

**MINUTES OF THE SUBCOMMITTEE OF THE
SENATE COMMITTEE ON FINANCE**

**Seventy-sixth Session
May 23, 2011**

The subcommittee of the Senate Committee on Finance was called to order by Chair Sheila Leslie at 1:14 p.m. on Monday, May 23, 2011, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

SUBCOMMITTEE MEMBERS PRESENT:

Senator Sheila Leslie, Chair
Senator David R. Parks
Senator Ben Kieckhefer

GUEST LEGISLATORS PRESENT:

Senator Steven A. Horsford, Clark County Senatorial District No. 4

STAFF MEMBERS PRESENT:

Brenda Erdoes, Legislative Counsel
Mark Krmpotic, Senate Fiscal Analyst
Patricia O'Flinn, Committee Secretary

OTHERS PRESENT:

Steve Holloway, Executive Vice President, Associated General Contractors
Renny Ashleman, City of Henderson
John Griffin, American Council of Engineering Companies of Nevada
David Goldwater, Sierra Nevada Corporation
Kimberlee Tarter, Deputy Administrator, Purchasing Division, Department of Administration
Jennifer Bauer, Department of Public Safety
Mark Froese, Administrator, Management Services and Programs Department of Motor Vehicles

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CHAIR LESLIE:

We will call the meeting on Senate Bill (S.B.) 359 to order.

SENATE BILL 359: Revises provisions relating to contracts with a governmental entity. (BDR 23-973)

Senator Horsford has an amendment to the bill.

SENATOR STEVEN A. HORSFORD (Clark County Senatorial District No. 4):

This bill brings much needed transparency and accountability to statewide contracting in the State of Nevada. At the last meeting of this Subcommittee, significant changes to S.B. 359 were discussed. Based on suggestions by this Subcommittee, the State Public Works Board (SPWB) and the Nevada Department of Transportation (NDOT) I have a mock-up of proposed Amendment 6521 to S.B. 359 ([Exhibit C](#)).

In section 4, the government agencies subject to the bill are more clearly delineated. The intent has always been to capture the larger agencies rather than creating burdens for the smaller ones. Section 4 defines a public body as a county, city, school district or "State agency, bureau, board, commission, department or division or any other unit of the Legislative, Judicial or Executive Department of the State Government, including the Nevada System of Higher Education." Concern was expressed that the inclusion of cities might apply to townships, but the Legal Division of the Legislative Counsel Bureau (LCB) has indicated the definition of city in statute means only incorporated cities.

Section 7 has been redrafted to clarify that service contracts connected to the purchase of goods are exempt from the provisions of S.B. 359, because service contracts cannot be separately negotiated with contractors who sell equipment to an agency. Sections 9 and 10 have been revised to clarify that the disclosure of fees being charged in contracts are the fees charged to real consumers, such as Nevadans who were charged bank fees when they used Automated Teller Machines to withdraw their unemployment insurance (UI) benefits. This does not apply to agencies that pay fees to a contractor as part of a contract. Further, as the amendment indicates and as the legislation intends, the total dollar amount charged to consumers such as the UI recipients are part of the contract.

There has been much discussion about section 11. We have tried to spell out more clearly what the intent is with regard to sole source contracts and extended contracts. First, sole source contracts are limited to two years, unless a period longer than two years is necessary for a contractor to recover up-front capital costs associated with a service contract. In addition, a sole source contract cannot be renewed beyond its original term unless the governing body of a city, county or school district, or the State Board of Examiners in the case of State agencies, approves that renewal by a two-thirds vote. This preserves the original intent of the legislation to address the automatic rolling over of sole source contracts without adequate scrutiny.

A new section, 11.5, has been created to address the issue of competitively bid contracts that are automatically rolled over without new competitive bidding. Under the new language, this cannot open unless the public body reopens the contract to competitive bidding. I know there has been some question about whether the provisions relating to sole source and competitively bid contracts apply retrospectively. The LCB Legal Division has indicated the provisions of S.B. 359 would apply to contracts awarded or renewed after the effective date of the legislation which is July 1, 2011.

