

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

**Seventy-Ninth Session
March 20, 2017**

The Committee on Government Affairs was called to order by Chairman Edgar Flores at 9:02 a.m. on Monday, March 20, 2017, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 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 www.leg.state.nv.us/App/NELIS/REL/79th2017.

COMMITTEE MEMBERS PRESENT:

Assemblyman Edgar Flores, Chairman
Assemblywoman Dina Neal, Vice Chairwoman
Assemblywoman Shannon Bilbray-Axelrod
Assemblyman Chris Brooks
Assemblyman Richard Carrillo
Assemblyman Skip Daly
Assemblyman John Ellison
Assemblywoman Amber Joiner
Assemblyman Al Kramer
Assemblyman Jim Marchant
Assemblyman Richard McArthur
Assemblyman William McCurdy II
Assemblywoman Daniele Monroe-Moreno
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Heidi Swank, Assembly District No. 16



STAFF MEMBERS PRESENT:

Jered McDonald, Committee Policy Analyst
Isabel Youngs, Committee Secretary
Cheryl Williams, Committee Assistant

OTHERS PRESENT:

Craig Madole, Chief Executive Officer, Nevada Chapter, The Associated General Contractors of America, Inc.
Jarrett Rosenau, Vice President/Operations Manager, Clark/Sullivan Construction
Frank Lepori, President, Frank Lepori Construction, Inc.
Sean Stewart, Chief Executive Officer, Nevada Contractors Association
Danny L. Thompson, representing Operating Engineers Local Union No. 3
Rob Benner, Business Representative, Building and Construction Trades Council of Northern Nevada, AFL-CIO
Dave Backman, Senior Vice President, K.G. Walters Construction Company, Inc.
Denis Cederburg, Director, Department of Public Works, Clark County
Laura Rehfeldt, District Attorney, Civil Division, Clark County District Attorney's Office
Les Lee Shell, Director, Risk Management Division, Department of Finance, Clark County
Gustavo Nuñez, P.E., Administrator, State Public Works Division, Department of Administration
Rebekah Holder, Government Affairs Strategic Analyst, City of Las Vegas
David Cherry, Communications and Intergovernmental Relations Manager, City of Henderson

Chairman Flores:

[Roll was called. Rules and protocol were explained.] First on the agenda today is a hearing for Assembly Bill 100.

Assembly Bill 100: Revises provisions governing contractors. (BDR 54-194)

Assemblywoman Heidi Swank, Assembly District No. 16:

Assembly Bill 100 is about parity between private and public construction contracts. Currently, in private construction contracts, Nevada's public policy provides that certain types of claims relating to delays or impacts that affect both general contractors and subcontractors cannot be waived by those contractors. However, the same rules do not apply to public works projects. On public works projects, not only do different rules apply compared to private projects, but different rules also apply between general contractors and subcontractors. That can lead to situations that unfairly harm general contractors financially. The majority of public owners do not exploit this discrepancy, and most treat both the general contractors and subcontractors fairly. However, A.B. 100 closes this loophole so that all contractors are equitably treated on all construction projects in Nevada ([Exhibit C](#)).

Craig Madole, Chief Executive Officer, Nevada Chapter, The Associated General Contractors of America, Inc.:

I would like to thank Assemblywoman Swank for sponsoring A.B. 100. With this legislation, private construction contracts and public contracts for construction will both allow for negotiations should delay, disruption, acceleration, or an impact event occur. As Assemblywoman Swank stated, A.B. 100 is placing the Legislature's stated public policy regarding construction contracts in the *Nevada Revised Statutes* (NRS) Chapter 624 into NRS Chapter 338. In 2005, both houses of the Legislature passed Senate Bill 300 of the 73rd Session. That bill, in section 11, subsection 2, stated that, "A condition, stipulation or provision in an agreement which: . . . (c) Requires a prime contractor [or subcontractor] to waive, release or extinguish a claim or right for damages or an extension of time that the prime contractor [or subcontractor] may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the prime contractor [or subcontractor] is not responsible, is against public policy and is void and unenforceable."

Simply stated, A.B. 100 codifies this policy in public works construction contracts. We have worked with other associations and officials who may be impacted by this legislation in numerous public meetings to prepare an amendment to replace A.B. 100 as introduced ([Exhibit D](#)).

Section 1 of the amendment removes language proposed in the original bill in NRS 624.622. Section 2 of the amendment clarifies that a contract for public works construction that requires a prime contractor or subcontractor to waive damages as a result of a delay, acceleration, or an impact event is void and unenforceable. As you can see in section 1 of the bill, the proposed language in section 2 is identical to existing language in NRS Chapter 624.

