Report of the Nevada Public Purchasing Study Commission

Concerning AB 228 of the 2011 Legislative Session

Submitted to the Director of the Legislative Counsel Bureau per the Requirements of AB 228

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Introduction

Assembly Bill 228 was passed and enrolled during the 2011 session of the Nevada Legislature. That Bill tasked the Nevada Public Purchasing Study Commission with studying and reporting back to the Legislature on the “feasibility of using standard form construction contracts for public works by state and local governments.”

The Nevada Public Purchasing Study Commission (Commission) was established by NRS 332.215 which states:

NRS 332.215 Commission to Study Governmental Purchasing; Members; meetings; duties.

1. Each county of this state whose population is 100,000 or more, must be a member of the Commission to Study Governmental Purchasing which is composed of all purchasing agents of the local governments within those counties. Each county whose population is less than 100,000 may participate as a voting member of the Commission. The members shall select a Chair from among their number.

2. The Commission shall meet no less than quarterly or at the call of the Chair to study practices in governmental purchasing and laws relating thereto and shall make recommendations with respect to those laws to the next regular session of the Legislature.

END SECTION

The Commission meets on a monthly basis with meetings regularly scheduled for the second Monday of each month, beginning at Noon. The meetings of the Commission are publicly posted and take place in Legislative Counsel Bureau (LCB) facilities in Carson City and Las Vegas that are connected via video-conference. During sessions of the Legislature, meetings are relocated to local government or utility company facilities that offer video conferencing equipment.

Commission officers are elected for 2-year terms and include two (2) Co-Chair positions and one Secretary position. At the time of the drafting of this report (November, 2012), the officers are:

Co-Chair (North): Andrea Sullivan, Washoe County School District
Co-Chair (South): Kathy Ogle, City of Henderson
Secretary: Dan Marran, City of Sparks

This report has been drafted by Dan Marran (Commission Secretary) and approved by the members of the Nevada Public Purchasing Study Commission for submittal to the LCB prior to the deadline outlined in the text of AB 228.
Bill Text

Assembly Bill No. 228–Assemblymen Hickey, Hansen; Goedhart, Goicoechea, Grady, Hambrick, Hardy, Kirner, McArthur, Segerblom, Sherwood, Smith and Stewart

CHAPTER..........

AN ACT relating to public works; directing the Commission to Study Governmental Purchasing to conduct a study of the feasibility of standard form contracts for public works at the state and local levels; and providing other matters properly relating thereto.

Legislative Counsel's Digest:
Under existing law, a public body is required to include certain provisions in a contract for a public work. (NRS 338.150, 338.153, 338.155) This bill directs the Commission to Study Governmental Purchasing to conduct a study of the feasibility of the use of a standard form construction contract for each contract for a state or local public work.

EXPLANATION – Matter in bolded italics is new; matter between brackets [omitted material] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. (Deleted by amendment.)

Sec. 2.
1. The Commission to Study Governmental Purchasing created pursuant to NRS 332.215 shall conduct a study concerning the feasibility of using standard form construction contracts for public works by state and local governments.

2. The study must include, without limitation:
   (a) A review of:
       (1) The laws of this State governing public works; and
       (2) The use of standardized contracts in other states and localities;
   (b) Construction contract clauses recommended for inclusion; and
   (c) Any other matters which the Commission deems relevant to the consideration of the issues.

3. In conducting the study, the Commission shall consider the recommendations and testimony from experts in construction and public works contracts, including, without limitation:
   (a) National associations primarily representing the interests of public owners or private contractors;
   (b) Representatives of management and labor organizations;
   (c) The State Public Works Board; and
   (d) Local government public works officials.

4. On or before January 15, 2013, the Commission shall submit a report of the results of the study and any recommendations for legislation to the Director of the Legislative Counsel Bureau for transmittal to the 77th Session of the Nevada Legislature.

Sec. 2.5. The provisions of NRS 354.599 do not apply to any additional expenses of a local government that are related to the provisions of this act.

Sec. 3. This act becomes effective on July 1, 2011.
Methodology
As directed in the text of AB 228, the Nevada Public Purchasing Study Commission (Commission), designed a process that allowed for the submittal of written comment as well as verbal testimony on the subject of standardized contracts. This would allow for the greatest flexibility to any individual, organization or entity that had an interest in the subject to offer an opinion.

The subject of AB 228 was discussed at the regular meetings of the Commission following the passage of the Bill. The content of these discussions were the basis of designing the framework for taking opinions from interested parties. On January 31, 2012, a letter from the (then current) Co-Chairs of the Commission was drafted and distributed that outlined the process for submitting written materials and the schedule of meetings where verbal testimony on the subject would be on the formal agenda of the Commission. That letter is included as Appendix 1 to this report. The letter offered a copy of the Bill and the initial distribution/mailing list for the letter. The final distribution/mailing list is included as Appendix 2 to this report.

Within this letter, interested parties were directed to submit any written materials to either of the Commission Co-Chairs, no later than June 15, 2012. Interested parties were also offered the opportunity to make verbal remarks on the subject at any of the regular Commission meeting scheduled from May – June of 2012.

The combined written comments and verbal testimony provide the basis for much of this report and are included in detail in Appendix 3 (Written Submittals) and Appendix 4 (Minutes from verbal testimony).
Summary of Written Submittals

The Commission received written testimony from:

1) The Associated General Contractors of America (AGC) – Nevada Chapter
2) IAM&AW Local Lodge 845
3) RTC of Southern Nevada
4) City of Las Vegas
5) Las Vegas Convention and Visitors Authority
6) International Union of Operating Engineers (IUOE) - Local 501
7) Engineers Joint Contract Documents Committee (EJCDC) – 1st Submittal
8) State of Nevada, Department of Administration – Public Works Division
9) White Pine County School District
10) Washoe County School District
11) AIA Nevada – 1st Submittal
12) The Associated General Contractors of America (AGC)
13) Engineers Joint Contract Documents Committee (EJCDC) – 2nd Submittal
14) Clark County Water Reclamation District
15) AIA Nevada – 2nd Submittal

These materials are included in Appendix 3 to this report. While all of the interested parties welcomed the discussion on the subject of standardized contracts, the submittals generally fell into 3 different groups;

1) Those for whom any adoption would not apply to their own business (2 organizations)
2) Those in favor of possibly moving toward a standardized model (5 organizations)
3) Those in opposition to changing current practices (6 organizations)

With one exception, all of the organizations in favor of moving toward a standardized model represent the architecture, design or construction industries. In some cases, these organizations are partners or are affiliated with companies that provide standardized contract forms to industry as a business. This is the case with the Associated General Contractors of America (AGC) who has suggested the “Consensus Docs” platform, the Engineers Joint Contract Documents Committee (EJCDC) who markets their own contracts (for a fee) to their membership and the American Institute of Architects (AIA) who markets their own contracts (for a fee) to their membership.

All of the represented organizations in opposition to a standardized model represent government agencies as the owners of construction projects who themselves have invested (in many cases) years in developing and perfecting their own contract terms that meet the specific needs of their project and their agency and meets the requirements of local ordinance and State law.
Summary of Verbal Testimony

Per the letter sent by the Nevada Public Purchasing Study Commission, verbal testimony was scheduled as a formal agenda item at the regular meetings of the Commission in the months of February through June of 2012. Interested parties had the opportunity to speak to the Commission from Carson City or Las Vegas. The minutes from those meetings are included in Appendix 4 to this report and are summarized here.

