

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

**Seventy-sixth Session
April 11, 2011**

The subcommittee of the Senate Committee on Finance was called to order by Chair Sheila Leslie at 12:50 p.m. on Monday, April 11, 2011, in Room 2144 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 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.

COMMITTEE MEMBERS PRESENT:

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

GUEST LEGISLATORS PRESENT:

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

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

Kimberlee Tarter, Deputy Administrator, Purchasing Division, Department of Administration
Dick Cooper, Policy Advisor, Senator Steven A. Horsford, Clark County Senatorial District No. 4
Gustavo Nuñez, P.E., Manager, State Public Works Board
Jeffrey Mohlenkamp, Deputy Director, Support Services, Department of Corrections
Daryl Capurro, Capurro Consulting

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Jack Mallory, International Union of Painters and Allied Trades, District Council 15

Rudy Malfabon, P.E., Deputy Director, Southern Nevada, Department of Transportation

CHAIR LESLIE:

We will reopen the hearing on Senate Bill (S.B.) 359. Senator Horsford is here with proposed Amendment No. 6168 ([Exhibit C](#)) to S.B. 359.

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

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

Senate Bill 359 will bring more transparency and accountability to government contracting in Nevada. I appreciate the suggestions and amendments that have been offered by various individuals. Today, I offer Amendment No. 6168 to S.B. 359 ([Exhibit C](#)).

The definition of “public body” in section 4 has been narrowed to include State, county, and city governments and their departments, agencies and boards. This definition addresses concerns that to include all public agencies in the State would be onerous on small agencies and not practicable in terms of reporting and review of all their contracts. The intent of S.B. 359 has been to capture the larger, more significant government contracts and the bill retains that with reporting by State, county and incorporated city governments.

Section 7 declares that this bill applies only to contracts for services. Amended language clarifies that service contracts connected to the purchase of goods are exempt from the provisions of S.B. 359. Service contracts cannot be separately negotiated with contractors who sell equipment to an agency; goods and services are combined in the initial request for proposal (RFP) process.

Sections 9 and 10 of the bill have been amended to make clear the disclosure of fees charged in contracts are those fees charged to “persons who are not a party to the contract,” page 2 of [Exhibit C](#). For example, Nevadans who have been charged bank fees to use ATMs to draw on their unemployment insurance benefits.

Section 11 has been revised in response to concerns raised that the proposed two-year limit on sole-source contracts and a requirement that competitively bid contracts be negotiated every two years could create unintended consequences for the agencies. I had been thinking in terms of the current economic crisis and the benefits of renegotiating contracts for lower costs. However, in the future, when the economy is growing, costs could increase every two years if contracts are required to be renegotiated. The provision, as originally written, could restrict the ability of government agencies to negotiate longer-term contracts that are more cost-effective and less expensive. Section 11, subsection 2 has been amended to read, "A public body may enter into a sole-source contract whose period exceeds 2 years if the longer period is necessary for the recovery of capital costs," page 3 of [Exhibit C](#).

At the same time, the problem of sole-source contracts being renewed without review is addressed. A public body may not renew a sole-source contract unless the governing body of the public body approves the renewal by a two-thirds vote. For the purposes of this subsection, the governing body of a State agency is the State Board of Examiners.

Section 11.5 is an addition that clarifies that a public body may not extend the period of an existing competitively bid contract with an independent contractor unless the public body first opens the contract to the same open competitive bidding process that would have been used in awarding the contract initially. Because the requirement to renegotiate contracts every two years has been eliminated, section 13, subsection 1, paragraph (e), requiring the reporting of savings generated by these renegotiations, has been eliminated.

It was determined that a permanent ban from government contracting was too harsh a penalty for violations of the contractor code of conduct and reporting requirements. This penalty in section 14 could potentially discourage contractor participation which is not our intent. Therefore, that provision has been deleted from S.B. 359, but the right to terminate the contract based on these grounds has been retained.

Section 15 addresses reporting on Public Works projects. This has been revised to reflect concerns of the State Public Works Board (SPWB) that it would create a substantial fiscal burden to process and input the terms of all State and local contracts. Instead, SPWB would create a Website that allows agencies to enter

the information and would also be available to the public. Section 15 also requires government agencies to report the gender, race and ethnicity of people submitting bids for Public Works projects. A provision has been added indicating that this reporting would not include identifying personal information such as social security numbers, driver's license numbers or banking information.