Section 13 has been amended to make clear that both sole source and competitively bid contracts, and their amounts, would be reported to the State Purchasing Division, as well as the savings generated by renegotiations of any contracts. For instance, if a sole source contract is renewed, was a savings achieved? If a competitively bid contract was extended after a new request for proposal (RFP), what savings were achieved by that extension? This would give us a better indication of how well government agencies are doing renegotiating contracts to save the taxpayers money.

I would like to highlight changes that were previously made to S.B. 359. Section 15 which addresses reporting on public works projects was revised to reflect concerns by SPWB that it would have to process and input the terms of all State and local contracts, creating a substantial fiscal burden. Instead, SPWB would create a Website that would allow local and State agencies to enter this information which would be publicly available. Section 15 also requires reporting of the race, ethnicity and gender of people submitting bids for public works projects. A provision has been added in subsection 3 that the reporting to SPWB would not contain any personal information about these individuals such as social security numbers, driver's license numbers or banking information. The

purpose of section 15 is simply to capture and disclose to the public who is bidding on and receiving public works contracts, how much they are being paid and the wages they are paying. This will allow the public to judge whether contractors being selected for public works projects are representative of their communities. Contractors not willing to provide this information would not be able to receive contracts going forward.

I have just been advised of a new issue with section 15 that others with the Associated General Contractors will address. This is an important provision of S.B. 359. The first day we heard testimony on this bill, many of our colleagues from the Senate and the Assembly spoke for this bill. Legislation was approved earlier in this Session that gives preference to companies based in Nevada on bidding for local and State projects. A preference for minority- and women-owned firms was not permitted to be added due to the fact there is no data to support the need for preferences. The language of section 15, first and foremost, is designed to require this data be reported for the race, ethnicity and gender for applicants or individuals who work on any public works project. The concern I hear now is that some contractors may not be able to do this because applicants may be referred by some other entity. I do not have a solution to this issue, but I do not support weakening the language in section 15. I would be open to clarifying language the Legal Division may suggest that would not impact the data collection.

Section 17 was revised after it was determined that the review by the State Board of Examiners and NDOT would be duplicative of current review by the governing board of NDOT. Instead, S.B. 359 as amended would require NDOT to post on its Website the professional service contracts it awards.

SENATOR KIECKHEFER:

Regarding section 11.5, there was discussion about extension language being included in the original RFP. Does this new section 11.5 capture those extensions, or would the contract have to be rebid?

SENATOR HORSFORD:

I have asked the Legal Division to help answer that question. The intent of the bill, if it is a sole source contract, is that it can only be extended beyond two years if the governing body approved it by a two-thirds vote.

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BRENDA ERDOES (Legislative Counsel, Legal Division, Legislative Counsel Bureau):
Senator Horsford stated it correctly. If within the balance of the term of the contract, and it is reevaluated, the two-thirds vote would be required to extend the term of the contract.

SENATOR KIECKHEFER:

Section 11.5 specifically speaks to competitively bid contracts. Although the terms of the bill would be applied prospectively, once the initial term of a contract ends, would it have to be rebid even though the initially negotiated contract allows for extensions?

MRS. ERDOES:

The public body would not be able to extend existing contracts without a two-thirds vote of the governing body.

SENATOR KIECKHEFER:

There is no language in section 11.5 requiring a two-thirds vote. It only states that it would have to go back out to competitive bid.

MRS. ERDOES:

I was looking at the wrong section. Under 11.5, the body would not be able to extend the contract even though an allowable right existed in an existing contract. The allowable right is not an absolute right, so the contract would have to be rebid.

SENATOR HORSFORD:

Are you asking whether including language in the RFP that creates an option to extend the contract would be allowed?

SENATOR KIECKHEFER:

I am thinking about both existing and prospective contracts.

SENATOR HORSFORD:

Existing contracts are not covered under S.B. 359.

SENATOR KIECKHEFER:

That is not what I understood Mrs. Erdoes to say. If there is an existing five-year contract that has a five-year extension upon mutual agreement, would that be prohibited if it was not rebid?

MRS. ERDOES:

Without additional language in the bill, we would say the bill could be applied to that contract because the extension was not mandatory, it is prospective and discretionary.

SENATOR KIECKHEFER:

I am not averse to these terms for prospective contracts, but previous negotiations should be honored.

