do not end up driving our state to just have one business or company that we are using consistently. I would like to make it as diverse as possible. That way, it is really a fair and objective look at what different types of professions, industries, and representations are saying about these contracts.

Chair Kirkpatrick:

We will close the hearing on A.B. 228. We are going to go into our work session now. For the Committee, when you have bills that are being heard in any committee it is helpful for you to lobby your own bill with your colleagues. I am finding that is something that does not happen anymore. The more that you can lobby your colleagues on those committees and explain what your bill does, the faster our committee hearings go, the information on the record is better, and it is helpful. I lobby my own bills all the time.

We will now go into our work session. We will start with Assembly Bill 59.

Assembly Bill 59: Makes various changes to the Open Meeting Law. (BDR 19-288)

The Committee members get the work session document at least three days in advance. There are bills today in our work session that are only done in conceptual form. We have agreed that when the amendments come out, because they are very technical, we will disperse the amendments. Ninety-nine percent of the time, I try to post my work session the night before so that the public has a chance to look at the bills as well.

Susan Scholley, Committee Policy Analyst:

Assembly Bill 59 makes various changes to the open meeting law and was sponsored by this Committee on behalf of the Attorney General. The summary you have before you ([Exhibit F](#)) lists the various changes that this bill would make to the open meeting law. There was a fair amount of testimony on this bill. During the hearing, the Attorney General proposed several amendments. The Department of Business and Industry proposed an amendment that was not directly related to the Attorney General's provisions in the open meeting law. It was germane to the open meeting law.

There is a mock-up in your work session packet. This mock-up includes not only the amendments that were proposed during the hearing by the Attorney General and the Department of Business and Industry but also some additional amendments that were proposed by the Attorney General in response to concerns raised at the hearing. On page 3, there has been some language removed around lines 13 and 14, 17 and 18, 19, 21, 22, 23 that deletes references to executive officers and staff. This is to ensure that the definition of "public body" would not include meetings that are essentially staff meetings. On line 37, there is clarification that regulatory bodies would be subject to being considered a public body even though they may be engaging in judicial or quasi-judicial activities. On page 4, line 33 there was a suggestion to clarify that a public body may combine two or more agenda items. On page 6, this clarifies that the Attorney General's intent was that only a knowing violation of the open meeting law would be punished.

Pages 7 and 8 of the mock-up would be amending an additional section of the open meeting law, *Nevada Revised Statutes* (NRS) 241.033. On page 8 is my conceptual attempt to capture the proposal by the Department of Business and Industry. I am sure the Legal Division of the Legislative Counsel Bureau will rewrite this. The idea is that when public bodies hold hearings to consider the character and competence of persons, there are additional requirements for advance notice to those persons. The Department wants to ensure that it would not include job applicants. The provisions for advance notice generally are geared toward employees or perhaps other persons connected with the agencies and not job applicants for empty positions.

Chair Kirkpatrick:

Are there any questions on A.B. 59? [There were none.]

ASSEMBLYMAN ANDERSON MOVED TO AMEND AND DO PASS
ASSEMBLY BILL 59

ASSEMBLYMAN STEWART SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN GOEDHART, MUNFORD,
AND PIERCE WERE ABSENT FOR THE VOTE.)

[Assembly Bill 73](#): Revises provisions governing the appropriation of water for a beneficial use. (BDR 48-467)

[Assembly Bill 115](#): Revises provisions governing the appropriation of water for beneficial use. (BDR 48-207)

We will now move to [Assembly Bill 73](#). We did have a subcommittee on this bill. There was a lot of discussion, so I will have Ms. Scholley give you a review of what the subcommittee was about.

Susan Scholley:

For the Committee members, there is a report of the subcommittee on [A.B. 73](#) and [Assembly Bill 115](#) ([Exhibit G](#)). Both of these bills relate to water. The subcommittee members were Chair Kirkpatrick, Assemblywoman Benitez-Thompson, Assemblyman Anderson, Assemblyman Goedhart, and Assemblyman Ellison. Assemblywoman Bustamante Adams and Assemblyman Livermore also attended the meeting. It was held on March 14, 2011, in Room 4100 at 5:30 p.m. The subcommittee received testimony from a number of persons who are listed here. I did not attempt to spell out who testified on what. There was certainly a lot of overlap. Proposed amendments were brought to the subcommittee at the hearing. They formed the basis for the discussion. Those proposed amendments that were presented to the subcommittee were different than the amendments that were presented to the Committee during hearings on those bills. They have been modified in response to comments and additional work done by the bill sponsors. The subcommittee did not take a formal vote at the conclusion of the subcommittee hearings. Instead, Chair Kirkpatrick indicated that these bills would come back to the full Committee for consideration. On page 2, I have attempted to summarize the changes that were presented to the subcommittee. They are in mock-ups on the work session document. I do not know that it would be appropriate to go through these at this time. It would better be done on the work session items on [A.B. 73](#) and [A.B. 115](#) respectively.

Chair Kirkpatrick:

That is what I would like to do. We did a good job. We appreciated that those Committee members were there. These amendments are conceptual. The Legal Division will give us a better definition. The legislative intent was very clear on which direction we were trying to get to. I have committed to the stakeholders on all sides that when the amendment comes out, before it is

dropped on the floor, we will all review it. I want to make it clear. I need a motion to approve the subcommittee report.