It is our intent, with this change in statute, that parties who did not contemplate an issue that causes a delay on the project will be required to negotiate in good faith. I am aware of some opposition to our proposal. Clark County has been working closely with us to have their concerns addressed. I feel confident that we will be able to bring an amendment forward that will be agreeable to both parties.

[[Exhibit E](#)] was presented but not discussed and is included as an exhibit for the meeting.]

Chairman Flores:

Will you walk us through a hypothetical? How does it happen now under law, and how would it happen with the changes?

Jarrett Rosenau, Vice President/Operations Manager, Clark/Sullivan Construction:

I can give you a real example of how this law affected us with a public works project owner. We were not compensated for an owner-caused delay on that project. The project was construction of a new building on an existing campus. There were existing overhead electrical lines that needed to be relocated prior to us being able to safely erect the new

structural steel frame. Our client coordinated directly with the utility company for the relocation of these services. This is typical for most projects, as the client is the one who contracts directly for permanent utility services.

When the design of the electrical relocation plan was complete, we were provided a copy for our review. Upon our review, it was clear the plan did not correctly relocate the existing electrical lines to miss our building, and our team communicated this to the client. As a result, our client had to reengage the utility company for redesign, which took additional time. Once the redesign process was complete and the actual electrical relocation work took place, it delayed our structural steel erection date by three weeks.

Our client approved the three-week delay of the impact to our contract to remove any potential cost of liquidated damages. However, they denied our request for the cost of our added general conditions for the three week schedule impact. We were forced to absorb the extra three weeks of added general conditions cost, even though we had no responsibility for the delay.

If A.B. 100 passes, the situation would be that the owner would be obligated under law to sit down and negotiate what those impacts were. It is still our burden to demonstrate we have been impacted. It is not a blank check for additional costs.

Assemblyman Ellison:

We run into this a lot in construction. Unforeseen circumstances end up delaying a project. Usually the prime contractor will come back to the subcontractors and demand compensation. I think this will clean up a lot of stuff. We run into this all the time.

Assemblyman Daly:

Some public agencies do treat the contractors fairly. Can you tell us what the response was from your agency? You do not have to name them. What was their response, knowing that the public policy on private jobs is there?

Jarrett Rosenau:

Their response was that we did not beneficially show the three weeks' impact. It was a bit of a paradox because they already approved the three-week schedule extension. Their justification was that we did not demonstrate beyond a reasonable doubt that the three-week extension affected our critical path on the schedule. Again, they already approved the time to the contract so we could avoid a liquidated damages penalty.

Assemblyman Daly:

In a situation like that, where you have that paradox, this policy would clear that up and get all the public agencies acting the same way? There would not be the ability to give you an extension, recognize there is an impact, and say, You did not prove it.

Jarrett Rosenau:

Correct.

Assemblyman Brooks:

On the project you spoke of, you said they were able to waive the liquidated damages on the three-week adjustment. In that same conversation, they should have recognized that if they are going to waive the liquidated damages, your general conditions would extend for three weeks as well. But were they denied in the whole settlement at the end of contract? Did they use the justification that they did not have to negotiate under law?

Jarrett Rosenau:

Yes. It was an interesting situation. They approved the schedule extension but denied the request for the general conditions. They did not cite chapter and verse that the law did not require them to negotiate in good faith with us, but it seemed obvious that it was the case.

Assemblyman Brooks:

If A.B. 100 as proposed were in place right now, you would have the legal justification to get those extended costs. Is that correct?

Jarrett Rosenau:

Yes. We just want the opportunity to sit down and say, We were impacted. We want the opportunity to address the direct cost associated with the impact.

Assemblyman Kramer:

When you start setting up for something like this, you might have rented air compressors or equipment or have people standing by because you are anticipating starting. It is not as if you can release them to go back and bring them back on another date. You have already spent money bringing them in. Can you describe the type of impact and how it is out of pocket to you? You are not paying someone for not being there, it really is out of pocket.

Jarrett Rosenau:

I wish it was as simple as a formula. Our general conditions are a time-driven component of the project as a general contractor. Those costs would be associated with project manager, project superintendent, our field office trailers, phone, Internet, et cetera. The nature and timing of the impact will dictate what costs the contractors or subcontractors have or do not have. Subcontractors are more time-driven in how they bid projects. If everything pushes out, you could run into delays or impacts down the road. All the contractors work together to forecast what their resources are for projects so they can meet their contractual obligations to the contractor. We strip down; we just want to be reimbursed for our costs. The cost delay on the project I mentioned earlier was about \$25,000. That could be much larger on a bigger project. This project was about \$8 million.