Regarding section 15, I have problems generally with bidder preferences. What is the barrier resulting in minority- and women-owned contractors not being awarded public works contracts?

SENATOR HORSFORD:

The "Good Ole Boys Network" keeps people out. We need to have a process that is fair, that allows people to know when contracts become open and available. We need to support minority- and women-owned business to have the capital necessary to bid on some of these projects. The same contractors get projects over and over. Despite attempts by Assemblyman Joseph Hogan, and others, who have worked with SPWB to improve the process either in employment or contracting, too little change is occurring. Section 15 is an attempt to gather the data to let us know if the anecdotal evidence is backed up by real data.

SENATOR KIECKHEFER:

If it is a problem in the process and the system, I want to fix it. But I have fundamental problems with preference systems. I think you will find that minorities and women are underrepresented, but I think the policy decision should be to fix the system rather than impose preferences.

SENATOR HORSFORD:

There are legislators who would like to put preferences in now. We determined that the data has to be gathered first. If there is a disparity, it will be another Legislature that will attempt to fix the disparity, if one exists. Since I have been in the Legislature, and well before my time, people have been trying to improve this process. There have been efforts. There is a pilot program with NDOT where reporting on employment is happening.

CHAIR LESLIE:

You cannot find a solution until you know the scope of the problem.

SENATOR PARKS:

Regarding section 4, certain aspects of government do not seem to be included in S.B. 359. Are metropolitan police departments, regional transportation commissions, convention and visitor bureaus, water districts, water authorities, flood control districts and county hospitals included in the definition of public body?

MRS. ERDOES:

No. It would not include most of those named entities unless they are State agencies.

SENATOR HORSFORD:

The definition was narrowed because the broader definition was too inclusive and there was concern about unintended consequences.

CHAIR LESLIE:

We will take public testimony at this time.

STEVE HOLLOWAY (Executive Vice President, Associated General Contractors):

Regarding section 15, subsection 2, we understand the purpose is to keep track of the number of minorities and women employed on a public works project. The biggest problem we foresee is that the contractor is not dealing with applicants at the time he is awarded a contract. The general contractor has his crew which includes supervisors, project managers and office staff. There are then several tiers of subcontractors. The first tier has a direct contractual relationship with the prime contractor, but there are other tiers of subcontractors who do not. The gathering of that data thus can be somewhat problematic, although I think it can be accomplished. For example, the wages offered for a public works project will always be the prevailing wages, or, if higher, the union wage. Those wages are reported as part of the certified payroll as are the employees on that project. Whether the applicant was hired for that particular job, though, we have no way of knowing. For example, over 60 percent of public works projects are awarded to union contractors and the workers come from the union hall. We do not know who they are until they show up for work. But, the most efficient way of getting all the information

requested would be to have the unions supply the information as people are assigned to the job.

CHAIR LESLIE:

Is the problem the applicants versus the people who are actually hired for the job? You would not know who had applied at the union hall.

MR. HOLLOWAY:

Yes. That is the major problem. Even a nonunion subcontractor would have crews in place. We would not know who was a new applicant and who had been working for them for 20 years.

SENATOR KIECKHEFER:

If we are trying to identify the barriers keeping minority- and women-owned businesses from public works projects, and if we only identify those people who are actually working on the job, rather than everyone who applies for the job, do we not miss a large percentage of the prospective workers who did not receive employment?

MR. HOLLOWAY:

Section 15, section 1, tracks the contractors who are applying for the job and who receives the contracts. We have no problem with subsection 1. Subsection 2 attempts to keep track of the number of minorities and women working on the job, no matter who the contractor is.

CHAIR LESLIE:

Is your problem that you would not know who applied and how to update the workforce?

MR. HOLLOWAY:

We can tell you who actually works on the job. When subcontractors submit their certified payroll we can probably get them to submit information regarding the race, ethnicity and gender of the workforce, although they do not have to respond.

We have a small problem with section 11.5. Often, the owner may decide to change the design, or they run into a problem that forces a change in design. As a result, they will issue a change order which then results in an extension of

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time for the initial contract. When a building is 75 percent complete, you are not going to rebid the 25 percent remaining.