ASSEMBLYMAN ELLISON MOVED TO APPROVE THE
SUBCOMMITTEE REPORT.

ASSEMBLYMAN LIVERMORE SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN MUNFORD AND PIERCE
WERE ABSENT FOR THE VOTE.)

We will now open up the work session on Assembly Bill 73.

Susan Scholley:

Assembly Bill 73 was sponsored by the Committee on behalf of the Division of Water Resources. It was heard in this Committee on March 9. [Read from ([Exhibit H](#)).] I will go through the pertinent changes. On page 1, lines 4 and 5, clarify that the State Engineer may enter onto lands. There was concern that the use of the word "premises" may imply that the State Engineer could enter buildings, perhaps private residences. In section 2 of the bill, the proposal reverts the language in section 2 back to the way it is currently in statute. If this mock-up is adopted, section 2 would be deleted in its entirety. The language in *Nevada Revised Statutes* (NRS) 533.410 would not be changed. The State Engineer indicated that, based on some further discussion on mailing the notice because of a rule of law that you get three additional days for mailing, he is going to incorporate that into his practice. There is no need to amend this provision of the law. Section 2 will revert to the existing language.

On page 4, the bill proposed a requirement in clarifying the domestic well credit program. There would have to be notification of customers of public water systems of the request for credits. This has been deleted. On page 5, the State Engineer requested that a parallel section be added in NRS Chapter 535 which relates to dams and impoundments. It clarifies that the State Engineer, as he does in NRS Chapters 533 and 534, has authority to enter onto lands where dams or impoundments are situated to investigate and carry out his duties. In section 6, there are statements of legislative intent. The changes made by this bill are not intended to change the interpretation or application of the law related to forfeitures. The provisions are made to clarify rather than change the operation of NRS 534.090 subsection 1.

Assemblyman Ellison:

The authorization for entrance on private property, that was in item 2? Are you on page 3? I thought we had amended that to say only large bodies of water would be included.

Chair Kirkpatrick:

Was that in section 1? I know there was a lot of discussion on that. I think the discussion was putting in "lands", which was something everyone could live with, instead of using the word "premises."

Assemblyman Ellison:

That is correct. We had discussed access and going through locked gates. We were concerned with the difference between pump houses versus something that was an open body of water. We wanted to make sure that we addressed that the public had to be notified prior to the State Engineer entering private property.

Chair Kirkpatrick:

That is currently standard practice to notify. There is a liability issue for the Office of the State Engineer. Mr. King would you like to clarify this?

Jason King, State Engineer, Division of Water Resources:

It is our normal practice, when we are out in the field, to contact the homeowner or whomever is operating the business that we are trying to get onto the property. That is our normal standard of practice. That is not always the case. We try to contact in terms of contacting someone, but if no one is around we continue with our field investigation.

Chair Kirkpatrick:

There were some questions about broken pipes or a major leak.

Jason King:

Is this a question about whether our personnel broke something?

Chair Kirkpatrick:

No. There are times when you have to get onto the land to address an immediate issue. You cannot wait. For instance, if there was a leak or a malfunction.

Jason King:

Yes. That is the case. Sometimes there are situations where we have to take care of something immediately. We would still try to contact the person who owns the land, but we would move forward with our work.

Assemblyman Goedhart:

A lot of times there would be private water operations. The duty to fix that belongs to the land owner. We are talking about private irrigation systems. It is not a public works system. In Amargosa Valley, we will get a phone call from someone saying that the Division of Water Resources is in the valley. Everyone makes the phone call but no one in the valley was aware that there had been any scheduled trip by the Division of Water Resources to properties until the first person in the valley makes the call and the word spreads that way. However, out of that whole valley, no one had been notified. It was just a spot check. There was no attempt out of the southern branch of the Division of Water Resources to notify anyone in the valley that they were doing a "spot check."

Jason King:

I understand what you are saying. We are talking about two different types of field work. There are instances where we conduct a crop inventory. We are out in the field driving on the streets, not actually entering people's property. We are driving around the perimeter of irrigated fields and getting an idea of how much land is being irrigated. While I still think it is a good idea that we go out and make some kind of an announcement that we are going to be conducting our inventory, when we do not enter the property and we are just conducting a crop inventory, we are not stopping to talk with people. If we have to go on the property and look at a domestic well or totalizing meter, then we make that effort.

Assemblyman Goedhart:

It has only worked that way in Amargosa Valley. That may be something you want to talk to your regional deputy about. We have big pieces of property where you cannot make an adequate crop inventory evaluation by driving by on the road.

Chair Kirkpatrick:

That is another issue. We do not want to confuse this.

Assemblyman Goedhart:

They do come on the property and they are not making a good attempt to make any notification. I appreciate my colleague from Elko's comment.

Chair Kirkpatrick:

I will entertain a motion.

ASSEMBLYMAN ELLISON MOVED TO AMEND AND DO PASS
ASSEMBLY BILL 73.

ASSEMBLYWOMAN BENITEZ-THOMPSON SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN MUNFORD AND PIERCE WERE ABSENT FOR THE VOTE.)

We will skip to Assembly Bill 115.