February 13, 2012 – Two individuals representing different local labor organizations in southern Nevada spoke to the Commission, expressing support for requiring local government agencies to use “Project Labor Agreements” (PLA’s) when contracting for public works. It was the belief of those individuals that the use of a PLA would guarantee that all contractors would be playing by the same rules.

March 12, 2012 – No verbal testimony was offered.

April 9, 2012 – No verbal testimony was offered.

May 14, 2012 – No verbal testimony was offered.

June 11, 2012 – Testimony was heard from representatives of the American Institute of Architects (AIA) Nevada Chapter that included the Executive Director, President and Vice President of the organization. The executive Director, UNLV Planning and Construction also spoke on behalf of the AIA position. AIA also provided written materials that are included in Appendix 3 to this report. AIA markets their own contract templates to their members and the construction industry for a fee. Taken from the minutes to this meeting:

The AIA document was represented as the “industry standard” and easily defensible due to the long history of the program. There are multiple contract types available as it was represented that there are 120 contract types, representing multiple types of project delivery methods. The documents are marketed as “fair, balanced and continually updated” using the input of architects, engineers, contractors and attorneys. While there is a cost associated with using the program, it was noted in the testimony that the use of the documents was “affordable.” It was noted that 20 states are using AIA documents at some level.
David Forman of UNLV testified that the campus has been using AIA contract forms for 4 years and that their reason for adoption was due to the industry familiarity with the contract forms and the decades of case law already established concerning the contract language.

Questions were offered to the AIA representatives that also detailed concerns of commission members regarding the wholesale replacement of legacy contract forms with something new. In the case of the documents that are recommended by the AIA, it was noted that the composition and continued revision of forms did not seem to take the interest of the project owner into account and that with 120 different contract types, it would be difficult to argue that a move to such a program would necessarily be a move toward standardization between agencies or any easier to defend if challenged in court.

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Feasibility of “Standard” Contracts

The text of AB 228 tasked the Nevada Public Purchasing Study Commission (Commission) to “conduct a study concerning the feasibility of using standard form construction contracts…” In the testimony that led to the passage of AB 228, Examples of different models of standard documents were offered. In the course of study and testimony on this issue, the Commission determined that the more well-known standard contracts included:

Consensus Docs – Taken from their website:

ConsensusDocs™ is a coalition of associations representing diverse interests in the design and construction industry that collaboratively develops and promotes standard form construction contract documents that advance the construction process. The ConsensusDocs Coalition is committed to assuring that the contracts serve the best interests of the project and the industry.

The coalition of organizations can be generally classified as those organizations supporting the needs of the contracting community, including design engineers, architects, contractors and subcontractors. In the course of the passage of AB 228, Consensus Docs were offered by representatives of the Associated General Contractors of America (AGC) as one possible model contract form that Nevada Public Agencies might use. It should be noted that the AGC is one of the sponsoring coalition members for the Consensus Docs platform.

American Institute of Architects (AIA) Documents – Taken from their website:

More than 100 forms and contracts comprise AIA Contract Documents. These forms and contracts define the relationships and terms involved in design and construction projects. Prepared by the AIA with the consensus of owners, contractors, attorneys, architects, engineers, and others, the documents have been finely tuned during their 120-year history. As a result, these comprehensive contracts and forms are now widely recognized as the industry standard.

Engineers Joint Contract Documents Committee (EJCDC) – Taken from their website:

The Engineers Joint Contract Documents Committee (EJCDC) is a joint venture of four major organizations of professional engineers and contractors. Since 1975, EJCDC has developed and updated fair and objective standard documents that represent the latest and best thinking in contractual relations between all parties involved in engineering design and construction projects.

EJCDC volunteers represent a major portion of professional groups engaged in the practice of providing engineering and construction services, or participate in one or more of 15 other professional engineering design, construction, owner, legal, and risk management organizations. EJCDC volunteers serve on one or more committees responsible for the document creation process and the governance of the organization.
A basic search of the Internet will find that there are many examples of construction contract documents that have been labeled and marketed as “standardized” for the industry. The three that have been listed here represent the options that were offered within testimony (written and verbal) to the Commission.

**Feasibility Finding:**
These offerings, combined with basic market research confirm that it is feasible for any organization, including public agencies, to choose to adopt, purchase and use a “standardized” third party solution for the drafting of construction contract documents.

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Benefits of a Standard Construction Contract
The argument taken by organizations that advocate for the adoption of a common construction contract is that the documents they recommend are “the industry standard” or are “fair and balanced” to all parties. The use of such contracts “remove the mystery” and have been “tested by the courts” over the life of the contract.

It can be argued that a standardized contract can reduce the amount of time needed to enter into an agreement between two parties because (in a best-case-scenario) both parties have already used the documents in the past and their respective legal counsel has already reviewed and approved the language for use in the course of doing business.

It is a normal goal within any organization (public or private) to draft standardized contract language that they will use in their business. As is their right, organizations will most often seek terms and conditions that will be to their own advantage in cases where contractual conflicts may occur. Therefore it is vitally important to look at the author or sponsoring organization to any model contract that might be suggested.

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Concerns Regarding a Standard Construction Contract

By its definition, a standard form contract is a contract between two parties where the terms and conditions of the contract are set by one of the parties, and the other party is placed in a "take it or leave it" position with little or no ability to negotiate terms more favorable to it. Examples of standard form contracts are insurance policies (where the insurer decides what it will and will not insure, and the language of the contract) and contracts with government agencies (where certain clauses must be included by law or regulation).

From the perspective of government agencies, there are multiple concerns with the potential adoption of standardized contracts:

1) **Differing Interests – Owner v. Contractor or Designer**
   
   Each of the organizations cited in this report that market “standard” contracts to their members come from the general position of the business/trade that is providing services on a construction project. However, the position of the owner (the local government agency) in the drafting of these contracts appears to be under-represented.

   The contracts in use by government agencies in Nevada are living documents that have been drafted and have evolved over time through changes in law and applicability of court decisions. Contract documents are routinely reviewed and signed by the legal counsel for the local agency who has their own unique experience in what language they feel will be defensible in a contract.

   Interests representing construction have expressed concern that agency contracts may be one-sided or include language that is particularly difficult for them to accept. It must be noted that the language contained in bid documents and resulting contracts is drafted with a specific eye to observance of relevant law while protecting the tax payers in each locality from potential risk in public contracting.

2) **Cost**

   There is a tremendous investment that has been made in each local agency in the drafting and updating of standardized contracts. That investment would be lost with the adoption of a contract form marketed by third party organizations. If standardized contract documents were to be adopted, there is an initial and continuing subscription cost to the owner that chooses to use these contracts. The total actual cost was not possible to quantify in the course of preparing this report, but the costs can easily be in the thousands of dollars per year, depending on the scope of construction activity at the local level.

3) **Language Concerns of Construction Industry**

   Arguments in testimony and discussion by interested parties generally express a concern about the language a local agency may choose to insert in to a bid or contract form. However, specific examples were never offered. Any time a potential bidder may wish to discuss language in a bid document, they have multiple opportunities to express those concerns with the owner of the project. In many cases, language concerns may be resolved locally, prior to the receipt of bids. There may be rare cases where language
cannot be resolved. But in those cases, the contractor always has the option to decline to offer a bid.