Assemblyman Brooks:

Using this project as an example, were there any cost impacts to the subcontractors involved? If you move the schedule three weeks, there are similar impacts to your subcontractors, vendors, et cetera. Did you have to negotiate? I hope you would pass off the relief for liquidated damages to the subcontractors, but were there additional costs that came out of pocket for you?

Jarrett Rosenau:

On that particular project, no. We rely on the subcontractors heavily to be part of our business. They are an integral part of how we perform work. It is not in our best interest to pass down costs to them. We were lucky on that one. We were able to work out a situation with the subcontractors where they did not push costs to us. Under the current wording of the law, we would not be protected from their claims, even though we cannot negotiate in good faith with the client.

Assemblyman Brooks:

Did you waive all their liquidated damages?

Jarrett Rosenau:

Yes. We did not pass any liquidated damages to anyone.

Assemblywoman Neal:

You want to remove liability from the contractor and subcontractor relationship?

Craig Madole:

Under current law, the prime contractor has to make any compensation for delays, disruption, et cetera, to the subcontractor. They are required to negotiate with the subcontractor. We are trying to ensure the public bodies negotiate with the prime contractors in those same circumstances.

Assemblywoman Neal:

How many delays have occurred that have been the fault of the State Public Works Division, Department of Administration?

Craig Madole:

I would suggest it is pretty common. For example, a job was recently bid at Stead. There was a notice to proceed for the contractor, so the contractor began to mobilize. After the mobilization began, the public owner realized they did not have the necessary building permits. In that instance, it caused a ten-day delay. The public owner did pay the general conditions for that delay. But delays are relatively common, particularly on more complex construction projects. Again, the vast majority of public owners already do negotiate these general conditions for payments for the costs incurred by these delays.

Assemblywoman Neal:

I am reading NRS 624.622 subsection 2, paragraph (c), which was the movement of one set of language from NRS Chapter 338. It "Requires a prime contractor to waive, release or extinguish a claim . . . is against public policy and is void and unenforceable." That particular language I am still confused about. I need help understanding what the impact of that language means.

Craig Madole:

That was the law enacted by the Legislature in 2005 that affects all private construction contracts. We want to take that same language and apply it to public works construction contracts.

Assemblywoman Neal:

I will just ask it flat out. Why do you think this is good public policy? That places burden on the government, who you want to be responsible for things that I do not feel they can afford to be responsible for. Does that make sense?

Craig Madole:

We think it is good public policy to require those negotiations between the public owner and prime contractor. Currently, in some circumstances, the liability is shifted to the prime contractor for any potential unforeseeable delay. This bill would only be for something that could not be contemplated between the two parties. They would be required to sit down and negotiate these potential damages. We do feel that is good public policy.

Assemblywoman Neal:

How many delays have happened that have not been contemplated?

Craig Madole:

I could not even guess. I would feel uncomfortable trying to venture a number.

Chairman Flores:

If I could ask the question differently. In any given project, how many delays do we typically expect that we could attribute to the government as opposed to the contractor themselves? Is that typical? Do we always have delays in a complex project?

Jarrett Rosenau:

That is a tough question to put a number to. Every project is unique and different. We have had many projects with no delays or impacts. We have had other projects that have had impacts, whether it was the coordination for the permanent utility services did not go the way it needed to go, or whether there was a change by the client for additional scope of work.

We really do not want change orders. We would prefer the schedule does not extend. We always work hard to absorb all of those, even when there is a compounding effect, so that we do not impact the schedule. These conversations are not fun to have with clients. We would rather avoid them at all costs, but we would like the opportunity to do so legally.

Chairman Flores:

In a complex project, is there more often than not a delay?

Jarrett Rosenau:

No. I think it depends on the project, the players, the stakeholders, how complete the design was, and how well they preplanned the projects.

Chairman Flores:

So more often than not, there will not be a delay?

Jarrett Rosenau:

Our goal is to always not delay the projects. I would say if the project has been properly planned, designed, and coordinated with the contractors, and the stakeholders are reciprocal in their responsibilities to the contract, we would not anticipate delays.

Assemblywoman Neal:

So let us say you get the ability to renegotiate costs now that there is an unanticipated delay. What happens then? You go back and sit at the table? You reopen contract terms, and then what occurs? Increase costs for whom? The government is supposed to pay you for the delay?

Jarrett Rosenau:

Yes. If we have identified what we believe to be an unforeseen condition or an impact to our contract, it is our responsibility and our burden of proof to demonstrate to the client that we have been affected and why. The next step would be to codify what those impacts were and whether they were central to the subcontractor or us. Then we would negotiate in good faith with the client to be reimbursed for that impact.