Susan Scholley:

Assembly Bill 115 was sponsored by the Assembly Committee on Government Affairs on behalf of the Legislative Committee on Public Lands. It was heard on March 9, 2011. [Read from ([Exhibit I](#)).] The amendment is attached. This is not a mock-up. Instead, because of the levels of evolution that the amendment has gone through, it was felt that trying to do a mock-up would have been too difficult. This will hopefully be easier to go through.

I am referring now to the subcommittee report ([Exhibit G](#)). I will go through the changes that this amendment makes to the existing statute. You have a clean version of what NRS 533.370 would look like if these amendments are passed. The Legal Division may make some changes to conform to its protocol. The substantive changes are lines 15 through 26. That is subsection 1 of section 3. That is the same language that is currently in the statute. There has been no substantive change there. Lines 27 through 33 are the same language that is currently in statute but is in a different place in the current version of NRS 533.370. Subsection 3 on lines 34 through 45 is the same language as the old section but in a different place. Subsection 4, which is lines 1 through 18 on page 2, is similar to what is in the current statute, but there are some substantive changes here. There is a change in the time within which the State Engineer may act on an application from one year to two years. That is on line 2. On line 4, currently written authorization to postpone an application must be given by the applicant and the protestant. This amendment would delete the requirement for the protestant to give permission. On line 5, paragraph (b) would give new grounds for postponement. Line 6, paragraph (c) is the same as in the current statute. There is no change. Paragraph (d) is the same as it currently is in statute. Paragraph (e) is the same except that "adjudications" has been added to this provision and also clarifying language that the court actions or adjudications which would form the basis for postponement would be those which may affect the outcome of the application. Paragraph (f) is new. Paragraph (g) is new. Paragraph (h) is new. Those are new grounds for postponement. Paragraph (i) is also new. I am not sure if that is not somewhere else in the statutes. We might ask Mr. King that later.

Subsection 5, which is on lines 19 and 20, is essentially the same as the existing statute except for the phrase "approved or rejected" on line 20. It is a replacement for "acted upon." The amendment proposes to substitute "approved or rejected" for "acted upon." Lines 21 through 27 in subsection 6 are essentially the same except, on line 27, this provision would now incorporate new grounds for postponement that have been added earlier in subsection 4. There is that substantive change to that section. Subsection 7, lines 28 through 34 is a large part of the reason for this bill being brought forward. Subsection 7 is new. It is a mixture of provisions regarding republication and reopening of protest periods. This was in the earlier version of the bill. The section on reopening the protest period for interbasin transfers has been deleted. Instead, this provision requires reopening protests on all applications where action has not been taken within seven years. In other words, before the State Engineer can take action on an application that has been pending for seven years or more, he would have to reopen the protest period. This is no longer limited to interbasin transfers. It would include all applications.

In subsection 8, lines 35 through 45 are the same as they are in the current statute. They have been moved around. On page 3, subsection 9 is the same as the old subsection 10. There has been no change; it has been moved around. Lines 9 through 15 are the same as the existing statute but are moved around. Two definitions have been deleted in this version because they are no longer used in this section. They are unnecessary because the references no longer exist. Section 6 is new. This clarifies that this bill would operate prospectively and would only apply to applications filed after July 1, 2011. There will be other sections to this bill because cross references will need to be changed and various technical matters will need to be taken care of. Other portions of NRS Chapter 533 and other chapters will need to be looked at.

Chair Kirkpatrick:

We spent well over three hours going through this section by section and line by line. We went over legislative intent versus what the original problem was. This does address the Supreme Court ruling. There are some concerns on the Senate side that allow municipalities to extend the application for 20 years. That is not within our purview. There is no guarantee that the bill will even get off the floor in the Senate. That is another discussion. I am good about following the bills so that we do not conflict. This bill that we are hearing today does not solve a lot of the problems, but we are trying to clean up as much as we can. This is a big step from where we have been in the past. It is very clear. This is something that needs to be taken up in the interim. This needs to be a working group. Assemblyman Goicoechea and I were going to do this

during the last interim. Nevada Revised Statutes Chapters 533 and 534 are big, but maybe you can help me this time.

ASSEMBLYMAN GOEDHART MOVED TO AMEND AND DO PASS
ASSEMBLY BILL 115.

ASSEMBLYMAN ELLISON SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN MUNFORD AND PIERCE
WERE ABSENT FOR THE VOTE.)

We will now go to Assembly Bill 76.

Assembly Bill 76: Makes various changes concerning the Public Employees' Benefits Program. (BDR 23-497)

Susan Scholley:

Assembly Bill 76 concerns the Public Employees' Benefits Program (PEBP). It was heard on March 18, 2011. [Read from ([Exhibit J](#)).] The open meeting law provisions that would be deleted are on page 3 of the mock-up. On the top of page 4 is the change that PEBP had suggested at the hearing. Sections 4 and 5 would also come out of the bill because those relate to the open meeting law exceptions.

Assemblyman Livermore:

I was very much opposed to the insertion of the closure of interviews for the Executive Director and Advisory Committee to evaluate applicants.

ASSEMBLYMAN LIVERMORE MOVED TO AMEND AND DO PASS
ASSEMBLY BILL 76.