4) **Scope (Bid Document Language v. Contract Form)**  
Concerns heard in testimony mostly focused on the idea that language in the local agency bids may be different when compared to other similar projects or local agencies. This highlights a general concern in that a possible standardization of the contract form does not necessarily address language that will exist in the bid forms used in the selection of the contractor, prior to the execution of a (possibly standardized) contract. Given that all contracts for public works will reference and incorporate the bid language, this is a significant concern.

5) **Customized “Standard” Contracts**  
Each of the organizations named in this report that market standardized contracts have included notations that their agreements are customizable based on the needs of the user. The American Institute of Architects (AIA) representatives noted that their suite of agreements included more than 120 different types of contracts that could vary based on the needs of the client. Both parties to the contract would still be required to comprehensively understand all of the language contained in the agreement and gain approval from their own legal counsel. With an infinitely customizable agreement, the savings in time or cost to the local agency would be impossible to quantify.

6) **Lack of Consensus Between Government Agencies**  
The presumptive benefit of the adoption of standardized contract form for government agencies in Nevada is that all local governments would presumably choose to use the same model of forms to the benefit of all parties. However, short of a mandate from the Legislature to use a single provider for all government agencies, it is unlikely that all local agencies would choose the same provider of contract forms. Under current law, the contract form to be used is drafted at the local level. Gaining consensus between local agencies on what language is adequate in any given project is not likely possible, especially once legal counsel is included in the discussion.

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Recommendation

It is the recommendation of the Nevada Public Purchasing Study Commission that no further action be taken on this subject. The contract forms used by government agencies in the State of Nevada continue to meet the needs of those agencies. A required adoption of a third party contract form solution will result in additional costs to each local agency without significant benefit to the local agencies and their ratepayers.

Contact Information

For any follow-up questions, please contact any of the officers of the Nevada Public Purchasing Study Commission:

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Contracts and Risk Manager – City of Sparks
431 Prater Way
Sparks, NV 89431
(775) 353-2273
dmarran@cityofsparks.us
Appendix 1:

Outreach Letter from the Nevada Public Purchasing Study Commission
January 31, 2012

Subject: A.B. 228 – Nevada public agencies’ use of Standard Form Contracts for Public Works Projects

We are writing on behalf of the Nevada Public Purchasing Study Commission (“NPPSC”) created pursuant to NRS 332.215.

Effective July 1, 2011, Assembly Bill 228 of the 76th Session of the Nevada Legislature (attached hereto as Exhibit “A”) directed the NPPSC to conduct a study of the feasibility of the use of a standard form construction contract for each contract for a state or local public work. The NPPSC is to consider the recommendations and testimony from experts in construction and public works contracts in Nevada.

By this letter we are seeking input from your agency or company on the use of standardized form contracts by Nevada agencies that construct public works projects. Please send any written comments you have on this issue no later than June 15, 2012 to: ASullivan@washoeschools.net or Krainey@lasvegasnevada.gov.

In addition to written comments on the above-described subject, the NPPSC will consider testimony received during its upcoming meetings. The NPPSC meets the second Monday of each month at 12:00 noon via videoconferencing from both a Northern and Southern Nevada location and will include an agenda item to receive public comment on this issue for its meetings between February and June of 2012. Please see Exhibit “B” which lists the dates and locations of these meetings. Oral testimony will be taken by any member of the public that attends an NPPSC meeting at one of the physical locations attached between February, 2012 and June, 2012. All written comments and oral testimony received during this time period be considered by the NPPSC as part of its study of the feasibility of using a standard form contract by Nevada agencies performing public works construction.

Please contact Andrea Sullivan or Kathy Rainey should you have any questions about this matter.

Sincerely,

Andrea Sullivan, NPPSC Co-Chair
Kathy Rainey, NPPSC Co-Chair

Cc: See Attached Exhibit “C” for list of all recipients of Letter
Assembly Bill No. 228—Assemblymen Hickey, Hansen; Goedhart, Goicoechea, Grady, Hambrick, Hardy, Kierer, McArthur, Segerblom, Sherwood, Smith and Stewart

CHAPTER........

AN ACT relating to public works; directing the Commission to Study Governmental Purchasing to conduct a study of the feasibility of standard form contracts for public works at the state and local levels; and providing other matters properly relating thereto.

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EXPLANATION – Matter in **bolded italics** is new; matter between brackets [**struckout matter**] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. (Deleted by amendment.)

Sec. 2. 1. The Commission to Study Governmental Purchasing created pursuant to NRS 332.215 shall conduct a study concerning the feasibility of using standard form construction contracts for public works by state and local governments.

2. The study must include, without limitation:
   (a) A review of:
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   (b) Construction contract clauses recommended for inclusion; and
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3. In conducting the study, the Commission shall consider the recommendations and testimony from experts in construction and public works contracts, including, without limitation:
   (a) National associations primarily representing the interests of public owners or private contractors;
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4. On or before January 15, 2013, the Commission shall submit a report of the results of the study and any recommendations for legislation to the Director of the Legislative Counsel Bureau for transmittal to the 77th Session of the Nevada Legislature.

Sec. 2.5. The provisions of NRS 354.599 do not apply to any additional expenses of a local government that are related to the provisions of this act.

Sec. 3. This act becomes effective on July 1, 2011.
Site 1: (North)
Carson City Legislative Building
Room 2135
401 South Carson Street
Carson City, NV 89701

Site 2: (South)
Grant Sawyer State Office Building
Legislative Counsel Bureau, Room 4401
555 E. Washington Avenue, Ste. 4000
Las Vegas, Nevada 89101

February 13, 2012
March 12, 2012
April 9, 2012
May 14, 2012
June 11, 2012
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<td>David M. Solaro</td>
</tr>
<tr>
<td>Wells</td>
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<tr>
<td>West Wendover</td>
<td>Bryce Kimber</td>
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<td>Winnemucca</td>
<td>Roger Sutton</td>
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<tr>
<td>Yerington</td>
<td>Roy McDonald</td>
</tr>
<tr>
<td>A. Philip Randolph Institute</td>
<td>SOUTHERN Marnette Rice</td>
</tr>
<tr>
<td>AFL-CIO Retirees Council</td>
<td>SOUTHERN Roberta West</td>
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<tr>
<td>American Federation Government Employees-</td>
<td>A.F.G.E. #1978</td>
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<td>Veteran's Affairs</td>
</tr>
<tr>
<td>American Federation Government Veteran's Affairs</td>
<td>NORTHERN John Copeland</td>
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Nevada Public Purchasing Study Commission - AB 228 Report Page 20
<table>
<thead>
<tr>
<th>Union Name</th>
<th>Local Number</th>
<th>Contact Name</th>
<th>District</th>
</tr>
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<tr>
<td>ATU - Amalgamated Transit Union</td>
<td>Local 1637</td>
<td>Richard Valero</td>
<td>SOUTHERN</td>
</tr>
<tr>
<td>BAC - Int'l Union of Bricklayers</td>
<td>Local 13</td>
<td>Carlos Aquin</td>
<td>SOUTHERN</td>
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<tr>
<td>BCTD - Building &amp; Construction</td>
<td>Local 192</td>
<td>Todd Koch</td>
<td>NORTHERN</td>
</tr>
<tr>
<td>CJA - The United Brotherhood of</td>
<td>Local 182</td>
<td>Darren Enns</td>
<td>SOUTHERN</td>
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<td>Kevin Kline</td>
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<td>Local 1705</td>
<td>Jim Cooksey</td>
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<tr>
<td>CJA - The United Brotherhood of</td>
<td>Local 1827</td>
<td>Terry Greenwald</td>
<td>SOUTHERN</td>
</tr>
<tr>
<td>CJA - The United Brotherhood of</td>
<td>Local 192</td>
<td>Tony Mayorga</td>
<td>NORTHERN</td>
</tr>
<tr>
<td>CJA - The United Brotherhood of</td>
<td>Local 1977</td>
<td>Steve Muchicko</td>
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<td>IBT - International Brotherhood</td>
<td>Local 357</td>
<td>John Phillipenas</td>
<td>SOUTHERN</td>
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<td>Local 396</td>
<td>Charles Randall</td>
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<td>Local 401</td>
<td>John H. Seymour</td>
<td>NORTHERN</td>
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<td>Local 549</td>
<td>Paul Tea</td>
<td>NORTHERN</td>
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<td>Local 92</td>
<td>Larry Griffith</td>
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<td>Mike Magnani</td>
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<td>IBEW - International Brotherhood</td>
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<td>Al Davis</td>
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<td>IBEW - International Brotherhood</td>
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International Assoc. of Heat & Frost Insulators and *Asbestos Workers
Local 135
SOUTHERN
Rick Johnson