Assemblywoman Neal:

When you reopen the contract or bid, how do you believe the conversation will go? Typically, under contracts, there is a material change versus a minor change. You are now debating the materialness to you and the government. Most people are going to disagree around the materialness of the change.

You are saying the act is unforeseen and the government is now on the hook. The government did not create the act. It is different if the government said, I was supposed to give you building permits on a certain date, and I did not. I am on the hook for that. But if it is something that could not have been foreseen, you want them to be on the hook for that. That is the way I am interpreting this. Am I right? I am trying to figure out how someone is on the hook for an unforeseen circumstance. You want to go back to the table and debate it is a material change and change the cost structure of the contract.

Jarrett Rosenau:

Yes. If we have bid a set of documents and provided a guaranteed maximum price for that set of documents per the drawings and specifications, and if something is materially different—whether it was a directed change by the client or an unforeseen condition—it does not seem fair or reasonable that we would have to absorb those costs for something we had no ability to quantify while we were preparing a guaranteed maximum price number.

Chairman Flores:

What you are saying is already true in the private sector, right? I am building a new facility and you bid on it. I accept a bid, and in the middle of construction I request a change and/or realize I do not have everything I needed in place. You have all this equipment you have rented and a host of individuals that you have brought in. You may have brought labor in from outside the area. In the private world, I would be on the hook for that. Is that correct?

Jarrett Rosenau:

Yes. We would have the opportunity to sit down and negotiate with you in good faith for the impacts of that change.

Assemblyman Brooks:

Do you think if this bill were to pass and we had the same rules for public projects that apply to private projects, you would see initial bids coming in a bit lower? In contracting, there is only one way to account for risk, and it is just money. You put money in the bid if you feel there is risk associated with owner behavior that may impact your schedule. Do you think we would see bids on public projects come in slightly lower as we peel out the component of risk that we pad into the contract? I was a contractor for many years, so I am thinking of it in those terms.

Craig Madole:

Honestly, I could not contemplate that. I could ask a contractor here if they feel comfortable speaking on that. I believe their pencils are pretty sharp on bid day. I do not know that this will necessarily reduce costs. However, I do think knowing the project would be negotiated should something occur would lend itself to more complete contract documents and designs.

Assemblyman Brooks:

Does this apply to all contract methodologies?

Craig Madole:

Yes. This language would affect all public works contracts regardless of contract delivery method.

Assemblyman Daly:

I think we got a bit off track. I want to get it right for everyone. When you put in your bid, you give them a price with time restraints. You have to complete the project within a certain number of working days. You try to anticipate as many issues as you can. If I read this provision correctly, this is just one of the provisions in the contract you negotiate. This law says you may have a right if you were damaged or there was something you could otherwise acquire. We will use a change order as an example. You agree to put in a certain amount of concrete. They want to change that. It will add additional days to the project. That is a difficult change order. You have a right to be compensated for that. This language says they cannot put a provision in your contract that says you have to waive that right.

When you look at the proposed amendment under section 2, subsection 2, paragraph (c), subparagraphs (1), (2), (3), and (4), those are all things caused by the public body ([Exhibit D](#)). They acted in bad faith. They did not tell you something. There was some other cause instigated or accountable to the public body. They cannot waive those, and they are required to negotiate over them. The change order is slightly different than what we are talking about today. It is my understanding that if there is a delay in your vendor supplying structural steel because he did not get it made in time, that is not the fault of the owner. That is your delay. You have to pay your subcontractors for any delays after that. There is no fault of the public body in that situation. In the scenario you gave at the project you were talking about, they were responsible, in their contract, to coordinate with the power company to move those lines. They did not do it. Through their mishandling of their obligation, they caused you a three-week delay and \$25,000 worth of damages. There is no mechanism in the law for you to recover that time and your cost and the potential delays in your project. They could have denied you the three weeks. Is that the case? It has to be a nexus to the public body in order for you to collect these damages? All you get to do is negotiate it?

Jarrett Rosenau:

Yes. You are right on the money with that assessment. If we make a mistake in our bid, A.B. 100 is not a means to create an opportunity to sit down with a client. We cannot say, We made a mistake: we should have had another 1,000 yards of concrete in the bid, but we did not. That is absolutely not the case. If we impact or delay a project and it is our fault, that is on us. It is our cost to bear. You are 100 percent correct in your assessment.