ASSEMBLYMAN ELLISON SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN MUNFORD AND PIERCE
WERE ABSENT FOR THE VOTE.)

Assembly Bill 98: Requires certain policies of health insurance and health care plans to provide coverage for acupuncture treatments in certain circumstances. (BDR 57-278)

Susan Scholley:

Assembly Bill 98 enacts the Uniform Emergency Volunteer Health Practitioners Act. The bill was sponsored by Assemblyman Segerblom. [Read from

([Exhibit K](#)).] The Nevada State Medical Association added a couple of definitions. The Division of Industrial Relations needed to clarify some of the language and make sure that these people were covered under workers' compensation and occupational disease benefits as other volunteers would be.

ASSEMBLYMAN ELLISON MOVED TO AMEND AND DO PASS
ASSEMBLY BILL 98.

ASSEMBLYMAN GOEDHART SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMAN MUNFORD AND PIERCE
WERE ABSENT FOR THE VOTE.)

Chair Kirkpatrick:

We will now close the work session at this time. I will now open the hearing on
Assembly Bill 361.

Assembly Bill 361: Revises provisions relating to preferences in bidding on
smaller public works contracts. (BDR 28-1053)

Assemblywoman Dina Neal, Clark County Assembly District No. 7:

In preparing this bill, I examined this legislation through two public purposes: Underrepresentation of women and minorities as employers and whether I could pass muster of satisfying this goal of creating a benign racial classification that served an important governmental objective and language that was substantially related to achieving those objectives. [Read from prepared text ([Exhibit L](#)) which referenced [Exhibit M](#), [Exhibit N](#), and [Exhibit O](#).] I wanted to give that introduction to give you some framework. I will now go through the bill section by section.

In section 2, within that preference language that is already there for veterans, I am including businesses owned by a woman or a member of minority group where, at least 51 percent of the ownership interest is held by one or more members of a racial or ethnic minority group and the business is organized to engage in commercial transactions. In this particular portion, there was an amendment that was submitted ([Exhibit P](#)). This amendment added the language of a small businesses disadvantaged definition. I agree with adding that definition to that section.

In section 3, there is a mechanism added in order to gather language. In section 3 it says, "a public body which awards a contract for public work shall: (a) Gather and maintain for every person who submits a bid or otherwise competes for the contract, the following information: (1) The cost of the

public work; (2) whether the person was awarded the contract; (3) The race, ethnicity and gender of the person; (4) The number of employees of the person at the time the person submitted the bid; and (5) The length of time for which the person had been in business at the time the person submitted the bid." In section 3, subsection 2 there is an issue that I did not notice at first. I am going to amend out and delete this area. I like the fact that information has to be gathered and maintained for every applicant for employment on public works by a person who is awarded, both the contractor and subcontractors. I would like to amend the language that says, "And other persons who provide labor." That "other persons" widens the scope and creates a fishing expedition. My intent was not to have it go that far. In an amendment, that will be deleted.

The rest of the bill under that paragraph asks for the information to be gathered on the wages, whether or not the applicant was hired, race, and ethnicity. It then asks the State Public Works Board under subsection 3 to compile and maintain the information reported by public works. I did not think this would be too burdensome because in 2007, Assemblyman Hogan tried to bring this issue up. It did not go anywhere. He got the Nevada Department of Transportation (NDOT) to voluntarily start to record information that relates to this. They have been doing that for about a year. I offered that in my exhibits ([Exhibit Q](#)). That was Assemblyman Hogan's information to show what had been collected and what is currently being collected. If it is already happening, then we have a chance of it being collected for public works.

Section 5 does not really change anything. The bill tries to make the definitions in section 5 inclusive of the words and meanings that were placed in the previous section 2 which is to deal with women and minorities. In Section 6, the bill adds the language "if a local business owned by a veteran with a service-connected disability or a local business owned by a woman or a member of a minority group, submits a bid, the bid shall be deemed to be 5 percent lower than the bid actually submitted." Section 7, subsection 4 delineates the number of local businesses and adds the language "the number of local businesses owned by a woman or member of a minority group that submitted a bid or proposal on a contract for a public work of this State." The bill continues on to add the language within appropriate sections to offset where they had veterans to be inclusive to women and minority groups in subsections 5 and 6. In sections 8, 9, and 10 there is really no change within the statute.

Assemblywoman Benitez-Thompson:

I would like to ask about section 2, a "Business owned by a woman or member of a minority group." Is your intent for section 2, subsections 1, 2, and 3 to require that any group that gets this preference meets all three criteria, or does it only have to meet one? If it only has to meet one, is it your intent to have a

business that would be owned by someone outside this definition but managed and operated by a woman or minority then qualify without the business being owned by that protected group?

Assemblywoman Neal:

It would be all three. The small business amendment ([Exhibit R](#)) brings in *Code of Federal Regulations*, Title 49, Parts 23 and 26. That is a federal statute. The 51 percent language is already in statute; it already has criteria where you have to establish that you are a part of a firm that has these protected groups and that you are going to engage in whatever category this is. In this case, it is public works and would be under construction. There is a presumption within the federal law that delineates whether someone is part of a group and they should be treated a specific way after an affirmation is given. There is a certification process to confirm that a group really is what it says it is. If that is included in here that is what the process is going to be.

