

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

**Seventy-Seventh Session  
March 7, 2013**

The Committee on Government Affairs was called to order by Chairwoman Teresa Benitez-Thompson at 9:03 a.m. on Thursday, March 7, 2013, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, 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 [nelis.leg.state.nv.us/77th2013](http://nelis.leg.state.nv.us/77th2013). In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: [publications@lcb.state.nv.us](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

Assemblywoman Teresa Benitez-Thompson, Chairwoman  
Assemblywoman Dina Neal, Vice Chairwoman  
Assemblyman Elliot T. Anderson  
Assemblywoman Irene Bustamante Adams  
Assemblyman Skip Daly  
Assemblyman John Ellison  
Assemblyman James W. Healey  
Assemblyman Pete Livermore  
Assemblyman Harvey J. Munford  
Assemblyman James Oscarson  
Assemblywoman Peggy Pierce  
Assemblyman Lynn D. Stewart  
Assemblywoman Heidi Swank  
Assemblywoman Melissa Woodbury

**COMMITTEE MEMBERS ABSENT:**

None



**GUEST LEGISLATORS PRESENT:**

None

**STAFF MEMBERS PRESENT:**

Jennifer Ruedy, Committee Policy Analyst  
Jim Penrose, Committee Counsel  
John Budden, Committee Secretary  
Cheryl Williams, Committee Assistant

**OTHERS PRESENT:**

John Terry, P.E., Assistant Director, Engineering, Chief Engineer,  
Department of Transportation  
Joanna Jacob, representing Association of General Contractors,  
Las Vegas Chapter, Nevada Contractors Association  
Derek Kirkland, Capital Program Specialist, Tahoe Transportation District  
Paul McKenzie, representing Building and Construction Trades Council of  
Northern Nevada, AFL-CIO  
Jack Mallory, representing Southern Nevada Building and Construction  
Trades Council

**Chairwoman Benitez-Thompson:**

[Roll was taken. Housekeeping matters were explained.] I want to begin with a Committee bill draft request (BDR). I will entertain a motion to introduce BDR 28-981.

**BDR 28-981**—Revises provisions relating to public works. (Later introduced as [Assembly Bill 218](#).)

ASSEMBLYMAN ELLIOT ANDERSON MOVED TO INTRODUCE  
BDR 28-981.

ASSEMBLYMAN ELLISON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

**Chairwoman Benitez-Thompson:**

We are going to be hearing one bill today: Assembly Bill 15. I will go ahead and welcome Mr. John Terry from the Nevada Department of Transportation (NDOT) to the witness table. We look forward to your presentation on A.B. 15.

**Assembly Bill 15: Removes the prospective expiration of the authority of the Department of Transportation to use the construction manager at risk method for the construction, reconstruction, improvement and maintenance of highways. (BDR S-365)**

**John Terry, P.E., Assistant Director, Operations, Department of Transportation:**

Assembly Bill 15 removes the prospective expiration of the authority of the Nevada Department of Transportation (NDOT) to use the construction manager at risk (CMAR) process. The Nevada Department of Transportation is currently under a sunset provision that would take effect July 1, 2013. We were given two years to use the CMAR process. With this presentation, I will show what we have done in those two years, and I will explain why we want to have that sunset provision removed. [Continued with PowerPoint presentation ([Exhibit C](#)).]

We have established detailed procedures for dealing with the CMAR process. As part of that process, we have conducted outreach meetings with the general contractor community and the Associated General Contractors (AGC), and we have gotten feedback on the CMAR process. We will continue to improve that process as we move forward. We partnered with the contractor community as we developed this, and we will incorporate the lessons learned as we move forward. [Continued with PowerPoint presentation ([Exhibit C](#)).]

I would also like to mention that when this two-year period was established through the Federal Highway Administration (FHWA), the CMAR process was experimental. We had to get individual project approval to use CMAR. Since the federal government has implemented what is called MAP 21 (the Moving Ahead for Progress in the 21st Century Act), the new federal highway bill, it is no longer experimental, and so we do not have to get the approval of the FHWA for each CMAR project. The process is now approved by the FHWA for use by departments of transportation (DOT) and heavy highway construction. [Continued with PowerPoint presentation ([Exhibit C](#)).]