CHAIR LESLIE:

Do you want change order exception language in the bill?

MR. HOLLOWAY:

I think something like that is needed, yes.

RENNY ASHLEMAN (City of Henderson):

I was under the impression that section 11.5 applied only to sole source contracts. I see that is not correct the way this is written. We could add the words "sole source" at the end of line 24 on page 3 of [Exhibit C](#).

JOHN GRIFFIN (American Council of Engineering Companies of Nevada):

Engineering projects are not necessarily competitively bid. Our selection is a quality-based selection which is a requirement of federally funded projects under the Brooks Act. In quality-based selection, quality is the first criterion and price is negotiated secondarily. Section 11.5 could be construed that the engineer might have to go through a competitive bid process on a renewable contract. I do not think that is the intent, but we want to make sure it is clarified.

MR. ASHLEMAN:

Regarding section 15, subsection 4, paragraph (a), obtaining the information from each member of a design-build team could be problematic. For example, it will not be possible to get the information from every member of a public corporation. This can probably be cured by regulation. However, section 15, subsection 4, paragraph (b) states that if a person who submits a bid is not a natural person, the public body must gather and maintain the required information from each natural person who owns or controls all or a portion of the person who submits the bid. For a public corporation, every shareholder owns all or a portion of somebody who is submitting a bid. There is no way to capture that information, nor is it relevant to the intent of the bill, yet that is what the section states. We have no objection to the intent, but the language needs to be narrowed.

CHAIR LESLIE:

Do you have any suggested language?

MR. ASHLEMAN:

I do not as yet. I did take this up with Senator Horsford's office. I would think that an amendment would want to exempt publicly owned corporations, or one owned by more than a certain number of people.

MR. HOLLOWAY:

We do not have objection to the overall intent and we are willing to work with the Legal Division to clear up the language.

DAVID GOLDWATER (Sierra Nevada Corporation):

If it is true the intent of section 11.5 is to deal only with sole-source contracts our concern is eliminated. Otherwise, make the bill prospective so that existing contracts with extensions would be exempted from this section.

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

Regarding section 10, I would like to restate a concern we have regarding the disclosure of the amount a subcontractor will be paid by the independent contractor. We have been advised by certain contractors that such information is a trade secret and requiring its disclosure could create an unfair business advantage to their competition.

Section 11.5 is confusing. Sections 1 to 14, inclusive, of S.B. 359 contemplate being codified into the *Nevada Revised Statutes* (NRS) 281, the ethics portion of NRS, whereas, section 15 is specific to NRS 338. Regarding purchasing and State-level contracts, the language in section 11.5 appears to make it easier to extend sole-source contracts than to extend competitively bid contracts. There are issues with the RFP process that occasionally occur; such as an error written into the RFP, or an error in the scope of the RFP or a procedural error that would require a contract extension. Section 11.5 does not take into consideration extended negotiations. Even in the midst of an RFP process, existing contracts might need to be extended to take into account a number of factors.

SENATOR HORSFORD:

Regarding section 10 and the total dollar amount paid to an independent contractor, I do not understand how taxpayer resources for a public contract can be proprietary information. Regarding section 11.5, I am open to recommendations. The intent of this section is that for a competitively bid

contract, reasonable terms of extension can be written into the RFP. I do not think a five-year contract should then be extended for five years without a competitive bid. Extending for one or two years, based on performance, is reasonable. Beyond that, the process is too narrow and lacks transparency.

SENATOR KIECKHEFER:

I do not know what the rules are currently for extensions. If five years plus five years is allowable, that does need to be scaled back. Would you be amenable to language that would extend an existing contract when additional time is necessary to complete the competitive bidding process?

SENATOR HORSFORD:

For sole-source contracts there is a process with a two-thirds vote. I would be willing to entertain extending that option for competitively bid contracts so that, under extenuating circumstances, there is a process in place. The issue of contracts coming up to deadline is a problem with planning. We have heard recently about contracts that everyone knew were expiring, but they did not start the bid process until they needed an emergency extension. That is a loophole. That is not being open and transparent. In section 11.5, if the RFP includes a reasonable extension, that would be allowable.