Assemblywoman Benitez-Thompson:

I just wanted to clarify that someone could not qualify under this definition by meeting all three of the criteria.

Assemblyman Livermore:

Would you define a minority group? I have heard a lot about how diverse America is and the growth of what other minorities are. What is your definition of a minority and how can that be judged?

Assemblywoman Neal:

Do you want me to clarify how minority definitions have changed within America? Will you restate your questions for me?

Assemblyman Livermore:

I do not want you to define how it has changed. I would just like you to define a minority group within the context of the law. The growth of minority groups into large segments of the population is happening. America is changing and there is diversification. How do you separate someone as a minority?

Assemblywoman Neal:

I understand. You are trying to say that America is shifting to a minority-majority focus. I am ready to define that but, within federal statute and state statute Hispanics, Asians, African-Americans, and women are still defined as minority groups. That definition of classification has not changed. That may change after this bill passes. We have our new census numbers. It will be public policy or public initiative as to whether or not we want to change that social reality.

Assemblyman Livermore:

This could be defined during a census cycle?

Assemblywoman Neal:

We have to stick with how it is defined currently. The groups are usually labeled as "disadvantaged communities." You still fall into the same definition, but we still have the definition of minority in the same facet that it was in the 1980. It has not been adjusted even though there has been a shift in population and a shift in Nevada.

Chair Kirkpatrick:

We learned this on Assembly Bill 144. The federal government requires that you have to collect all of this data first to prove that you have been disadvantaged and that you have not been given the same opportunities in order to get the minority status through the federal government. That is why section 3 in this bill is asking for that information. A vendor has to prove that before minority preference can be given. I can get Legal to write something up that is clear on how this works. You have to collect the data first. Once the data is collected, there would be trigger mechanism so that a preference could be given. Is that correct?

Assemblywoman Neal:

Yes. That is correct. It was set up that way but I cannot give a particular percentage until I establish that there is a need. There is indirect evidence. The strongest piece that I presented to this Committee was the statistics documentation ([Exhibit Q](#)). In those graphs there is an overlay of the zip codes over the tax districts. You can get an idea of that assessed value and the tax liability. Those communities are already paying the state. We can then determine whether or not there is an equity issue in allowing them to participate equally.

Assemblywoman Flores:

The word "minority" is not necessarily referring to the raw numbers or the amount of people in a society. There has been some talk about the Hispanic community becoming one of the fastest growing minority populations and potentially becoming a majority in terms of raw numbers in the population. However, when we talk about minorities for these purposes they are still minorities for purposes of representation in certain industries. These industries are things such as small business ownership, business ownership in general, higher education, lawyers, doctors, et cetera. There are many areas in which these groups have been historically disadvantaged because of certain policies that were in place or other historical reasons. These groups are still very much

underrepresented and still very much a minority in all of these areas. Minority is not just raw number. We still are the minority in many areas of life.

Assemblywoman Bustamante Adams:

The private sector has used this mechanism extensively and has been successful in diversifying its portfolios as far as suppliers are concerned. Regarding certifying agencies of minority and women-owned businesses, I would like to see verbiage regarding certifying agencies collected as well. Who certifies them makes a difference. I would hate to see self-certification in that respect. On page 3, line 28, you talked about deleting any other person who provides labor. Was that intended to be directed to suppliers of the subcontractors?

Chair Kirkpatrick:

This particular piece of the bill is a legal issue. There are reasons why specific things are asked for. That is one thing I learned when we had a discussion on A.B. 144. We should ask the Legal Division what it needs in order to make this happen. We have seen these bills in the past, but the Legal and Research Divisions did about 60 hours of checking to make sure there was the specific criteria that were needed to prove this was within this bill. We need to ask the Legal Division in order to clarify this language. I do not want to muddy the waters. If we all agree to take this out that is fine, but if Legal comes back and tells us it does not work then we cannot move forward.

Assemblywoman Bustamante Adams:

On page 4, line 44 it says, "if a local business owned by a veteran with a service-connected disability or a local business owned by a woman or member of a minority group." I am not sure if it is defined in some other area, but I think what a small business is needs to be clear.

Assemblywoman Neal:

We will get together and try to work that out. The idea was to make sure that it had a city and state focus to capture that group. That does need to be clarified.

Assemblyman Ellison:

How many minority groups get funding through contractors' boards or different organizations that put money out for these? If I go on the Internet right now and apply for a loan, I do not qualify. If I had a woman-owned, Native American, or other minority group business, I would. As just a businessperson, I do not qualify. There are many of these bills that are coming out. You did a job based on the ability of the individual. There are wonderful women out there that are business owners. I work for a woman contractor right now. She does

better work than some men. I do not work with her because she is a woman. I work for her because she is a good contractor. I believe that we need to work together. Everyone should be fair. No one should take precedence over anyone else. My wife is a quarter Cherokee; I should turn my businesses over to my wife. That would give me a double advantage to bids. I do not do that because I want everyone to bid and everything to be fair. I am hoping that we can adjust some of the things in this bill. I am hoping we are not trying to separate. Everyone should be based on their ability to do their job.

Assemblywoman Benitez-Thompson:

As I read the bill, there is nothing that compromises the merit or the quality of the contractor at all. There is nothing in here that says that someone who would otherwise not meet the requirements of the public works documents would be chosen over someone else. This is in no way impacting or changing merit.