**Assemblyman Livermore:**

Have there been any examples of cost reduction or cost savings with the CMAR process?

**John Terry:**

We have done three projects, one of which has been completed. Yesterday, Gus Nuñez from Public Works indicated that they are really seeing a reduction in their change order percentage of construction, and I think we saw that at our Moana project. We expect to see that moving forward. I cannot give you an answer as to a trend because we have not gone far enough, but I will say as we have gone through the guaranteed maximum price (GMP) process to try and get the cost negotiated with a contractor, we have had pretty good success at seeing costs that are under our original engineer's estimate. I cannot give you a final answer on that because we do not have enough history.

**Assemblyman Healey:**

Thank you very much for your presentation. It helped me to get a general feeling for this. Why was there only a two-year limitation put on it? Was it a pilot program? From your agency, how is it decided which of the three processes that you choose? Also, for the I-15 and Cactus Avenue Interchange project that is just getting underway in Las Vegas, which process is being used?

**John Terry:**

I think if you look at the presentation from yesterday, the vast majority of heavy highway construction is performed by the general contractor. The concern that you are negotiating with a contractor for such large sums, no matter how established your process, and the fact that it was still an experimental process through the FHWA, I think by establishing better processes by the FHWA and other DOTs now using the process, it is not considered experimental. I cannot say exactly why the Legislature chose to do it that way, but that is my opinion of some of the reasons they want to consider it experimental and a trial period.

To answer your second question, we are developing guidelines to determine which of the three processes to use for each project. Basically, we go through an evaluation process. Frankly, we are developing this, and these are draft guidelines. We would look at the project risk, the third-party involvement, and some other criteria. We have a committee that evaluates them and makes a recommendation to the Director's office on which method to use moving forward, but it is mostly based on size of project, allocation of risk in the construction project, innovation, and other factors. It is not yet a firm process, but we do go through an evaluation process to try and determine which method to use.

To answer your third question regarding the Cactus Avenue Interchange, which recently advertised in Las Vegas, that was standard design-bid-build (DBB) low-bid construction.

**Assemblyman Munford:**

I know that NDOT has been partnering with the City of Las Vegas on the F Street project in my district. You were talking about bids and things of this sort. Just where are you with the City of Las Vegas on the bids? Who is supposed to be the contractor overseeing that project?

**John Terry:**

Bids were opened for that project last week or the week before. We have an apparent low bidder. We were probably within a month or so of awarding to that contractor and that will probably be on our next Transportation Board agenda. That project is moving forward. We have received bids, and we do intend to award in the next few months.

**Assemblyman Munford:**

There might be a possible groundbreaking in the near future. Is that correct? Do you have a timetable or some numbers there?

**John Terry:**

I do not have a schedule yet for the groundbreaking, but given where we are at, I would estimate about two to three months from now.

**Assemblyman Munford:**

That will be good. Maybe by the time we adjourn here at the Legislature something will be happening. Is that correct?

**John Terry:**

Yes sir.

**Assemblyman Munford:**

Then I can participate in that event.

**Assemblyman Stewart:**

I want to make sure that I understand this. In certain projects then, this type of construction is more efficient, there is more coordination between you and the contractor, things get done more quickly, and we are not sure that it will be more cost-effective, but it appears that it will be more cost-effective. Is that correct?

**John Terry:**

Yes, sir.

**Assemblyman Stewart:**

Secondly, this has been a project that has been tested throughout the country and not just here. Is that correct?

**John Terry:**

Yes, that is correct.

**Assemblyman Stewart:**

Do you have coordination with other states and how effective has it been in other states? Do you talk with other directors?

**John Terry:**

Yes. Utah has probably been the key state. In fact, we have modeled some of their procedures and actually had their director come to present to our Transportation Board. We have coordinated with other states as well, but I would say that our processes follow the state of Utah more than any other state. We have looked at other states, especially since the FHWA has allowed this method without being experimental in the new highway bill. We are not first; other states have used it.

**Assemblyman Daly:**

I have a couple of questions on the preconstruction services phase of the work. I understand that is when the contractor gets first selected and they are put in, are they qualified? There is a discussion on the price, but they get selected based on who you believe is the most competent, or the best contractor to perform this job.