Section 16 has been deleted to remove criminal penalties for failure to report in section 15. It was determined this could discourage contractor participation without any gain.

Section 17 has been substantially revised after it was determined that review of contracts by the State Board of Examiners of the Nevada Department of Transportation (NDOT) would be duplicative of the current review by the NDOT Board of Directors. Instead, S.B. 359, as amended, would require NDOT to post any professional services contracts it awards on its Website.

SENATOR KIECKHEFER:

Why does this amendment continue to exclude school districts?

SENATOR HORSFORD:

I do not know that they were ever expressly included.

SENATOR KIECKHEFER:

School districts award large contracts that may fall under the purview of the intent of S.B. 359.

SENATOR HORSFORD:

I would not object to including them.

SENATOR KIECKHEFER:

The amendment to section 11 that allows an agency to enter into a longer-term, sole-source contract to receive potential savings over the term of the contract appears to be limited to recovery of capital costs. Is that the intent?

SENATOR HORSFORD:

The intent is that subsections 1, 2 or 3 of section 11 stand alone. Recovering capital costs would be one criterion to determine if it is reasonable to extend the length of a sole-source contract beyond two years.

SENATOR KIECKHEFER:

Is the intent that a sole-source contract cannot be for more than two years?

SENATOR HORSFORD:

A sole-source contract can be for a period of two years. It must then be bid. If the public body decides it must extend the sole-source contract beyond two years, it must be approved by two-thirds vote of the governing body of the public entity. The goal is sole-source contracts must either be competitively bid after two years, or the justification for sole-source status is reviewed and approved every two years.

SENATOR KIECKHEFER:

Does the two-year limitation apply only to sole-source contracts, not to competitively bid contracts?

SENATOR HORSFORD:

That is correct. The requirement to review competitively bid contracts every two years has been removed.

SENATOR KIECKHEFER:

Are Master Services Agreements considered sole-source contracts?

SENATOR HORSFORD:

I will leave that to the Subcommittee's discretion. I did not like the idea that someone in Colorado was negotiating on behalf of Nevada. The bill has been amended to exempt service contracts tied to goods or equipment.

SENATOR KIECKHEFER:

How are racial and ethnic preferences incorporated into statute? I am concerned the data gathered per the requirements of section 15 will not yield the information we need to collect for the outcome. Is the premise that bids should be awarded and distributed based on population percentages?

SENATOR HORSFORD:

I will defer to legal counsel who has tried to bring minority preference requirements into bills in the past. We are trying to gather the data so the preference can then be instituted.

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BRENDA J. ERDOES (Legislative Counsel, Legal Division, Legislative Counsel Bureau):

We reviewed cases and what is required to demonstrate the strict scrutiny tests both the U.S. Supreme Court and the Nevada Supreme Court would require. Our goal was to ensure the correct statistics would be gathered to draft a preference statute if the information so supported it.

SENATOR KIECKHEFER:

When minority preferences are built into statute, how are they based? What data are you looking for? Are you looking for the number of people who bid on contracts, or the number of subcontractors incorporated into those bids? Are you trying to determine if that is reflective of the overall population in the community? Do you want to find out the percentage of minority contractors in the State? What are we trying to ascertain with this reporting requirement?

MRS. ERDOES:

We are trying to gather the contractor and public entity data with this statute. The demographic information is available elsewhere.

SENATOR KIECKHEFER:

Does this bill include the subcontractors who would be incorporated into any big contract, not just after it is awarded, but as part of the bid process?

MRS. ERDOES:

Yes, that is correct.

SENATOR HORSFORD:

To be clear, the requirement in section 15 is for Public Works projects only.

CHAIR LESLIE:

The amendment incorporates the suggestion from SPWB that the words "or cause to be entered" be added to section 15, subsection 1, sub-subsection (d) which creates flexibility regarding who inputs the data into the system.

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

Regarding the definition of "public body" in section 4, Senator Horsford indicated it would be limited to incorporated cities, but the language used in the

bill is "city." The term "capital cost" in section 11, subsection 2 is not defined. Is this language exclusive or inclusive? Agencies have negotiated better rates for a contract term extension as well as entering into contracts for a longer period of time to allow the vendor to capitalize the initial start-up costs.