International Assoc. of Heat & Frost Insulators and
Asbestos Workers
Local 16
NORTHERN
Steve Steele

International Assoc. of Heat & Frost Insulators and
Asbestos Workers
Local 69
NORTHERN
Rick Marshall

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
District Council
SOUTHERN
Mike Dalpiaz

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 416
SOUTHERN
Mary Reed

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 155
NORTHERN & SOUTHERN
Donald Savory

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 27
NORTHERN
Michael McDonald

International Union of Operating Engineers
Local 12
SOUTHERN
Tom Robertson

International Union of Operating Engineers
Local 3
NORTHERN
Steve Ingersoll

International Union of Operating Engineers
Local 501
SOUTHERN
Maria Hardy

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 118
NORTHERN (Sub Hall)
Rick Davis

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 8
NORTHERN
Jim Leonard

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 18
SOUTHERN
Mario Vicchiullo

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 118
SOUTHERN
Donald Savory

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 155
NORTHERN & SOUTHERN
Jim Leonard

International Association Of Bridge, Structural, Ornamental, And Reinforcing Ironworkers
Local 27
NORTHERN
Michael McDonald

IUPAT - The International Union Of Painters And Allied Trades Home - DC15
Glaziers Local 2001
SOUTHERN
John Smirk

IUPAT - The International Union Of Painters And Allied Trades Home Local 567
SOUTHERN
Todd Koch

IUPAT - The International Union Of Painters And Allied Trades Home Local 767
SOUTHERN
Daniel Belau

LIUNA - Laborers International Union Of North America Local 169
NORTHERN
Richard “Skip” Daly

LIUNA - Laborers International Union Of North America Local 872
SOUTHERN
David McCune

LIUNA - Laborers International Union Of North America Local 872
SOUTHERN
David McCune
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<tr>
<td>Machinist &amp; Aerospace Workers, Local 519</td>
<td>Richard Logan</td>
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<td>Machinists, Local 801</td>
<td>William Schnechter</td>
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<td>Office &amp; Pro. Empl. Int'l Union, Local 29</td>
<td>Patrick Sanchez</td>
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<td>OPCMIA - Operative Plasterers' and Cement Masons, Local 979</td>
<td>Alan Rennie</td>
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<tr>
<td>OPCMIA - Operative Plasterers' and Cement Masons, Local 979</td>
<td>Tim Mortan</td>
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<td>Paper, Allied Ind., Chemical &amp; Energy Workers Int'l, Local 8-675</td>
<td>David Campbell</td>
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<tr>
<td>PPF/UA - Plumbers and Pipe Fitters Union, Local 525</td>
<td>Greg Esposito</td>
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<tr>
<td>PPF/UA - Plumbers and Pipe Fitters Union, Local 669</td>
<td>Steve Hayden</td>
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<td>PPF/UA - Plumbers and Pipe Fitters Union, Local 669</td>
<td>Randy Roxson</td>
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<td>Road Sprinkler Fitters (aka Sprinkler Fitters), Local 669</td>
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<td>RWAW - United Union of Roofers, Waterproofers and Allied Workers, Local 162</td>
<td>Darren Enns</td>
<td></td>
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<tr>
<td>RWAW - United Union of Roofers, Waterproofers and Allied Workers, Local 81 - Reno</td>
<td>Helen Green</td>
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<tr>
<td>RWAW - United Union of Roofers, Waterproofers and Allied Workers, Local 81 - Reno</td>
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<td>SMW - Sheet Metal Workers International Association, Local 26</td>
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<td>State of Nevada Employees Assoc./AFSCME #4041, NORTHERN &amp; SOUTHERN</td>
<td>Neil Lake</td>
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<td>Local 39 NORTHERN</td>
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<td>Local 8498 SOUTHERN</td>
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<td>Jerry Kalmer</td>
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<td>Transport Workers</td>
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<td>Local 502 SOUTHERN</td>
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<td>United Food &amp; Commercial Workers</td>
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<td>Roberta West</td>
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<td>ABC - Associated Builders &amp; Contractors</td>
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<td>Chris Williams</td>
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<td>Mandi Lindsay</td>
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<td>Todd Copenhaver</td>
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<td>Rob Filary</td>
<td>SOUTHERN</td>
<td>Rob Filary</td>
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<td>AGC - Associated General Contractors</td>
<td>NORTHERN</td>
<td>AGC - Associated General Contractors</td>
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<tr>
<td>John Madole</td>
<td>USW - United Steel</td>
<td>John Dolinger</td>
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</table>
Appendix 2:

Outreach Mailing List
## State Public Works Board and Local Government Public Works Officials