There have been a few CMAR projects with NDOT. I guess my question is, sooner or later, when you have a DBB project, or a design-build (DB) project, you have an engineer's estimate of the cost of the construction based on experience and materials and things that you know. It is just an estimate, but it gives a guideline. Do you have those guidelines on the preconstruction services? I hear in the industry that people are using that as a profit area more than would normally be done, which may not be in the best interest of the state. In other words, how much will it cost us, as a state, if we do the preconstruction services versus what you are going to contract for? Do you have an engineer's estimate on that?

**John Terry:**

We are quite experienced in negotiating with engineering consulting firms, because we use them greatly. We are not as experienced in negotiating these up front kind of construction services with construction firms, but I will say it is a very open-book process. We make them open their books to us. We try and

use reasonable charges for their work with reasonable overhead, et cetera. I have not seen what you were referring to. The magnitude of those construction services contracts up front are obviously quite small compared to the actual construction later. We continue to monitor those. I would also like to say that we pay actual cost. In other words, we negotiate an agreement with rates and then we pay them their actual cost as we proceed through them. We have a process for overseeing those. I do not know if I answered your question, but that is what we have been seeing.

**Assemblyman Daly:**

Yes, you did answer my question. In other words, you are learning as you go, and you are going to get better at it. I think that is what I heard. There is a learning curve for everybody; I am not saying that as criticism. I just wanted to make sure that some of that was done.

I have a separate question. We heard a presentation from State Public Works yesterday about how they select subcontractors, and various things. The Nevada Department of Transportation and most all of the horizontal work in the state follow what you call the silver book. Everyone else calls it the orange book, but it is standard schedules and plans, and it requires the prime contractor to perform 50 percent of the horizontal work. I am assuming that you have carried that over to CMAR, which then would create a difference in procedure from what we heard from State Public Works. You do not need to pick as many subcontractors, so how have you gotten over the hurdle of making sure that you are getting a fair price?

I know you have got Intelligent Systems Engineering Services and all that stuff, but you do not make the contractor bid every phase, or every scope of the work. He says, "No, I am going to self-perform this, because I have to perform at least this much and I may perform more of it." You have safeguards on how you get that price, and I would just like a little better idea of what you do on that procedure, on which scopes of work they do decide to subcontract.

**John Terry:**

Yes. I hope that was kind of the gist of our presentation yesterday, why we are so different than public works in terms of this. Yes, we are negotiating with a contractor for the vast majority of the work in a much bigger way than they are because we are not getting sub bids on this part of the work. We are negotiating with a contractor. We tried to make that point. You are absolutely correct. The critical aspect is which things they sub out, versus which things they self-perform. It is usually pretty straightforward. In our industry, we know which things they are going to sub out. They are telling us up front when they submit their qualifications what types of work they do and what is going to be

subbed out. There can be a little bit of gray area as we get later into the process once they do decide which areas are to be subbed out, and we work with them on that.

Then, we tried to show through this process that we are following *Nevada Revised Statutes* (NRS) Chapter 338. We do have an established process for getting those subcontractors. They still select them, but we are present at the process.

All of the other requirements that we are under, whether it is federal funding, state funding, or both in terms of DB percentages and subcontracting rules, we have to follow in CMAR just like in any other process.

To answer your question, yes. We tried to make the point yesterday that there is still a large percentage of the work under CMAR, that we are negotiating unit prices with the contractor, and we are going to pay them those prices during the contract. That is why we tried to establish this detailed process of how we do that. Obviously, we have extensive records of what unit prices are for our main items of work, and so we have a good track record there.

**Assemblyman Elliot Anderson:**

I am looking at the text of the repealed section, subsection 2. I know the digest clearly says that we are moving the limitation on your ability to do CMAR contracts. But, of course, there are a number of other sections from NRS Chapter 338 from which we are also removing the limitation. Can you comment on some of the others that we are removing the limitation on in subsection 2 of the repealed section?

**John Terry:**

I really cannot. I do not have that in front of me. I am really not in a position to answer what you are getting at there, but maybe if you could be more specific.

**Assemblyman Elliot Anderson:**

Could you just follow up with us afterward and send it to the Committee Policy Analyst? I think it would be good to have some explanation of what those other sections do.

**John Terry:**

Absolutely.