Frank Lepori, President, Frank Lepori Construction, Inc.:

I have been working in Nevada for the last 32 years. I have a story. We were working for Truckee Meadows Community College once. There was a transformer we had to move. The paperwork was not done in time, so it delayed the project. The community college worked with us and gave us partial general conditions for the delay. Most jobs that we do for the cities, states, and counties already include negotiation. There are delays that the contractor causes, and there are delays that the owner causes. Together, we work through the project. We might change our critical path to meet the schedule. Usually the government agency has a big grand opening, and we do not want to be a part of a delay. All we are asking for is the ability to negotiate. We will probably not get full general conditions. We will probably get some, though. That is how it works today. It is up to the individual you are working with. Unfortunately, there are some individuals with different personalities, and sometimes you butt heads. Most of the time you lay out your problem and negotiate it. That is how the business works.

Assemblywoman Neal:

I guess ideologically I am more of a government protectionist. They do not have millions of dollars and this deep pocket where we can constantly reopen a contract or a bid for unforeseen consequences. I need "unforeseen consequences" to have some parameters. "Unforeseen circumstances" seems so broad. This could be a constant occurrence. I am not sure the government can afford to do that.

Frank Lepori:

Every job is so different in terms of your scope of work. There are three contractors here, and we all do different things. Really, you have to trust the people working for you. I have to trust the people who work for me. Together they negotiate a win-win situation. I think that is what we are asking for. To sit down and negotiate it out and not just be told no. I am a taxpayer too. I do not want to see the government pay an extra dime for what we do. We are the first one to back up the needs for the community. We do not want to spend additional money. But it is not fair to the contractor to get delayed and not recover some of the money or have the ability to recover some of that money.

Assemblyman Ellison:

I will give an example. I did a project a while back. The contractors moved some of the buildings. At that time, it increased the heating, ventilating, and air-conditioning system, so the electrical system would not work. They wanted us to go to the supply house and pick up larger panels, which is not going to happen. Those were a special order. That takes anywhere from three to six weeks if you pay to have it moved to the top of the list. They were complaining that they could not make schedule.

If the building's plans had stayed the same, we would not have had that problem. But the plan changed, and we had to increase the loads for all the equipment. Not only did we have to change the panel size, but we had to change the wire size and the conduit size. I can understand what you are trying to say, Assemblywoman Neal. You can get pushed back into a corner where there is no way you can meet a deadline. I hope you can work with the sponsor of the bill. It is not always about the state. It might be the architect, add-on, or changes—a lot of situations add up to this. That is why you try to negotiate this out instead of ending up with an attorney.

Chairman Flores:

Are there any other questions from the Committee? [There were none.] Is there anyone wishing to testify in favor of the bill? Any additional information or insight is appreciated. Otherwise, a "ditto" is more than sufficient. Thank you.

Sean Stewart, Chief Executive Officer, Nevada Contractors Association:

The Nevada Contractors Association encompasses the contractors and subcontractors located in southern Nevada. We have been working with Craig Madole and the contractors in the north on this issue. We agree with everything that has been said today.

The only thing I would add is just to reiterate that right now all of the entities we deal with in southern Nevada are following the same protocol discussed today. We have not had any issues, but it only takes one bad apple to bring the issue forward. We want to ensure it is written in existing law.

Assemblywoman Neal:

Clark County submitted a proposed amendment ([Exhibit F](#)). Have you seen it?

Sean Stewart:

Yes. I have seen it.

Assemblywoman Neal:

What do you think of their changes?

Sean Stewart:

We are fine with those changes. We have told Clark County we are willing to work with them to ensure it comes in a form they agree with.

Danny L. Thompson, representing Operating Engineers Local Union No. 3:

If you are a contractor in Nevada today and you are still in business, you have a really sharp pencil. The construction industry was literally destroyed in this state with the economic downturn. So many of them went out of business I cannot count them. Because of that, our members have been affected. They still have very high unemployment numbers—40 or 50 percent unemployment in some cases.

When one of these situations comes up, the contractor is on the hook not just for their employees' pay, but also for their benefits and retirement. All the local unions in Nevada spend a lot of time trying to collect that money because they are owed by someone. When they turn the right age, they have to be paid. I think it is only fair in these situations where something happens that is not the contractor's fault, you enter into negotiations and figure out a solution. It is not just for the contractors, it is a solution for the workers as well. We stand in support of this bill.

Rob Benner, Business Representative, Building and Construction Trades Council of Northern Nevada, AFL-CIO:

We are here in support of this bill.