Assemblywoman Neal:

That is not my intent. I want everyone to be as qualified as they were before when they were bidding on contracts. I want to make sure that these are good jobs and that good people do the jobs. This is our effort to try to be more equitable. In the census data ([Exhibit N](#)) and ([Exhibit O](#)) released in 2006 for Nevada, (even though it says 2002) it lists all firms and it lists the number of female-owned, Hispanic-owned, male-Hispanic-owned, et cetera. The numbers of firms that actually exist versus the number of firms that are created that happen to be minority is very small. We want to provide the opportunity for groups who may be able to bond collaboratively together to start to become a part of public works in a real way. Prior to this, they were not even included in the statute, but in the earlier part of *Nevada Revised Statutes* NRS Chapter 338 we felt the need to make sure that these groups were not discriminated against in employment. I think we should be employers. This is not to say that this preference will last forever. This is just to say that there may be a need at this point to create one to level the playing field so that minorities and women can equally participate in the work that they chose to do. That may happen to be public works.

Assemblyman Goedhart:

With the plurality of different minorities, we are going to be in a situation soon where white versus different minority groups is not going to hold the traditional context. Maybe it is a little simplistic, but we would like to be in an environment where it is based on meritocracy. We need to look beyond all the issues of color, race, and religious ideologies. My father was born and raised in Indonesia; my mother is from the Netherlands. We are first-generation American. My parents always told me that we went through some bad times

but, in America, it is always about working harder and smarter than the next person. If you have the grace of the good Lord to shine upon you, this country owes you nothing except the opportunity to succeed and the opportunity to try. It does not guarantee success, but it gives you the opportunity. We want to level the playing field, but we do not want to make so many adjustments and manipulate the system so much that we get away from what made this country so great: accepting people from all countries and all races and coming together as a melting pot.

Assemblywoman Neal:

I agree. We have been on this playing field since the time of Dr. Martin Luther King Jr. when he gave his speeches about equality. We have theory, and we have practice. In Nevada, we have not arrived at the real theory playing out within public works where we are all given equal opportunity. Once we collect this data, we will know for sure. When you look at the labor force demographics in Nevada you can see it. There is 20 percent unemployment for African-Americans, 18 percent for Hispanics. In Assemblyman Hogan's report ([Exhibit Q](#)) on the Interstate 15 South Design Build project, he broke it down by groups and showed hours worked. Equity is not there in employment. Equity is not there in terms of our ability to be an employer. This preference is not going to be forever. I would never try to make anything last 20 years when it is not relevant. Everything is about relevancy and whether or not what you are doing serves a significant and substantive point and purpose in the state. Once it does not have that value, you cannot do it anymore. I agree to those points, and I agree to that end. I do not want division. What I want is everyone to have equal opportunity to earn and accomplish wealth in this state.

Chair Kirkpatrick:

I will now call those that are in opposition to A.B. 361?

John P. Sande IV, representing the Reno-Tahoe Airport Authority:

We are not opposed to the purpose of the bill. I do not want my presence here in opposition to be construed as, or perceived against, the policy considerations that this bill encourages. Our primary concern is found on the caption of the bill itself. It states that the bill contains an unfunded mandate. Section 3 is going to require a fair amount of work for any public body that is engaged in contracting. It requires it to get information that is not currently required. In a time when we are trying to streamline government and consolidate the costs of government, requiring extra work could be burdensome to the diminishing labor forces that we have.

In section 4, it says that failure to comply with the act could subject someone to criminal prosecution as a misdemeanor. We are dealing with race and

ethnicity. In a typical situation, if it is just a person you can sometimes ask him his race or identity and he will be able to tell you that. We are now dealing with contractors that are often companies composed of several individuals. It might be difficult, if not impossible, to receive that information. You might be dealing with several ethnic groups. For instance, Native Americans might be a portion of the ownership, there might be Hispanics or Latinos that are portions of the ownership, also whites that are owners. How do you classify that group? If I get that wrong, am I subjecting myself to criminal penalty for having documented it incorrectly? What if the company does not want to give it to me? Construction companies can be publicly-traded companies. What if they do not want to identify themselves as a gendered company? If I do not get that information for them, am I subject to a misdemeanor penalty? We are not opposed to the policy considerations that this bill requires. I found it interesting to listen to this information. We do have problems with this bill.

Chair Kirkpatrick:

I do not think that many of us noticed that it was misdemeanor if you did not comply. That was one of the issues that we had with this bill previously. They wanted to hold contractor's money and that was defeating the purpose.

Assemblywoman Bustamante Adams:

Mr. Sande, I know that you brought up two points, one that it would be a lot of work to gather the information and with construction companies there are a lot of owners. I do not agree on either one of those statements. In the private sector, it is not a large amount of work. It is very simple to gather the information. As far as classification is concerned, that is why there are certifying agencies that do that work for the contractors. The bill clearly states who the owner is and who needs to have managing authority of the business. Both of your arguments are not valid.

Assemblywoman Flores:

I agree with my colleague.

Chair Kirkpatrick:

Is there anyone else who is in opposition? [There was no one.] Is there anyone who is neutral?