**Assemblyman Daly:**

The final follow up was along that line. Again, the State Public Works Board said yesterday that even if the prime contractor has been selected and wants to



self-perform, he has got to bid that against the others. You do not have that requirement. Is that correct the way I understand it?

**John Terry:**

No. We absolutely do have that. In other words, we negotiate a general GMP. I think on one of my slides yesterday I said that they submit an electronic bid. We have the right to have them go through this whole process, and if we do not like their electronic bid, we can put it out to bid. So, yes, we do have the right. We receive a bid from them at the end of this negotiation process, and from our independent cost estimator, we make a decision whether to award based upon that bid. We have the right to throw that bid out, and put it out to bid. We do have that right, and it is in our process.

**Chairwoman Benitez-Thompson:**

Seeing no additional questions from Committee members, we will move into support for A.B. 15. Anyone wishing to put comments on the legislative record please come forward.

**Joanna Jacob, representing Association of General Contractors, Las Vegas Chapter, Nevada Contractors Association:**

As Mr. Terry mentioned, NDOT did reach out to the contractor community when they were rolling out the CMAR process, and we participated in that working group. All along, our concern has been that we want to see this be a fair and balanced process, and so we are in support of lifting the sunset provision because we want to continue working with NDOT to address that. Thank you.

**Chairwoman Benitez-Thompson:**

Are there any questions for Ms. Jacobs? [There were none.]

**Derek Kirkland, Capital Program Specialist, Tahoe Transportation District:**

We are working with NDOT. Our project, the South Lake Tahoe Bikeway, was selected as one of the lowest costs of their three CMAR projects. We are at about 90 percent of design, and we feel that bringing the contractor on at the design level has really helped us to bring all of the agencies together to make more efficient decisions, especially in areas such as Tahoe where you have sensitive areas. We deal with a lot of different federal, state, and local agencies that all have some sort of decision making in the process. We feel that the process and the contractor's experience at the design level have been a great help for us. So, we definitely support NDOT's request. Thank you.

**Assemblyman Oscarson:**

First, I have to disclose that Mr. Kirkland is the son-in-law of our school district superintendent. I received a text message from him this morning that said to go easy on him.

I am just curious. Do you have any indication of cost savings on that project? Since you started that project so early on with the contractor, do you have any indication what the savings might have been? What have you realized? Is there any projection of that at this point in time?

**Derek Kirkland:**

As of right now, I feel comfortable saying that having that contractor's experience with the design level, and with the sensitive areas in Tahoe, there could be a lot of risk involved if you get a contractor who may not have the experience working in Tahoe. We are able to iron that out up front, select a contractor who has the experience with Tahoe, and who has the understanding of the sensitive environment and the limited construction season. I think we are going to see the savings once we get to that construction point. We are going to be able to streamline the construction schedule and complete the project in one construction season. In return, we would have some cost savings.

**Chairwoman Benitez-Thompson:**

Are there additional questions? [There were none.] Thank you very much for your testimony. Is there anybody with additional testimony in support? Seeing none, we will move to comments for the legislative record in opposition.

**Paul McKenzie, representing Building and Construction Trades Council of Northern Nevada, AFL-CIO:**

Our council is in opposition of raising this sunset. We are not in opposition of continuing with the CMAR process but, for those of you who were on this Committee last session, there were some issues with the process that were brought before the Committee last session and only through the fact that NDOT was hoping to gain the utilization of the CMAR process were all the parties brought to the table. The original bill that was brought before this Committee met with much opposition in trying to resolve it. It was only by bringing NDOT into the formula that we were able to get the parties together to work through some of the difficulties that we were having with the CMAR process, and come up with some legislation that has largely improved the process over the last two years. However, the process is not yet perfect.

This is a fairly new process. It is becoming the contracting process of choice for many public agencies. They are contracting large and small projects using the CMAR process, and there are many issues out there that the public bodies

have that we need to resolve so that we can make this a good process that is transparent to the public.

That brings us to our number one issue with the process. Most agencies have the belief that because CMAR is not subject to the public bid process, that means all the documents and bids submitted around CMAR are top secret, and you cannot have access to them. They refuse even the names of the contractors who are involved in the bid process. They refuse access to information about qualifications of subcontractors. They refuse information concerning the selection process. They refuse access to information claiming that, under CMAR, we have to go to the CMAR contractor to access that information rather than the public body. There is not a single provision in the CMAR process in NRS Chapter 338 that outlines any of those specifics that the public bodies are claiming that it does.