<table>
<thead>
<tr>
<th>ORGANIZATION</th>
<th>ADDRESS</th>
<th>PHONE</th>
<th>FAX</th>
<th>CONTACT</th>
<th>EMAIL</th>
<th>WEBSITE</th>
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<tbody>
<tr>
<td>Boulder City (City of)</td>
<td>City Hall 401 California Avenue, Boulder City, NV 89005</td>
<td>702-293-9200</td>
<td>702-293-9241</td>
<td>Scott Hansen, Public Works Director</td>
<td><a href="mailto:shansen@bcnv.org">shansen@bcnv.org</a></td>
<td><a href="http://lcrda.com/meadowvalley/cont.html">http://lcrda.com/meadowvalley/cont.html</a></td>
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<tr>
<td>Caliente (City of)</td>
<td>P.O. Box 1006, Caliente, NV 89008</td>
<td>775-726-3679</td>
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<td></td>
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<td><a href="http://lcrda.com/meadowvalley/cont.html">http://lcrda.com/meadowvalley/cont.html</a></td>
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<tr>
<td>Carlin</td>
<td>PO Box 787 - 101 S. 8th Street, Carlin, NV 89822</td>
<td>775-738-8091</td>
<td>775-754-6912</td>
<td>Tom Ballew, City Engineer</td>
<td><a href="mailto:dballew@cityofcarlin.com">dballew@cityofcarlin.com</a></td>
<td><a href="http://explorecarlinnv.com">http://explorecarlinnv.com</a></td>
</tr>
<tr>
<td>Carlin</td>
<td>PO Box 787 - 101 S. 8th Street, Carlin, NV 89822</td>
<td>775-754-6515</td>
<td>775-754-6912</td>
<td>Carlos Esparza, Public Works Director</td>
<td><a href="mailto:cesparza@cityofcarlin.com">cesparza@cityofcarlin.com</a></td>
<td><a href="http://explorecarlinnv.com">http://explorecarlinnv.com</a></td>
</tr>
<tr>
<td>Churchill County</td>
<td>155 North Taylor St., Ste 190, Fallon, NV 89406</td>
<td>775-423-2153</td>
<td>775-423-9102</td>
<td>Miorad Misha Stojicic, Engineering &amp; Capital Projects Manager</td>
<td><a href="mailto:cceengineering@churchillcounty.org">cceengineering@churchillcounty.org</a></td>
<td><a href="http://www.churchillcounty.org">http://www.churchillcounty.org</a></td>
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<tr>
<td>Douglas County</td>
<td>P.O. Box 218, Minden, NV 89423</td>
<td>775-782-6227</td>
<td>775-782-6266</td>
<td>Carl Ruschmeyer, Public Works Director</td>
<td><a href="mailto:cruschmeyer@co.douglas.nv.us">cruschmeyer@co.douglas.nv.us</a></td>
<td><a href="http://www.douglascounty_nv.sites/PublicWorks/default.aspx">http://www.douglascounty_nv.sites/PublicWorks/default.aspx</a></td>
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<tr>
<td>Elko</td>
<td>40 Court Street, Elko, NV 89801</td>
<td>775-777-7241</td>
<td>775-777-7249</td>
<td>Dennis Strickland</td>
<td><a href="mailto:dstrickland@ci.elko.nv.us">dstrickland@ci.elko.nv.us</a></td>
<td><a href="http://www.ci.elko.nv.us/public_works/index.cfm">http://www.ci.elko.nv.us/public_works/index.cfm</a></td>
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<tr>
<td>Ely</td>
<td>501 Mill Street, Ely, NV 89301</td>
<td>775-289-2430</td>
<td>775-289-1463</td>
<td>Jim Souba</td>
<td><a href="mailto:jsouba@ci.fallon.nv.us">jsouba@ci.fallon.nv.us</a></td>
<td><a href="http://www.ci.fallon.nv.us/public_works/department/PublicWorks/index.cfm">http://www.ci.fallon.nv.us/public_works/department/PublicWorks/index.cfm</a></td>
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<tr>
<td>Gardnerville</td>
<td>1407 Highway 395 North, Gardnerville, NV 89410</td>
<td>775-782-7134</td>
<td>775-782-7135</td>
<td>Tom Dalaine</td>
<td><a href="mailto:dalaine@co.douglas.nv.us">dalaine@co.douglas.nv.us</a></td>
<td><a href="http://www.gardnerville-nv.gov/">http://www.gardnerville-nv.gov/</a></td>
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<tr>
<td>Humboldt County</td>
<td>25 West 4th Street, Winnemucca, NV 89445</td>
<td>775-623-6332</td>
<td>775-623-6337</td>
<td>Bobby Thomas</td>
<td><a href="mailto:bthomas@co.humboldt.nv.us">bthomas@co.humboldt.nv.us</a></td>
<td><a href="http://www.hcnv.us/contact_info.htm">http://www.hcnv.us/contact_info.htm</a></td>
</tr>
<tr>
<td>Incline Village General Improvement District</td>
<td>1220 Sweetwater, Incline Village, NV 89451</td>
<td>775-832-1269</td>
<td>775-832-1311</td>
<td>Joe Pomroy</td>
<td><a href="mailto:jepomroy@ivgid.org">jepomroy@ivgid.org</a></td>
<td><a href="http://www.ivgid.org/departments/PublicWorksandEngineering">http://www.ivgid.org/departments/PublicWorksandEngineering</a></td>
</tr>
<tr>
<td>Lander County</td>
<td>315 S. Humboldt Street, Battle Mountain, NV 89820</td>
<td>775-635-2860</td>
<td>775-635-1120</td>
<td>Gina Little or Jacob Edgar</td>
<td></td>
<td>[http://landercounty_nv органисм/pubilc_works.html](http://landercounty_nv органисм/pubilc_works.html)</td>
</tr>
<tr>
<td>Las Vegas (City of)</td>
<td>333 N. Rancho Drive, Las Vegas, NV 89106</td>
<td>702-229-6276</td>
<td>702-382-0848</td>
<td>Jorge Cervantes, PE, PTOE</td>
<td><a href="mailto:jcervantes@lasvegasnevada.gov">jcervantes@lasvegasnevada.gov</a></td>
<td><a href="http://www.lasvegasnevada.gov/GOvernment/publicworks.htm">http://www.lasvegasnevada.gov/GOvernment/publicworks.htm</a></td>
</tr>
<tr>
<td>Las Vegas Convention and Visitors Authority</td>
<td>544 Sierra Vista Dr. LV 89169</td>
<td></td>
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<td><a href="http://www.lvwwd.com">http://www.lvwwd.com</a></td>
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<tr>
<td>Las Vegas Valley Water District</td>
<td>1001 So. Valley View Blvd., LV 89107</td>
<td>702-258-3266</td>
<td>702-258-3811</td>
<td>Shawn Moilus, Director of Engineering</td>
<td><a href="mailto:smoilus@lasvegaswater.com">smoilus@lasvegaswater.com</a></td>
<td><a href="http://www.lvwwd.com">http://www.lvwwd.com</a></td>
</tr>
<tr>
<td>Lincoln County</td>
<td>P.O. Box 307, Pioche, NV 89043</td>
<td>775-962-5165</td>
<td>775-962-5877</td>
<td>Cory Lyle</td>
<td><a href="mailto:clyle@lincoln-nv.com">clyle@lincoln-nv.com</a></td>
<td><a href="http://www.lynx-county.org/index.aspx">http://www.lynx-county.org/index.aspx</a></td>
</tr>
<tr>
<td>Lovelock</td>
<td>P.O. Box 238, 400 N. 14th Street, Lovelock, NV 89419</td>
<td>775-273-2356</td>
<td>775-273-7979</td>
<td>Joe Crim</td>
<td><a href="mailto:scrim@cityoflovelock.com">scrim@cityoflovelock.com</a></td>
<td><a href="http://www.cityoflovelock.com/Officees%20emails.html">http://www.cityoflovelock.com/Officees%20emails.html</a></td>
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<tr>
<td>Lyon County</td>
<td>27 South Main Street, Yerington, NV 89447</td>
<td>775-246-6200 x15</td>
<td>775-463-6596</td>
<td>Mike Workman</td>
<td><a href="mailto:mworkman@co.lyon.nv.us">mworkman@co.lyon.nv.us</a></td>
<td><a href="http://www.lyon-county.org/index.aspx">http://www.lyon-county.org/index.aspx</a></td>
</tr>
<tr>
<td>Mesquite (City of)</td>
<td>30 E. Mesquite Blvd., Mesquite, NV 89027</td>
<td>702-346-5237</td>
<td>702-346-5382</td>
<td>Bill Tanner</td>
<td><a href="mailto:btanner@mesquitenv.gov">btanner@mesquitenv.gov</a></td>
<td><a href="http://www.mesquitenv.com/department/PublicWorksandEngineering">http://www.mesquitenv.com/department/PublicWorksandEngineering</a></td>
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<tr>