Does section 11.5 apply to all service contracts entered into by a public agency, or only sole-source contracts? If it applies to all contracts, there are some areas that could be problematic. State agencies frequently enter into what is referred to as a "bridge contract." These contracts are for a three- to six-month time period to allow the agency to create an RFP or solicitation document. This new section appears to eliminate that ability. Will renewals anticipated within the solicitation document remain acceptable business practice?

CHAIR LESLIE:

Are you referring to competitively bid contracts? Senator Horsford clarified that section 11 applies to sole-source contracts only.

MS. TARTER:

Senator Horsford was very clear that section 11 subsections 1, 2 and 3 only apply to sole-source contracts. But it is not clear to what the new section, 11.5, applies.

DICK COOPER (Policy Advisor, Senator Steven A. Horsford, Clark County Senatorial District No. 4):

Section 11 relates to sole-source contracts. Section 11.5 relates to all other types of contracts. Regarding the earlier question, cities is meant to apply to incorporated cities only.

CHAIR LESLIE:

Is the language in the new section 11.5 meant to be separate from section 11?

MR. COOPER:

Yes, it is. The language deleted from section 11 applied to both sole-source and competitively bid contracts. The language dealing with sole-source contracts remains in section 11, while that dealing with competitively bid contracts is in section 11.5.

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CHAIR LESLIE:

The concerns you raise about "bridge contracts" are valid.

MS. TARTER:

Yes, it indicates that no renewal is contemplated and there may be times when agencies need to do short-term renewals. As an example, last week an agency submitted a sole-source request that was denied. The agency was granted authority for a six-month extension on their existing contract to allow time for the RFP process.

MR. COOPER:

You are correct, the section as it currently reads does not contemplate and allow for these types of "bridge contracts." The Subcommittee may want to add language to account for them.

SENATOR KIECKHEFER:

Is there anything in statute that addresses "bridge contracts" or is it just an industry term?

MS. TARTER:

It is an industry term.

SENATOR KIECKHEFER:

Perhaps we need to place a time limitation of six months or one year into this section.

CHAIR LESLIE:

Is there any language in regulation about "bridge contracts?"

MS. TARTER:

It is a practice born from the State's policy that a contract can be extended for time only with approval from the Clerk of the Board of Examiners on behalf of the Board. Thus, the contract approval process can take two to three weeks rather than two to three months.

CHAIR LESLIE:

We are trying to get people to plan ahead, but circumstances are not always within our control.

MS. TARTER:

Yes. The agency in my example assumed they would receive approval for continuation of their sole-source contract. They did not receive that approval and must now make new plans.

CHAIR LESLIE:

This bill must make provision for extenuating circumstances.

MS. TARTER:

Yes. Otherwise, there will be a lapse in services, or services provided outside of a contract, and more retroactive contracts. All of this would create more liability exposure for the State.

CHAIR LESLIE:

Do you think six months is the appropriate time period?

MS. TARTER:

I hesitate to impose a specific time frame because contracts and needs vary so widely.

CHAIR LESLIE:

There must be some guidelines.

MS. TARTER:

Tie it to the reprocurement requested by the public entity. The reprocurement must occur within the time frame of the extension requested. The recent negotiations for the Medicaid Management Information System took two years from development to award. The complexity of the project dictates the length of negotiations. If a time limit is imposed, it could work to the disadvantage of the State if the contractor increases demands because he knows the State must act soon.

CHAIR LESLIE:

Think about some language that would work for these situations.

MS. TARTER:

Can the original solicitation contemplate renewals? Often an agency will write a contract for a term of four years with two options to renew for one additional

year. They can then write an amendment to exercise those renewals. It is much more difficult to terminate a contract for breach than to write a renewal if the relationship is satisfactory.

CHAIR LESLIE:

The intent of S.B. 359 is to eliminate as much as possible the renewal of contracts without review.

SENATOR KIECKHEFER:

When a contract is originally bid, do the RFP documents state it would be subject to renewal?

MS. TARTER:

Yes, it is often disclosed in the solicitation document. The RFP will indicate it will be a two-year contract with an option to renew for an additional two years, or a four-year contract with an option to renew for two one-year terms. It varies. Agencies like to have the flexibility to end the relationship if it is not working.