If you look at the regulations that are supposed to govern the CMAR process, those regulations are basically the State Public Works regulations. But if you go to any minor public body, for instance a school district, city, a regional transportation commission, or even NDOT, you will find that they are utilizing a different process than what was outlined by the State's Public Works Division for CMAR. Each one of them has a little different method of doing it. Because this state has a law and regulation process which all divisions of government are supposed to follow, it would seem that there would be zero difference between the ways that they are doing it. They should all be doing it identically.

Another issue that we have with the way that it is currently being done, and I sat in on the working group last session and we discussed this at great length and it was made very clear by the public agencies, the contractors, the legislators, and the members from the Labor Division who all sat on that working group, that the awarding body should not be able to influence the selection of subcontractors. We have seen time and time again that the awarding body is dictating to the CMAR contractor which subcontractors they have to use.

If you remember yesterday when Gus Nuñez discussed their subcontractor bid process, he discussed the fact that they were present at the bid opening. They got a copy of the original bids, then they oversaw the scrubbing process, as he called it, that the contractor did on those subcontractors. There is particular information that they have to provide with their bid that meets the specifics of the bid documents, and that scrubbing process is an investigation into that to make sure that they met all of the stuff that is requested in the bid documents. Once that is done, the general contractor, or the CMAR contractor,

is supposed to select whichever contractor he feels is the best bid. The key word here is best bid. Our public bodies are telling these CMAR contractors that they have to select the low bidder. That was not the intent of the legislation. I sat on the committees and we discussed this over, and over, and over again, that the contractors did not want to be limited to the low bid under this process because they are supposed to be at risk. We will get to that part later, but they are supposed to be at risk on this project.

Their hope is that they can build a team that they can depend on so that when things come up in this process, when they need a subcontractor who can adjust and overcome the differences in the project, that they can depend on that contractor doing that without increasing the cost of the project. Under the true definition of this bid process, the CMAR contractor is the one who would have to eat that adjustment. That does not necessarily mean that he is going to use the low bidder. He is going to use the bidder or subcontractor who he believes is most capable of performing that job in an efficient manner, and adjusting to those changes in the project.

So, the influence of the public bodies is something that truly needs to be addressed. Whether it means that we have to take the public bodies out of that subcontractor selection process entirely, or whatever we need to do, but that needs to be fixed because these CMAR contractors are being forced to utilize subcontractors that they would not use on other processes of bidding.

The last issue that we have with this process is that CMAR is supposed to be construction manager at risk. Because of the special applications that we have allowed here in statute for the public body and the contractor to negotiate a best price for this project, for them to be involved in the planning process and get paid for that involvement, we call this contractor at risk. If the construction manager is truly at risk, and if there is something to change, that means he is the one who takes the risk in that change. There are public bodies out there that are holding these contractors to the fact that they are at risk, and if something comes up that was not anticipated in the project, that should have been anticipated by the contractor in the project, then he is held at risk and he has to absorb the cost of that.

Other public bodies are allowing change orders more freely on this process than they are on the DB project process. So, if we are going to have a special process to put a contractor in the planning process so that he can absorb the risk of the changes in the contract, then we need to limit the ability of the public body to give change orders to this guy, if it is something that he should have foreseen. Now, I understand if they come in and they change what they want at the last minute. I am sure that Assemblyman Ellison has encountered

occasions where he has bid a project, and through the project, somebody has come to him and said "I have changed my mind. I want this." That is not something that the contractor should have anticipated. But, they should have been able to anticipate how many runs of twelve-gauge wire they can get through three-quarter-inch conduit. If they misinterpreted that and they had to change the size of conduit, they should have to absorb the cost of that change, not the public body.

For these reasons, we do not necessarily think that NDOT should not be allowed to continue utilizing CMAR. However, we believe that we need to have a method to make sure that all the parties come back to the table each legislative session to work on this process until we have got it perfected. Once this system is perfected, I will come up here and sit beside NDOT and support passage of the legislation to remove the sunset from CMAR. Until then, I would ask this Committee to not remove the sunset, but rather to extend it until the next legislative session so that we can give this process another two years to mature. Hopefully, next session we can come back with a system that I can strongly support. I would be happy to answer any questions.