**Jack Mallory, representing the International Union of Painters and Allied Trades,
District Council No. 15:**

I did offer an amendment ([Exhibit P](#)) to Assemblywoman Neal's bill for a couple of different reasons. The first reason is because currently in the state of Nevada there are some minority-owned businesses. Approximately one-third of the businesses that District Council No. 15 partners with in the construction

industry are minority-owned businesses. At the same time, a number of those businesses are larger businesses. We are talking about a very small segment of public works contracts. We are talking about contracts that are \$100,000 or less. My idea in proposing this amendment was that there are currently contractors that would fit the definition of a small disadvantaged business enterprise or small disadvantaged business in the construction industry. This preference would give them an opportunity to expand and grow their businesses. At the same time, it would create incentive for new businesses to be started up by disadvantaged business groups or individuals. When I was looking for a different definition for certifications to include in this amendment, I looked at the definition of a small disadvantaged business from the Small Business Administration. I chose this for the reason that it is a moving target. Even though the definition of a disadvantaged group has not effectively changed in the last 40 years, there is potential for that group identity to change in the future. By having that standard definition come from what is recognized as the ultimate certifying agency in the United States, I think it would create a strong standard.

As a part of this, Nevada does have a disadvantaged business enterprise program. If you certify with this disadvantaged business enterprise program, you are certified for work with Nevada Department of Transportation, Regional Transportation Commissions of Washoe and Clark Counties, as well as both airport authorities in Las Vegas and Reno. There is already a mechanism in the State of Nevada for certifying contractors as a disadvantaged business enterprise. Within the definition from the federal government, it includes all minority groups that are currently recognized and states some of the same things that are stated in the bill itself.

Chair Kirkpatrick:

That was part of your amendment. You showed us that information. Is that correct?

Jack Mallory:

Yes.

Chair Kirkpatrick:

Are there any questions?

Michael Tanchek, State Labor Commissioner, State of Nevada Department of Business and Industry:

I have the enforcement responsibilities for this bill. In terms of enforcement, not only would it be a misdemeanor offense, there would also be other sanctions that I have available to me in order to ensure that these provisions are complied

with. We would be looking at public bodies and prime contractors, primarily because they are responsible for collecting data. Many times the contractors have problems getting basic information from their subcontractors. It will flow downhill from there. If I see problems with this, I will anticipate that it will be with subcontractors in terms of getting the information to the employees. This enforcement mechanism would only apply in terms of projects that are in excess of \$100,000. The provisions of NRS 338.080 exempt projects that are less than that amount.

Assemblywoman Benitez-Thompson:

If the misdemeanor provision was taken out, would that change your stance on this bill?

Michael Tanchek:

No. *Nevada Revised Statutes* 338.080 gives me a variety of enforcement mechanisms at my disposal aside from misdemeanor prosecution, for instance, administrative fines, disqualification, and other things of that nature. There would be other enforcement mechanisms available. A misdemeanor is just one of them.

Assemblywoman Benitez-Thompson:

You would be more comfortable with this bill without the misdemeanor? Or would that not change your overall perception?

Michael Tanchek:

It would not change my view because I would still have that enforcement responsibility. If a contractor or public body does not collect this information, I would have to take some sort of enforcement action. I just do not know how big of a problem I would be looking at.

Assemblyman Anderson:

Can you send the Committee a list of what enforcement measures you do have under this provision?

Michael Tanchek:

Yes.

Ted J. Olivas, Director of Administrative Services, City of Las Vegas:

We are neutral with some things to consider. I would like to thank Assemblywoman Neal for working with us on this bill and explaining how this bill works. As a quick history, the preference for bids on smaller contracts submitted by local businesses owned by veterans with service-connected disabilities was added to this statute by the Legislature in 2009. That is

NRS 338.1384 through 338.13847. It is a new process that we have. It is a two-step process. You gather and report the data. That is provided in sections 1, 3, 4, 8, and 9. That starts July 1, 2011. Then if the Attorney General determines sufficient data exists to defend the preference provided for in this bill, the Governor would issue a proclamation. Sections 2, 5, 6, and 7 would be implemented. Mr. Mallory talked about the clarification on racial or ethnic minority. Section 3 talks about a person submitting a bid and a person awarded a contract.

I would suggest that we use the term "contractor" instead of "person" because a contractor submits a bid. It is defined in NRS 338.010 subsection 3. In section 3, subsection 1, paragraph (a), items 1 through 5, it talks about the data that we are gathering on our received bids. We are guessing that the race and ethnicity is for the contract owner and not the person who submits the bid. So if it is someone's construction company but someone else of a different race or ethnicity submits the bid, then you do not want him to check another ethnicity. We need to clarify that.

Section 3, subsection 2, paragraph (a) defines the data that the successful contractor has to gather. It says that the data has to be gathered for every applicant for employment on public works, including subcontractors and suppliers. How far down does that go? There could be four or five levels. Do I need to know what the subcontractor to the subcontractor to the subcontractor did in terms of his employment practices as it relates to this public works? It could be a lot of data. *Nevada Revised Statutes* 338.090 relates to violations of the prevailing wage statute, which is NRS 338.010 to 338.090. It relates to both contractors and public employees. If you violate that law, you are guilty of a misdemeanor. So, if I take a \$200,000 job and make it into smaller pieces so that I do not have to make the prevailing wage requirements, I would be in violation of the law. I am guilty of a misdemeanor, as well it should be. However, by adding reporting requirements of this bill to NRS 338.090, which is section 4, it would make a public employee guilty of a misdemeanor for improperly reported data that was submitted to us. I am not sure that was the intent of this.