Dave Backman, Senior Vice President, K.G. Walters Construction Company, Inc.:

Around 99 percent of everything I do is on public works projects, saltwater facilities. To affirm what Assemblywoman Swank said, most owners negotiate in good faith. That is a great thing. But there are occasions where they do not. We are looking for some room to do that negotiation. Most delays in my line of work are due to lack of permitting, errors and omissions in the design, et cetera. I am involved in a project that is a year late right now due to an error in the design. The owners operate in good faith; we will negotiate this stuff. But there are cases where that is not an option. That is why I am in favor of this bill.

Chairman Flores:

Is there anyone wishing to testify in opposition to the bill? [There was no one.] Is there anyone wishing to testify as neutral to the bill?

Denis Cederburg, Director, Department of Public Works, Clark County:

We are here to speak in neutral with the amendment we have proposed ([Exhibit F](#)).

Laura Rehfeldt, District Attorney, Civil Division, Clark County District Attorney's Office:

I am here to make some comments with respect to the amendment that Clark County has proposed. We will stand neutral, subject to our amendments. Our concern with this bill is that it would make contract provisions that do not provide damages to a contractor for delays for which the contractor is not responsible completely void. I do not see any language in what has been proposed that allows any room for negotiation. It would just make that provision void.

It would be a huge exposure to the public body financially. It would be very difficult for the public body to budget for public works projects. It would be unfair. The public body would take on all risks related to weather, force majeure events, third parties, and different site conditions. That is an area that encompasses its own area of law and legal principles apply based on the facts and circumstances of any given case. There is no point. It would be detrimental to the public body for that allocation of risk to be written on our contracts.

The county's amendment is fair. It addresses the concerns addressed by the contractors that they not be subject to damages from delays within the control of the owner. It codifies the existing practice of the county and its contracts, whereby the county is responsible for the things within its control. It does not sound like there have been any issues with respect to the southern Nevada entities.

The provisions allocate the risk to the county when events occur within our control. It sets a parameter. It protects the county from being liable for damages when the contractor is in the best position to handle the risk, whether through the bid, means and methods, protection of its work, or insurance. Our amendment is modeled after statutes in the neighboring states, all within the jurisdiction of the Ninth Circuit Court of Appeals, including Arizona, California, Oregon, and Washington.

Assemblywoman Neal:

I like the language in your amendment a lot better. In section 2, subsection 2, paragraph (c), subparagraph (3) you say, "Caused by active interference by the public body." Can you give me an example of that? Have you ever engaged in an active interference before?

Laura Rehfeldt:

The language making void a provision allocating risk caused by active interference is already existing in the statute. What we are adding goes beyond that. We are adding the items in green to section 2, subsection 2, paragraph (c), subparagraph (5). We are adding the parameters that say, "Unreasonable under the circumstances, was not within the contemplation of the parties at the time the agreement was entered into," and not within the control of the public body. Active interference is already in the law as are instances caused by fraud, misrepresentation, or concealment.

In essence, is this amendment necessary? The existing statute takes care of the concerns that have been articulated by the contractors as we understand it. But we are willing to work with them to include things that are more within the control of the public body.

**Les Lee Shell, Director, Risk Management Division, Department of Finance,
Clark County:**

I wanted to say thank you to Assemblywoman Swank and the contractors for agreeing to work with us. We are here in neutral today because we believe we can get to some amendatory language that does limit our liability to those owner-caused delays.

**Gustavo Nuñez, P.E., Administrator, State Public Works Division, Department of
Administration:**

As public works understands it, the original stated reason for A.B. 100, as provided by The Associated General Contractors of America, Inc. representatives, was to delete certain provisions from NRS 624.622 that were used as a loophole to avoid the requirements of NRS 338.485. However, it is still not clear why it is necessary to amend NRS Chapter 338 to eliminate a loophole in NRS Chapter 624.

Another stated intent of A.B. 100 is to amend NRS 338.485 so that the Division of Public Works cannot require a contractor to waive a claim for delay damages if the delay is caused by the owner. Again, I am not clear why NRS 338.485 requires revisions. Existing law allows a contractor to seek damages for delays against the Division of Public Works if caused by the Division of Public Works. The exceptions contained in NRS 338.485 and our contract documents comply with applicable Nevada Supreme Court law.

A new stated purpose of A.B. 100 is to create equality between public and private construction; however, public construction and private construction are not equal. The Division of Public Works must comply with NRS Chapters 338, 339, and 341 as well as numerous provisions that tell us how we must qualify contractors, write bid documents, write specifications, advertise projects, issue preferences, award bids, handle bid disputes, pay prevailing wages, award to the lowest bidder, reject bids, and write contract documents. None of these requirements apply to private owners. The state must comply with all of these requirements while minimizing the risk to the state and Nevada taxpayers.