**Assemblywoman Neal:**

How many times, in your opinion, have you witnessed NDOT selecting the subcontractor?

**Paul McKenzie:**

I have not witnessed NDOT selecting the subcontractor. But, if we do not have a sunset on CMAR in some place, we are not going to get the parties back to the table. NDOT is the only agency that has a sunset on this process right now. That is the only leverage point we have to bring the parties back to the table in order to continue to improve the process.

**Assemblywoman Neal:**

You discussed an issue of uniformity and how they handle the opening of the bids. How many times has that occurred?

**Paul McKenzie:**

Every public agency or subdivision of this state has a different process. You saw two different processes yesterday that were explained by NDOT and State Public Works. Those two processes are established under the same provisions of NRS Chapter 338, and therefore, are governed by the same provisions of Nevada Administrative Code 338. So those processes should be the same.

Every subdivision of government that lets CMARs has a different process that they have developed based upon their interpretation of the law, and some of those are very different than what Gus Nuñez explained yesterday. If you look at NDOT's process in comparison to the State Public Works process, while they are different, they follow pretty much the same pattern. Nevada Department of Transportation has just established more checks and balances, to make sure that they stay online with cost, than State Public Works.

We have got public bodies out there that believe each subcontractor has to be approved by their selection committee, not by the contractor's selection committee. The process for looking at the sub-bidders is an open process; I am supposed to be able to attend those bid openings. There is one other public body that has allowed me to attend those bid openings: the university system. Everyone else has refused to let the public attend those bid openings.

The way the statute reads, we can attend a bid opening, we just are not privy to the price that is submitted by the subcontractor. So we should be able to know who the subcontractors are because we can attend that bid opening. The majority of the public bodies out there will not even give us a list of the subcontractors who are prequalified on the project, let alone let us attend the bid openings.

Each body has a different process. Very few of them are even close to what State Public Works reviewed for you yesterday.

**Assemblywoman Bustamante Adams:**

How long have you been lobbying?

**Paul McKenzie:**

My first session as a lobbyist was 2003.

**Assemblywoman Bustamante Adams:**

I remember you from last session and I appreciate what you do. Even last session, every time in the DB and the other processes, it is always an evolution because we always have construction coming back up, and we are looking at NRS Chapter 338 all the time. Even with CMAR, I know that it is going to evolve constantly. I think if we are waiting for perfection, just as Assemblywoman Kirkpatrick always says, we are not going to have perfection. Things are going to change. That is just my perspective—it is not a question—it is just the fact that it is going to be an evolution in process. If we wait for perfection, we would probably never get anything done. That is not directed at you. I am just stating the fact that, regarding your comment on waiting for it to be perfect, it will never happen.

**Assemblywoman Neal:**

I know we still have Mr. Mallory waiting to discuss, but I want NDOT to come back to the table, if Chairwoman Benitez-Thompson would give me that flexibility, to address the issues that were brought forth in terms of the ability not to come to the bid opening. Also, why is there a difference in your interpretation of NRS Chapter 338? That would help the Committee.

**Chairwoman Benitez-Thompson:**

We will have the bill sponsor come back up at the end to clarify.

**Assemblyman Oscarson:**

I just want to make sure that I understand. For the record, you do not oppose this; you are concerned about two basic issues: continuity and transparency. Would that be correct?

**Paul McKenzie:**

Yes, Assemblyman Oscarson. We believe the CMAR process is a great tool in the toolbox of the public agencies. Like any process, it has issues that need to be resolved. As it is a new process, we need to help it evolve. The bid-build process has been out there for years, and I am sure we went through a lot of hiccups when we first started that process. All of these established processes went through a lot of issues as they started getting used. Those have been established over a period of years and there has been a lot of work done on those. This process still needs some work. It is not a bad process, it just needs some work. We need to make it transparent so the public has access to the information, and we need to make sure that it is done the same way by everyone.