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<tr>
<td>Minden</td>
<td>1604 Esmeralda Avenue, Suite 101,</td>
<td>775-782-5976</td>
<td>775-782-5287</td>
<td>Jennifer Scott, Minden Town Manager</td>
<td><a href="mailto:jenifer@co.douglas.nv.us">jenifer@co.douglas.nv.us</a></td>
<td><a href="http://www.townofminden.com/aboutminden/contactus/officestaff.html">http://www.townofminden.com/aboutminden/contactus/officestaff.html</a></td>
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<tr>
<td>Mineral County</td>
<td>P.O. Box 1035, Hawthorne, NV 89412</td>
<td>775-945-2507</td>
<td>775-945-2265</td>
<td>Mike Trujillo - sent an email confirming this info 1-6-11</td>
<td><a href="mailto:mtrujillo@gmail.com">mtrujillo@gmail.com</a></td>
<td><a href="http://www.mineralcountychamber.com/">http://www.mineralcountychamber.com/</a></td>
</tr>
<tr>
<td>North Las Vegas (City of)</td>
<td>2250 Las Vegas Blvd North, North Las Vegas, NV 89030</td>
<td>702-633-1200</td>
<td>702-649-4096</td>
<td>Dr. Qiong Lin, Public Works Director</td>
<td></td>
<td><a href="http://cityofnorthlasvegas.com/Departments/PublicWorks/PublicWorks.shtml">http://cityofnorthlasvegas.com/Departments/PublicWorks/PublicWorks.shtml</a></td>
</tr>
<tr>
<td>Nye County</td>
<td>250 N. Hwy 160, Suite 2, Pahrump, NV 89040</td>
<td>775-751-6843</td>
<td>775-751-6856</td>
<td>Dave Fanning, Public Works Director</td>
<td><a href="mailto:public_works@co.nye.nv.us">public_works@co.nye.nv.us</a></td>
<td></td>
</tr>
<tr>
<td>Pershing County</td>
<td>P.O. Box 1656, Lovelock, NV 89419</td>
<td>775-273-2700</td>
<td>775-273-3617</td>
<td>CJ Safford, Building</td>
<td><a href="mailto:scottf@pouercounty.com">scottf@pouercounty.com</a></td>
<td><a href="http://pershingcounty.net/index.php/Planning-and-Building-department.html">http://pershingcounty.net/index.php/Planning-and-Building-department.html</a></td>
</tr>
<tr>
<td>Regional Transportation Commission</td>
<td>P.O. Box 30002, Reno, NV 89520</td>
<td>775-348-0171</td>
<td>775-348-0171</td>
<td>Jeff Hale, Engineering Director</td>
<td></td>
<td><a href="http://www.aiann.org/">http://www.aiann.org/</a></td>
</tr>
<tr>
<td>Regional Transportation Commission</td>
<td>2050 Villanova Drive, Reno, NV 89502</td>
<td>775-348-0400</td>
<td>775-348-3503</td>
<td>Lee Gipson, Executive Director</td>
<td><a href="mailto:gipson@gbis.com">gipson@gbis.com</a></td>
<td><a href="http://www.ai.org/">http://www.ai.org/</a></td>
</tr>
<tr>
<td>Reno (City of)</td>
<td>1 E. First Street, Reno, NV 89501</td>
<td>775-334-2350</td>
<td>775-334-2490</td>
<td>John Flansberg, Director</td>
<td><a href="mailto:spwb@reno.gov">spwb@reno.gov</a></td>
<td><a href="http://reno.gov/">http://reno.gov/</a></td>
</tr>
<tr>
<td>Reno-Tahoe Airport Authority</td>
<td>P.O. Box 12490, Reno, NV 89510-2490</td>
<td>775-328-6676</td>
<td>775-328-6646</td>
<td>Joyce Humphrey, Manager Purchasing and Materials Management</td>
<td></td>
<td><a href="http://renoairport.com/airport-authority">http://renoairport.com/airport-authority</a></td>
</tr>
<tr>
<td>South Truckee Meadows GID</td>
<td>handled through Washoe County - so they are covered</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td><a href="http://www.washoecounty.us/clerks/stmgid_minutes.php">http://www.washoecounty.us/clerks/stmgid_minutes.php</a></td>
</tr>
<tr>
<td>Southern Nevada Water Authority</td>
<td>100 City Parkway, Suite 700, LV 89106</td>
<td>702-862-3401</td>
<td>702-862-3499</td>
<td>Marc Jensen, Director of Engineering</td>
<td><a href="mailto:jensen@snwa.com">jensen@snwa.com</a></td>
<td><a href="http://www.snwa.com/">http://www.snwa.com/</a></td>
</tr>
<tr>
<td>Sparks (City of)</td>
<td>411 Prater Way, Sparks, NV 89431-4598</td>
<td>775-353-2340</td>
<td>775-353-7800</td>
<td>Neil Krutz, Community Services Director</td>
<td></td>
<td><a href="http://cityofsparks.us/departments/community-services">http://cityofsparks.us/departments/community-services</a></td>
</tr>
<tr>
<td>State Public Works Board</td>
<td>515 East Musser St., Suite 102, Carson City, NV 89104</td>
<td>775-684-4114</td>
<td>775-684-4142</td>
<td>Gustavo Nuñez, PE Administrator</td>
<td><a href="mailto:sspwb@washoegov.com">sspwb@washoegov.com</a></td>
<td><a href="http://spwb.state.nv.us/">http://spwb.state.nv.us/</a></td>
</tr>
<tr>
<td>State Public Works Board</td>
<td>1830 East Sahara #204, Las Vegas, NV 89104</td>
<td>775-486-5115</td>
<td>775-486-5094</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Storey County Public Works</td>
<td>26 &quot;B&quot; Street, Virginia, City, NV 89440</td>
<td>775-847-0958</td>
<td>775-847-0947</td>
<td>Mike Nevin, Public Works Director</td>
<td><a href="mailto:mnevin@storeycounty.org">mnevin@storeycounty.org</a></td>
<td><a href="http://www.storeycounty.org/public-works/">http://www.storeycounty.org/public-works/</a></td>
</tr>
<tr>
<td>Tonopah</td>
<td>102 Burro Avenue, Tonopah, NV 89049</td>
<td>775-482-6336</td>
<td>775-482-3778</td>
<td>James Eason</td>
<td></td>
<td><a href="http://www.tonopahnnevada.com/">http://www.tonopahnnevada.com/</a></td>
</tr>
<tr>
<td>Truckee Meadows Water Authority</td>
<td>1155 Capital Blvd., Reno, NV 89502</td>
<td>775-834-8033</td>
<td>775-834-8153</td>
<td>Scott Estes, Director of Engineering</td>
<td><a href="mailto:estes@tmwa.net">estes@tmwa.net</a></td>
<td><a href="http://www.nevadaagc.org/">http://www.nevadaagc.org/</a></td>
</tr>
<tr>
<td>Truckee River Flood Project</td>
<td>3380 Gateway Drive, Ste. 230, Reno, NV 89521</td>
<td>775-850-7470</td>
<td></td>
<td>Jay Alden, Director</td>
<td></td>
<td><a href="http://www.washoe.gov/Parks/FloodManagement/">http://www.washoe.gov/Parks/FloodManagement/</a></td>
</tr>
<tr>
<td>Washoe County</td>
<td>1001 E. 9th Street, Reno, NV 89512-2845</td>
<td>775-328-2040</td>
<td>775-328-3699</td>
<td>David M. Solano, PE, Acting Public Works Director</td>
<td></td>
<td><a href="http://www.abcnv.org/">http://www.abcnv.org/</a></td>
</tr>
<tr>
<td>Wells</td>
<td>P.O. Box 366, Well, Nevada 89835</td>
<td>775-752-3715</td>
<td></td>
<td>Jason Penglolly or Dennis Calton</td>
<td></td>
<td><a href="http://www.wellsnevada.com/wellsity.shtml">http://www.wellsnevada.com/wellsity.shtml</a></td>
</tr>
<tr>
<td>West Wendover</td>
<td>775-664-3363</td>
<td></td>
<td></td>
<td>Bryce Kimberly, Public Works Director</td>
<td><a href="mailto:bkimber@westwendovercity.com">bkimber@westwendovercity.com</a></td>
<td><a href="http://www.westwendovercity.com/resguide/publicworks_utilities.php">http://www.westwendovercity.com/resguide/publicworks_utilities.php</a></td>
</tr>
<tr>
<td>Winnemucca</td>
<td>90 West Fourth Street, Winnemucca, NV 89445</td>
<td>775-623-6396</td>
<td></td>
<td>Public Works Supervisor</td>
<td></td>
<td><a href="http://www.winnemuccacity.org/PublicWorks.cfm">http://www.winnemuccacity.org/PublicWorks.cfm</a></td>
</tr>
<tr>
<td>Yerington</td>
<td>102 S. Main Street, Yerington, NV 89447</td>
<td>775-463-3511</td>
<td>775-463-0030</td>
<td>Roy McDonald, Director of Public Works</td>
<td></td>
<td><a href="http://www.Yerington.net/index.asp?NO=180">http://www.Yerington.net/index.asp?NO=180</a></td>
</tr>
</tbody>
</table>
These are the people in the Superintendents’ offices we were given as contacts.