The Nevada Supreme Court, in *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009 (Nev. 2004), addressed the enforceability of "no damage for delay" clauses in construction contracts. The court decided that those clauses are enforceable. However, if the owner acts in bad faith and breached the promise of good faith and fair dealing, then that party can incur liability. Those instances where an owner can be found to have acted in bad faith are the listed exceptions currently found in NRS 338.485. This statute was amended in 2011 to track the Nevada Supreme Court decision and to balance the law between protecting the state and the rights of contractors.

Nevada Revised Statutes 338.485 also entitles the contractor to damages for delay if the Division of Public Works decides to add scope and duration to the project. The current law treats both parties in a fair and equitable way. Existing law and its inclusion in our public works contracts encourages both the contractor and the owner to minimize delays. The owner is encouraged to complete the project. The contractor is encouraged because there is no claim for money associated with normal construction delays, only additional time. Therefore, everyone has the same goal: minimize delays and finish the project. If there is a recognized exception, using language approved by the Nevada Supreme Court increases the likelihood that in the event of a dispute, the contract language will be enforced.

The language proposed by A.B. 100, specifically the proposed addition of section 5 to NRS 338.485, is so broad that it can arguably include anything that an owner does that can be labeled unreasonable. The Division of Public Works strives to follow its contract documents to the letter and treat contractors fairly. However, unreasonable can mean uncooperative, unhelpful, or difficult. This is so broad that it swallows the other exceptions in NRS 338.485.

In addition, the Nevada Supreme Court specifically rejected other language proposed in section 5: "delays not contemplated by the parties at the time they entered into the contract." Certain delays, for example weather, can be contemplated at the time of contracting and are bargained for. However, the exceptions in NRS 338.485 cover those circumstances that cannot be contemplated or bargained for, such as the owner's bad faith. Those instances are already addressed.

The current law strikes a fair balance between contractors and public works. Assembly Bill 100 would significantly increase the risk to the state and its taxpayers in the form of potential litigation and associated costs and liability.

I may add, listening to some of the testimony, it seems to ignore existing law. There are already exceptions to the "no damages to delay" statutes. I would like to read those. *Nevada Revised Statutes* 338.485, subsection 2, paragraph (c), subparagraph (1) states, "So unreasonable in length as to amount to an abandonment of the public work." Subparagraph (2) states, "Caused by fraud, misrepresentation, concealment or other bad faith by the public body." Subparagraph (3) states, "Caused by active interference by the public body." For example, if we are responsible for getting a permit in a timely fashion and we do not, and that delays the contractor, that is interference by the public body, and we are required to pay for those delays. Obviously, if the delay is on the contractor, that is on them. Subparagraph (4) states, "Caused by a decision by the public body to significantly add to the scope or duration of the public work." Everything that has been talked about here has already been covered under existing law. I would say, I think we ought to stay with the current law and not change it due to one bad actor.

Chairman Flores:

I think it would be appropriate to deem your testimony as opposition as opposed to neutral. You brought powerful dialogue to this conversation. I appreciate that.

Assemblywoman Neal:

What do you think of the Clark County amendment ([Exhibit F](#))? Basically, when you look at the amendment, they strike out all of section 1, add in existing law, add the acceleration or disruption, and add the "unreasonableness" clause.

Gus Nuñez:

We still feel that the current law is the best way to handle it. It requires everyone to act in good faith. If the public body in any way interferes or does not perform their part of the contract, there is an exception. The contractor can seek compensation for that. If we significantly increase the scope and/or duration, they can also be compensated for those delays. We feel the circumstances currently listed in the law are fair to both sides.

I apologize, I should have explained that the reason I am testifying neutral is because The Associated General Contractors and others have reached out to us, and we have been working on these things. I should have stated that we will continue to work on a good resolution to this matter.

Chairman Flores:

In the scenario with the bad actor, why was *J.A. Jones Const. Co.* not enough to seek damages?

Gus Nuñez:

I am not completely familiar with that particular issue. It seems to me that the owner was responsible for getting the utilities adjusted in a timely fashion, and that caused a delay. To me, not enforcing liquidated damages and adding the days to the contract is an admission that they did delay the contract. It was the owner's responsibility, not the contractor's. I believe active interference would apply there. Why it did not, I could not tell you. But it should have applied.

Assemblywoman Neal:

If that happened, why was this existing law not triggered to deal with it? Do you think the power to negotiate and come back to the table when an unforeseen delay occurs is happening now? Do they have the power to come back to the government entity and have a renegotiation of terms? How often does that happen?