**Jack Mallory, representing Southern Nevada Building and Construction Trades Council:**

Like my counterpart from the north, we have also experienced certain awarding bodies creating obstacles and not really following the regulations in the statute in the way that it was intended. Also like my counterpart from the north, we believe that, if used appropriately, the CMAR process is without a doubt a valuable delivery method for public agencies to be able to utilize. It is not our interest to delete or remove the ability of NDOT to continue using that process. Because of that, we agree with Mr. McKenzie that the sunset should simply be extended. In addition to that, we believe that the sunset extension should apply to all public awarding bodies who are utilizing the CMAR process so that there is a greater opportunity for more global review of the way that people are applying the process by this body. We will be submitting an amendment that reflects that.

**Assemblyman Stewart:**

Do you ever have problems with the other two processes?

**Jack Mallory:**

We have experienced problems with the direct competitive bid process because of the requirement that the bid be awarded to the lowest, most responsible, responsive bidder. There have been instances where a contractor meets that definition because they have not yet been found guilty of violating the law, and they are awarded a project at a price that is so low that other contractors simply cannot compete. We have seen projects be awarded for what our contractor partners have represented is less than their materials cost for some of these projects. That is generally an indication that there are going to be problems with that project. We do not have a lot of experience with DBB, at least organizationally. My experience with DBB has been very limited, but with the direct bid process, it does not allow for best value construction. I would say that is probably the biggest problem.

**Assemblyman Stewart:**

So, there is a method for you to challenge irregularities, in your opinion, in the other two processes, and those do not have sunsets. Could you not still challenge irregularities, in your opinion, with the CMAR process, even though it was made permanent?

**Jack Mallory:**

Yes, sir, I believe that would be the case if we were being given access to that process. As stated by Mr. McKenzie, there are awarding bodies who have really not followed the statute, in our opinion, as far as the way they conduct the bid openings and how the public is excluded from that process.

**Assemblyman Stewart:**

But that is true in the other two processes as well.

**Assemblyman Livermore:**

Mr. Mallory, the last couple of questions that my colleague from the south asked raised this question in my mind. In a hard-bid project, as you just stated, you cannot control what a contractor submits as a bid number. From that bid number are derived what are called change orders later down the line, once the project is up and going. What is the difference between CMAR and hard-bid when change orders get involved? In some cases, maybe the bid that was done by hard-bid, you do not know what was in that contractor's mind when he developed that bid. That is why I posed that question.



**Jack Mallory:**

I will attempt to answer your question. It is a little more difficult for me to make a complete representation on that question, but under the hard-bid process, as you called it, those change orders can be forwarded on to the awarding body, rather than having to be absorbed by the construction manager at risk because of the guaranteed price involved, unless there are design changes that substantially alter the project. What we have seen and experienced with the hard-bid process is that a contractor will go in with a low bid and then they will submit change orders at the end of the project to make up the difference between their bid value and their actual cost. We see this in both public and private sectors.

I went to a presentation by the Clark County School District, which was effectively a review of some of the projects that they had performed. It was a review of performance by both union and nonunion contractors, and I was surprised to find that in their estimated bid prices, effectively their engineer's estimate, they had a percentage allocated within that project specifically for change orders. It appalled me that they were anticipating that there were going to be change orders involved. In southern Nevada, they are building schools on basically the same types of plans with minimal changes.

**Assemblyman Livermore:**

I was involved as a local county official with the building of a swimming pool, and the contractor that was awarded the bid went through quite a bit of change orders. With that being said, selection of a CMAR is a different process than just putting the set of plans out to bid. I believe the owner goes through an interview process to select that CMAR contractor. I do not know exactly how this would work, but are not past contracts, or some history of that selection process, of value to somebody who has a CMAR? Would it not be helpful to know the contractor's history as far as change order presentations?

**Jack Mallory:**

I believe that the experience with the contractor is invaluable, and the ability to evaluate the prospective construction manager at risk through the qualification process is of tremendous value as well. The CMAR process is really designed for best value contracting, and best value application of public works. Personally, I think if it is working the way that it is supposed to work, it is better than a hard-bid.

**Chairwoman Benitez-Thompson:**

Although I see no one in Las Vegas, I will certainly present the opportunity for anyone who wishes to put comments on the record to come forward. Seeing none, are there additional comments in opposition? [There were none.]