Kathy Rainey, Manager  
Purchasing & Contracts  
City of Las Vegas  
495 S. Main Street  
Las Vegas, NV 89011  
702 229 6021 (office)  
(702) 524-7541 (cell)

Carson City School District  
Carole Akers

Churchill County School District  
M. Lehman

Clark County School District  
D. Jones

Douglas County School District  
Holly Luna

Elko County School District  
J. Zander

Esmerelda County School District  
G. Gazaway

Eureka County School District  
B. Zunino

Humboldt County School District  
M. Bumgartner

Lander County School District  
J. Squibb
Lincoln County School District
N. Holton

Lyon County School District
C. McIntosh

Mineral County School District
T. White

Nye County School District
W. Roberts

Pershing County School District
D. Fox

Storey County School District
R. Slaby

Washoe County School District
J. Gabica

White Pine County School District
R. Dolezal

Aloha, Tracy

PLEASE NOTE: As of February 27, 2012, City Hall is located at 495 S. Main Street, Las Vegas, NV 89101. Visit us on the web at www.lasvegasnevada.gov.

---

From: Kathy Rainey  
Sent: Wednesday, April 11, 2012 1:54 PM  
To: Tracy Medeiros  
Subject: AB 228 letter

Can you send me the listing of the school districts and contact name you sent the letter to. I need to inform my co-chair and secretary at the NPPSC.

Kathy Rainey, Manager  
Purchasing & Contracts  
City of Las Vegas  
495 S. Main Street  
Las Vegas, NV 89011  
702 229 6021 (office)  
(702) 524-7541 (cell)
Appendix 3:

Written Responses Received from Interested Parties or Groups:

1) The Associated General Contractors of America (AGC) – Nevada Chapter
2) IAM&AW Local Lodge 845
3) RTC of Southern Nevada
4) City of Las Vegas
5) Las Vegas Convention and Visitors Authority
6) International Union of Operating Engineers (IUOE) - Local 501
7) Engineers Joint Contract Documents Committee (EJCDC) – 1st Submittal
8) State of Nevada, Department of Administration – Public Works Division
9) White Pine County School District
10) Washoe County School District
11) AIA Nevada – 1st Submittal
12) The Associated General Contractors of America (AGC)
13) Southern Nevada Water Authority
14) Engineers Joint Contract Documents Committee (EJCDC) – 2nd Submittal
15) Clark County Water Reclamation District
16) AIA Nevada – 2nd Submittal
The Associated General Contractors of America (AGC) – Nevada Chapter
December 9, 2011

Dan Marran Co-Chair
Nevada Public Purchasing Study Commission

Dear Dan:

Re: AB 228

We would like to thank your group for addressing the issue of AB 228 and expressing a willingness to begin to address the issue of public works contract documents.

We recognize that your resources are limited and that your group has to address other priorities over the next few months.

Would it be appropriate to have your group take a look at some of the core contract provisions that appear in every public works contract?

We currently have similar contract provisions that are written to achieve the same purpose, but written in slightly altered versions. These are frequently interpreted differently by contractors.

Could your group review these core contract provisions and offer suggested language? This would reduce contract disputes and result in cost savings to public agencies and taxpayers.

Thank you for your consideration.

Sincerely,

[Signature]

John Madole
Executive Director

JM:cc
IAM&AW Local Lodge 845
On behalf of IAM Local Lodge 845 we do not have any union members that do contracts for Public Work Projects. We are mostly with the Airline Transportation Division and some Government contracts at Nellis AFB and Creech AFB. I have read this and do not think it pertains to us at Local Lodge 845. But thank you for including us in the Nevada Purchasing Study. If you have any other questions feel free to contacts us again.

Thank You
Alan J Rennie  President
RTC of Southern Nevada
February 13, 2012
Email to: krainey@lasvegasnevada.gov (no original will be sent)

Dear Ms. Rainey:

It is the opinion of the Regional Transportation Commission of Southern Nevada’s (RTC) Purchasing & Contracts department that the use of a standard form construction contract (SFCC) for each contract for a state or local public work would not be in the RTC’s best interest.

The RTC has unique requirements because of the use of federal funding on most of its capital projects. The Federal Transit Administration (FTA) requires us to include specific additional clauses in our federally funded contracts that are not required (or needed) on other state and locally funded contracts. Also, some language is simply not allowed by the FTA to be in our contracts, such as geographic preferences. Other language required by the FTA is different than what is required by state law, such as bonding requirements.

Additionally, while most of the state and local purchasing departments have similar contract language and collaborate on many procedures, terms and conditions, and forms, all organizations have legal departments who have slightly different interpretations of the law, for example, based on Home Rule or Dillon’s Rule. Some language is especially sensitive, such as each agency’s indemnity clause. Differences in interpretation between agencies come up all the time and finding common language for a SFCC, which would pass the scrutiny of each agency’s purchasing department and its legal department would be difficult, if not impossible.

Another concern would be the central repository and the resources that would be required to maintain the SFCC. It would seem that one agency would need to be designated to maintain the SFCC, yet the resources required would be unfair to that agency. Required changes, updates, approvals of changes and updates, and distribution of revised SFCC to the NPPSC members could require an enormous amount of resources.