Gus Nuñez:

We had a situation recently. We are the building official for the Division of State Lands, State Department of Conservation and Natural Resources. The National Guard has a good footprint out at the Stead facility. It used to be an Air Force base. Now it is under the jurisdiction of the City of Reno. The city indicated that they needed a permit by a certain date, and the state was required to have that permit ready. It was delayed by a week, so the contractor was delayed. To me, that is active interference. We promised the contractor something and did not deliver. Therefore, the state and the contractor will sit down and figure out what the damages were. We will compensate the contractor for the delay.

Chairman Flores:

Is there anything in the Supreme Court case that will contradict NRS? We often get Supreme Court decisions that we codify in NRS symbolically, for clarity, for guidance, et cetera. We should be concerned if there is something in that case law that will be in contradiction to the NRS or if we will have two competing avenues trying to give guidance.

Gus Nuñez:

In consultation with our deputy attorney general, we feel that current law and our contract documents track the decision made by the Nevada Supreme Court exactly. I would suggest that if there are questions, I would be happy to ask our deputy attorney general to work with the Legislative Counsel Bureau's Legal Division to ensure that is the case.

Rebekah Holder, Government Affairs Strategic Analyst, City of Las Vegas:

We are also neutral, having seen Clark County and The Associated General Contractors' amendment. We feel there is a willingness to work together to fine-tune this amendment. We feel there will be a good position for both parties.

David Cherry, Communications and Intergovernmental Relations Manager, City of Henderson:

I want to thank the bill sponsor for allowing us to come in and discuss our concerns with the underlying bill. In addition, I want to say the city is definitely interested in participating in ongoing discussions with Clark County and the contractors and working out some final amendment language. The reason we are here in neutral is because we feel that it is important to see the final language where both parties are comfortable. It is helpful to have these issues unpacked during a hearing. We appreciate the opportunity to hear the testimony from both those in opposition and those in support.

Chairman Flores:

Will the bill sponsors please come back up?

Assemblywoman Swank:

Under the current law, the fact is that there are some owners who just say no to contractors when there is a delay. Those contractors still need to pay their subcontractors. What A.B. 100 would do is not guarantee that the contractors would get all of their money, but that they would get access to the negotiating table. That is all we are asking for in this bill. We know we have a lot of good actors in our state, but we have to legislate for the long term. People in the future may not be such good actors, so we need to close this loophole. We are still working with all of the stakeholders and will continue to do so moving forward.

Assemblyman Daly:

I am wondering where we are getting crossways on this. I am looking at NRS 338.400 through NRS 338.645. It talks about progress payments, when the owner of a public works project makes a progress payment, and what the prime contractors are required to do in relationship to their subcontractors. They have to pay their subcontractors in a timely fashion. If they do not pay the subcontractors, there can be interest.

The breakdown is that the language Mr. Nuñez says applies has been interpreted to not apply to the prime contractor. All this is about the relationship between the owner and the prime contractor, and the prime contractor's responsibility to the subcontractors. That language does not include the prime contractor in the waivers. The prime contractors cannot force their subcontractors to waive those rights, but apparently the owner can force the prime contractor to waive those rights. Is that correct? Is that why we need this? To get the prime contractor on the same footing in the relationship with the owner as the prime contractor is with the subcontractors?

Craig Madole:

You stated that perfectly. The prime contractor must make payments to the subcontractors, but the public owner can legally force the prime contractor to waive any damages.

Chairman Flores:

Thank you for the insightful dialogue. It seems like we will be able to get to common ground. I will close the hearing on A.B. 100. Is there any public comment? [There was none.] This meeting is adjourned [at 10:14 a.m.].

RESPECTFULLY SUBMITTED:

Isabel Youngs
Committee Secretary

APPROVED BY:

Assemblyman Edgar Flores, Chairman

DATE: _____

EXHIBITS

[Exhibit A](#) is the Agenda.

[Exhibit B](#) is the Attendance Roster.

[Exhibit C](#) is written testimony presented by Assemblywoman Heidi Swank, Assembly District No. 16, regarding Assembly Bill 100.

[Exhibit D](#) is a proposed amendment to Assembly Bill 100 presented by Craig Madole, Chief Executive Officer, Nevada Chapter, The Associated General Contractors of America, Inc.

[Exhibit E](#) is a document titled "Summary of AB 100 Provided by the Nevada Chapter Associated General Contractors of America," submitted by Craig Madole, Chief Executive Officer, Nevada Chapter, The Associated General Contractors of America, Inc., regarding Assembly Bill 100.

[Exhibit F](#) is a proposed amendment to Assembly Bill 100 submitted by Les Lee Shell, Director, Risk Management Division, Department of Finance, Clark County