Are there any comments in neutral? [There were none.] I will invite the bill sponsor back up for clarification.

**Assemblywoman Neal:**

Could you address two concerns? First, the alleged comment that NDOT is somehow selecting the subcontractor in the CMAR process. Second, there was a statement that you interpret NRS Chapter 338 differently than Gus Nuñez at Public Works. Why is there a difference in interpretation of the same exact statute? What do you do differently that makes the application different?

**John Terry:**

Our involvement in the subcontractor process is the prequalification process for subcontractors, who have to be prequalified anyway, and being present at the subcontractor bid process to observe that process. We do not select who the subcontractor is. I believe I said that earlier. That is the role of the general contractor. We are present for that process. Obviously, our presence assures that they meet federal requirements, and disadvantaged business enterprise requirements that are in our normal contracts, but we do not select them. I believe that they made reference to other agencies that they believed, or observed doing that, but not NDOT.

Regarding your second question, that is the complex one. That is why we tried to have the two presentations yesterday. We tried to explain that we are working within NRS Chapter 338. We are interpreting NRS Chapter 338 and applying it to our process. We try to establish up front that even in DBB, even in DB, there are differences between how Public Works does contracting, and how we do contracting under NRS Chapter 408 due to the nature of the work. So, yes, we have a process that is somewhat different, but I would contend that the process is somewhat different because the nature of the work, the percent of subcontracting, and the way we do business is different both under DBB, and under CMAR, and that we have established procedures that meet NRS Chapter 338 CMAR requirements. I will agree they are different, but I would contend that those differences are mostly based on the nature of the work we are doing and that we are in compliance with NRS Chapter 338.

**Assemblyman Ellison:**

I have two questions for clarification. I like design work because everybody can look at a project and put the project together as long as they follow code or whatever, and it is competitive. My question is, based on this, if you go through the bid process and look at the subcontractors and qualify all the subcontractors, who has the final say to pick that subcontractor? Because, if you get a general contractor out there who has had a bad experience with the

subcontractor, that creates a disaster down the line. They have got to have a marriage. Could you elaborate on that?

**John Terry:**

We prequalify the subcontractors so that they have to use prequalified subcontractors. The general contractor in the CMAR process has the right to select the subcontractors within that process, within our oversight.

[Vice Chairwoman Neal assumed the Chair.]

**Assemblyman Oscarson:**

The word "transparent" came up several times here today, and I just want to make sure that, according to the regulations and guidelines, this is a transparent process that people can see in, and that we can be aware of what is going on, and that it conforms with the statute.

**John Terry:**

Assemblyman Oscarson, we have tried every way we can to make it transparent, and as we evolve the process, we will continue to make it even more transparent. Yes, we will.

**Vice Chairwoman Neal:**

Does the Committee have any other questions?

**John Terry:**

If I may have a closing statement, from our opinion this bill is to address removing the sunset from NDOT. I appreciate that the building trades and others may have issues with the CMAR process, but their issues are with the CMAR process in general. We have been put under this sunset, and their issues are with the general CMAR process for others than just NDOT.

In the simple world, this is just a bill to remove the sunset from NDOT, and I would contend that it should not properly be tied to the issues that they are having with other agencies and the CMAR process in general. As some here have said, we are going to have constant hearings and tweaks to not just the CMAR legislation, but also to DB and DBB legislation. Perhaps the proper way to address those concerns is not by holding this bill and eliminating the sunset on NDOT.

**Vice Chairwoman Neal:**

Thank you for those closing remarks. Seeing no further comments, we will close this hearing on A.B. 15. We are open for public comment. Is there

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anyone in the audience who has public comment on this bill? Seeing none, thank you for your presentation.

We will adjourn this meeting of Government Affairs [at 10:08 a.m.].

RESPECTFULLY SUBMITTED:

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John Budden  
Committee Secretary

APPROVED BY:

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Assemblywoman Teresa Benitez-Thompson, Chairwoman

DATE: \_\_\_\_\_

**EXHIBITS**

**Committee Name:** Committee on Government Affairs

**Date:** March 7, 2013

**Time of Meeting:** 9:03 a.m.

<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A		Agenda
	B		Attendance Roster
A.B. 15	C	John Terry/Nevada Department of Transportation	PowerPoint Presentation