SENATOR KIECKHEFER:

If it is in the original RFP . . .

CHAIR LESLIE:

The problem I have is that it is a six-year time frame, not a four-year time frame.

MS. TARTER:

Yes. If that is the case, the agency has justification with respect to the competitive side of the process, not only sole-source contracts; there is still a capital cost recovery. The vendors will factor that into their costs when competing. There is still a need for justification. The agency must obtain approval for the extension from the Board of Examiners. The solicitation document may have the numbers to substantiate the savings over a longer time frame, but the renewal option gives the agency the flexibility to walk away from a contract that is not working.

CHAIR LESLIE:

A lot can happen in six years.

MS. TARTER:

I have also seen contracts written for a period of two years with an option to renew for two years. It creates flexibility. Does this bill apply to contracts that are already in place? If a current contract has three years remaining, will it be subject to these provisions? Or will the provisions apply only to contracts solicited and awarded after the effective date of the bill?

The language in section 13 still contains the language regarding renegotiating a contract while the language in section 11 requiring renegotiations every two years has been removed. Does the language in section 13 also need to be removed?

MR. COOPER:

I will have to talk to legal counsel. It may need to be stricken as well. If an agency renegotiates a contract, this information must still be reported.

CHAIR LESLIE:

This bill is exempt so it does not have to be passed by the deadline of Friday, April 15. I will take additional testimony regarding the proposed amendment.

GUSTAVO NUÑEZ, P.E. (Manager, State Public Works Board):

Regarding section 15, the State Public Works Board has no objections and there is no fiscal note.

MARK KRMPOTIC: (Senate Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau):

The exemption applied to the original bill due to the fiscal notes that were submitted. The exemption is not removed through any amendments that are made, but the fiscal impact could be removed.

JEFFREY MOHLENKAMP (Deputy Director, Support Services, Department of Corrections):

We intend to remove our fiscal note as a result of the changes to section 11.

DARYL CAPURRO (Capurro Consulting):

The public is leery of sole-source contracts without an explanation of their necessity. Assembly Bill No. 246 of the 75th Session was passed to create a

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special hunting tag, called the Dream Tag. However, the bill included a named sole-source contractor. The net result was the tag has not been implemented.

CHAIR LESLIE:
Would this bill have solved that problem?

MR. CAPURRO:
If this bill passes, there will be additional requirements of a sole-source contractor.

JACK MALLORY (International Union of Painters and Allied Trades, District Council 15):
We supported the original bill, but we are still supportive with the amendment.

RUDY MALFABON (Deputy Director, Department of Transportation):
We appreciate the amendment. However, section 15, subsection 1, paragraph (e) that deems "a bid that does not contain the information that the public body is required to gather and maintain pursuant to paragraph (a) to be nonresponsive," is confusing since some of the information requested in paragraph (a) will not be available until the contract is awarded.

CHAIR LESLIE:
Is the Subcommittee ready to move this bill? Or do we want it to be worked on more?

SENATOR KIECKHEFER:
I think the Purchasing Division raises some good questions particularly relating to retroactivity, or renewals in the original bid as well as the issue of bridge contracts, and extensions as written into an original RFP.

CHAIR LESLIE:
Let us make a list. We want clarification about the retroactivity of the bill. We want to accommodate the bridge contracts described by Ms. Tarter. We need to clarify that section 11 is applicable to sole-source contracts and section 11.5 is applicable to competitively bid contracts. And, we want to clarify the status of extensions as written into the RFP.

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SENATOR KIECKHEFER:

We need a definition of the recovery of capital costs.

CHAIR LESLIE:

Yes, and to ensure the definition of city is only incorporated cities.

SENATOR KIECKHEFER:

Do we want to include school districts?

CHAIR LESLIE:

Let us bring this back to one more meeting.

SENATOR PARKS:

I would want to include school districts. I would like to see a second mock-up before we take action.

CHAIR LESLIE:

We can have the Legal Division look at the last issue raised by NDOT, as well.

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CHAIR LESLIE:

As there is no further testimony, this meeting is adjourned at 1:43 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
SB 359	C	Senator Horsford	Amendment 6168