We are proponents of inclusionary purchasing involvement in city activities. We are involved in the Nevada Public Purchasing Study Commission (NPPSC) and the Regional Business Development Advisory Council. We have a community outreach committee that we meet with. That includes the Urban League, the veterans, the Women's Chamber of Commerce, The Las Vegas Paiute Tribe, the Nevada Minority Supplier Development Council, the Latin Chamber of Commerce, the National Association for the Advancement of Colored People

(NAACP), et cetera. These are the kinds of things that we talk about. We want to make this bill work.

P Michael Murphy, representing Clark County:

We echo Mr. Olivas's comments.

Chair Kirkpatrick:

Is there anyone else that would like to testify as neutral on A.B. 361? [There was no one.] I will now call up those that are in support.

Marlene Lockard, representing the Nevada Women's Lobby

We are in support of this bill. We feel that until we have all the data, it is very hard to make any comments or some of the assumptions that many people actually think are happening in the marketplace. In these economic times, you also find that many women are real entrepreneurs that have been unemployed and have found ways to continue to support their family. Opportunities to take that business acumen and getting the ability to grow and qualify for some of these jobs are very important.

Jan Gilbert, representing the Progressive Leadership Alliance of Nevada:

We are in support of this bill. We feel that it is an issue of economic justice. We are collecting bills for our Nevada Racial Equity Report Card. This bill will be one of those bills that we will be grading if it proceeds. We support the amendment that was proposed and feel that this is creating opportunity for communities of color to advance.

Assemblywoman Neal:

For me to bring this bill and move outside of an issue-based analysis is very hard. Race brings in many different issues that would not be considered if we just talked about it as if it were something else. I did not see section 4 as changing any kind of disciplinary relationship. I did not see charging someone for a misdemeanor for reporting. The language saying that you have to pay prevailing wage would have stayed exactly the same as it was before without inclusion of those groups. It is not my intent to overburden anyone. It was always my intent to stick to issues and to focus on an issue that may need help. When race overlaps, I do not want to be looked at as the person who is trying to shadow an issue or make someone believe that something may not really be an issue. I would like to focus on the issue at hand. The issue is the ability of people to work and ability of contractors to be a part of the public works process as the taxpayer base that they happen to be within this state.

Chair Kirkpatrick:

Local business is defined in NRS Chapter 333. We need to check with the Legal Division on those particular data pieces. I am not sure if they are specific to some bigger piece. We will now close the hearing on A.B. 361. Is there any public comment at this time? [There was none.] We do have a Committee Bill Draft Request (BDR) that needs to be introduced.

BDR 22-1119— Removes prospective expiration of certain provisions relating to land use planning. (Later introduced as [Assembly Bill 454](#).)

This is something that we did last session. We allowed tentative and final maps to be extended because there was a hardship for people. We wanted to put in a sunset clause hoping that they could get back on track. That does not appear to be the case for builders. It is very expensive to start over with your tentative and final maps. We do have a Committee BDR lifting the sunset clause.

ASSEMBLYMAN STEWART MOVED FOR COMMITTEE
INTRODUCTION OF BDR 22-1119.

ASSEMBLYMAN ELLISON SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN MUNFORD AND PIERCE
WERE ABSENT FOR THE VOTE.)

This bill will be introduced and come to the Committee as a regular bill.

The meeting is adjourned [at 11:04 a.m.].

RESPECTFULLY SUBMITTED:

Jenny McMenomy
Committee Secretary

APPROVED BY:

Assemblywoman Marilyn K. Kirkpatrick, Chair

DATE: _____

EXHIBITS			
Committee Name: <u>Committee on Government Affairs</u>			
Date: <u>March 25, 2011</u>		Time of Meeting: <u>8:03 a.m.</u>	
Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 228	C	Assemblyman Pat Hickey	Proposed Amendment
A.B. 228	D	Ted J. Olivas, representing the City of Las Vegas	Testimony Overview
A.B. 228	E	Ted J. Olivas, representing the City of Las Vegas	Commission Comments
A.B. 59	F	Susan Scholley	Work Session Document
A.B. 73 A.B. 115	G	Susan Scholley	Work Session Document
A.B. 73	H	Susan Scholley	Work Session Document
A.B. 115	I	Susan Scholley	Work Session Document
A.B. 76	J	Susan Scholley	Work Session Document
A.B. 98	K	Susan Scholley	Work Session Document
A.B. 361	L	Assemblywoman Neal	Prepared Text
A.B. 361	M	Assemblywoman Neal	Minority Preference Supreme Court Decision
A.B. 361	N	Assemblywoman Neal	U.S. Census Data
A.B. 361	O	Assemblywoman Neal	U.S. Census Data
A.B. 361	P	Jack Mallory/International Union of Painters and Allied Trades	Amendment
A.B. 361	Q	Assemblywoman Neal	Work Force Statistics
A.B. 361	R	Assemblywoman Neal	Certification Overview