CHAIR LESLIE:

Do you want to put a time period on that?

SENATOR HORSFORD:

I know there are variables, but two years seems reasonable. Adding the second provision requiring a two-thirds vote could make that extension.

MS. TARTER:

There are many variables. Extensions are based on the complexity of the contract and the needs to capture capital investments among other things. State policy is that contracts can be entered into for four years, inclusive of the original contract period. If the agency wants to request a longer contract term, they must justify it in advance in their original solicitation document. The contract terms must be approved by the Board of Examiners.

CHAIR LESLIE:

How often are contracts awarded beyond the four-year term?

MS. TARTER:

I do not have facts, but the policy is primarily adhered to unless there are compelling reasons to deviate from it.

SENATOR HORSFORD:

The Senate Committee on Finance looked at the largest State contracts; most of those were five, seven or nine years. While it might be the policy, it is not the practice for some of the largest contracts.

CHAIR LESLIE:

Would you prefer to have the four-year policy in statute?

SENATOR HORSFORD:

No, I am not trying to completely revamp the purchasing process. I am trying to make it more open and transparent. I am amenable to modifying section 11.5 so that if the RFP allows for a contract extension, the extension be for no more than two years. Or, if that language is not in the RFP, an extension would require a two-thirds vote of whichever governing body approved the contract initially. That would address most of the issues that have been brought forward.

Regarding section 15, subsection 4, paragraph (a), I do not know why the design-build team was included.

MRS. ERDOES:

When this was built, we wanted to cover all areas of the public works process that this Legislature might want to examine later. This is another group of the contracts awarded.

SENATOR HORSFORD:

That is part of the intent. Architects and engineers are a big part of the public works process. The language regarding who owns or controls all or a portion of the person who submits the bid may need to be tightened up. Typically, we are looking for 51 percent ownership to indicate a minority- or woman-owned business.

MRS. ERDOES:

We can make some changes in the language to better reflect that intent.

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CHAIR LESLIE:

What about the question that was raised about not knowing who applied for the positions versus those who are working.

SENATOR HORSFORD:

Senator Kieckhefer stated it clearly: if you only report the information for those individuals who are working on the projects, without also including who applied, we are not capturing the full story. I do not know how to address that issue, but I am sure that a solution can be found.

JENNIFER BAUER (Department of Public Safety):

Based on the proposed amendment, the Department of Public Safety can withdraw its fiscal note.

MARK FROESE (Administrator, Management Services and Programs, Department of Motor Vehicles):

Based on the amendment, the Department of Motor Vehicles can withdraw its fiscal note.

CHAIR LESLIE:

It is time to make a recommendation back to the full Senate Committee on Finance incorporating the proposed amendment and the discussion we have heard today.

SENATOR KIECKHEFER:

I look forward to the continuation of the debate in the full Committee.

SENATOR PARKS MOVED TO APPROVE THE SUBCOMMITTEE REPORT: SECTIONS 10, 11.5 AND 15 WERE DISCUSSED; AS FOR SECTION 10, AND THE CONTENTION THAT THE TOTAL AMOUNT PAID TO A SUBCONTRACTOR IS A TRADE SECRET, IT IS PUBLIC MONEY AND THIS SECTION SHOULD BE LEFT AS IT IS; WE WILL ACCEPT THE SUGGESTIONS REGARDING SECTION 11.5 TO MODIFY THE RFP PROCESS TO ALLOW FOR A CONTRACT EXTENSION AND TO RECEIVE AN EXTENSION FROM THE GOVERNING BODY BY A TWO-THIRDS VOTE; SECTION 15 WILL REMAIN THE SAME, EXCEPT THAT THE LEGAL DIVISION WILL WORK ON THE LANGUAGE OF SUBSECTION 4.

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SENATOR KIECKHEFER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR LESLIE:

As there is no further business to come before the Subcommittee, this meeting is adjourned at 2:20 p.m.

RESPECTFULLY SUBMITTED:

Patricia O'Flinn,
Committee Secretary

APPROVED BY:

Senator Sheila Leslie, Chair

DATE: _____

<u>EXHIBITS</u>			
Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
SB359	C	Senator Horsford	Proposed Amendment