For these reasons, we are not in favor of a standard form construction contract for each contract used for our public works projects.

Sincerely,

Sharon Hauht, CPSM, C.P.M.
Manager of Purchasing & Contracts
February 14, 2012

Kathy Rainey  
NPPSC Co-Chair 
400 Stewart Ave.  
Las Vegas, Nevada 89101

SUBJECT: AB 228 Nevada Public Agencies use of Standard Form Contracts for Public Works Projects

Dear Mrs. Rainey:

Thank you for soliciting our opinion on the feasibility of using a standardized contract for state and local public works projects. As you are aware, the City of Las Vegas has a high volume of public works projects and we work in a very competitive contractor environment. The contract that we currently use to delineate the contractor's and city's responsibilities has evolved over a period of several years to a document that is easily interpreted and defendable in court. Our concern with a new law that would require public entities to utilize the same contract for all public works projects is that we would lose the specific language that we have incorporated into our contracts that protects our City. There may be some sections of the contract that are general in nature and could be standardized across the state, but just as we would not be content with the language that other entities use in their contracts, there is language in ours that may not work for those entities.

In addition, modifying our contract at this time would be very time consuming for Public Works, the Purchasing Office and our City Attorney's Office. Our current workforce has been reduced to a minimum size due to the current economy and taking on a task of this nature is not feasible at this time. We work very closely with the contracting community to insure that our contract is fair and easily understood. We do not receive complaints about our contract so the issue with contracts may lie in a different region of the state or with specific entities.

Please let me know if I can be of further assistance.

Sincerely,

David N. Bowers, PE, PTOE  
City Engineer  
City of Las Vegas, NV

DB:rc 

cc: Jorge Cervantes, PE, PTOE, Public Works Director
Las Vegas Convention and Visitors Authority
In response to your letter dated January 31, 2012 the Las Vegas Convention & Visitors Authority’s input on a standard form contract for public works is as follows:

The LVCVA opposes the standardization of public works contracts. However, if enforced, the following would need to be overcome:

? Agencies and their attorneys to agree on language
? A minimum threshold should be set for use of the standard contract forms (possibly $1,000,000), but the forms could be used at the discretion of the agency under that threshold
? Smaller agencies may not be able to financially afford the estimated amount per year to “buy” the forms; Forms should be available from more than one source, if possible, creating competition
? The sample contract forms that have been provided would need to be more equally beneficial to both the contractor and the owner

Please direct any other questions to me. Thank you.

Penny
International Union of Operating Engineers (IUOE) - Local 501
Good Afternoon,

We received your request for input and comments on the *use of standardized form contracts* by Nevada agencies that construct public works projects.

At International Union of Operating Engineers Local 501 (Southern) we do not use contracts by Nevada agencies nor do we perform public works construction projects.

If we can be of any other assistance to your organization, please let us know.

Thank you,

Adelaide C. Barler
Comptroller
IUOE 501 (Southern)
2405 W 3rd Street
Los Angeles, CA 90057
(213) 385-1561 ext 126

FOR: LAS VEGAS, NEVADA OFFICE
Nevada Public Purchasing Study Commission
Co-Chair Andrea J. Sullivan, CPSM, C.P.M.
Co-Chair Kathy Rainey

Subject: AB 228

Dear Co-Chairs Sullivan and Rainey:

In recent days the Engineers Joint Contract Documents Committee (EJCDC) has become aware of pending legislation AB 228, which has been referred to the Nevada Public Purchasing Study Commission (Study Commission) for further study of the feasibility of using standard form construction contracts for public works projects. This letter is an offer of assistance in identifying key clauses in public works construction contracts and to provide recommendations and testimony to the Study Commission. We are aware of your meeting on March 12, 2012, however due to only becoming aware of it on March 7, we are unable to arrange for someone to attend on that date.

EJCDC has been drafting and publishing standard form construction and engineering contracts since 1975. These documents are widely used on public works and infrastructure projects throughout the United States. EJCDC is comprised of delegates from four major organizations of professional engineers and contractors, together with liaison members representing public owners, sureties, insurers, construction contract lawyers, subcontractors, and equipment suppliers. It is EJCDC’s intent to develop fair and objective standard documents that reflect the best contracting practices, including a reasonable allocation of responsibilities and risks to the parties of the construction contract. EJCDC’s four sponsoring organizations are:

- the American Society of Civil Engineers (ASCE),
- the Associated General Contractors of America (AGC),
- the National Society of Professional Engineers (NSPE), and
- the American Council of Engineering Companies (ACEC).

In addition to the Sponsoring Organizations, Liaison Organizations provide input to the drafting of documents. Included among those organizations are:

- American Public Works Association (APWA)
- United States Department of Agriculture – Rural Utility Service (USDA-RUS)
- International Municipal Lawyers Association (IMLA)

EJCDC looks forward to your acceptance of our offer to make recommendations and provide testimony to the Study Commission.

Respectfully,

Robert M. Seipold, EJCDC Chair
State of Nevada, Department of Administration – Public Works Division
April 18, 2012

Andrea Sullivan, NPPSC Co-Chair  
Kathy Rainey, NPPSC Co-Chair  
Nevada Public Purchasing Study Commission  
P.O. Box 11130  
Reno, NV 89520-0027

RE:  AB 228 – Nevada public agencies’ use of Standard Form Contracts for Public Works Projects

Ms. Sullivan and Ms. Rainey,

Thank you for your request for input from the State Public Works Division on the use of standardized contracts for public works projects. A memo summarizing my thoughts on the question of using standard form contracts for public works projects is attached.

At this point the Division’s position is consistent with my testimony during the Assembly Government Affairs Subcommittee March 25, 2010 hearing. An excerpt of my testimony is also attached. Although my position has not changed, I certainly welcome the opportunity to participate in ongoing discussions with the Nevada Public Purchasing Study Commission and other key players. If you have any questions or require any further information please do not hesitate to call. Thank you.

Sincerely,

[Signature]

Gustavo Nunez, P.E.
Administrator

GN/hf

Enclosure
MEMORANDUM

Date: April 18, 2012

To: Nevada Public Purchasing Study Commission

From: Gustavo Nuñez, Administrator, State Public Works Division

Subject: AB 228 – Nevada public agencies’ use of Standard Form Contracts for Public Works Projects/Summary of Prior Testimony

Initial Response to AB 228

In response to AB 228 as initially drafted, SPWD submitted a fiscal note in the amount of $900,000. This figure is a conservative figure estimating the staff and attorney time it would take to first revise our contract documents and then train on those documents as well. As you may recall the original bill contemplated the use of Consensus Docs; therefore much of the associated costs would be related to bringing the Consensus Docs into conformity with Nevada law.

However, the costs to ‘simply’ create standard form contracts for all Nevada public agencies for public works projects would involve similar if not greater costs. As a preliminary matter it is still my opinion that there is no problem. Contractors are not complaining about SPWD’s contracts; therefore it is my opinion that AB 228 is exploring a expensive solution for a non-existent problem.

SPWD’s Development of their Current Documents

SPWD’s current documents were painstakingly developed over an approximately 2 year period. SPWB retained the services of a noted expert in the field of construction contracting and risk management, Gerald Katz, Esq. to assist with drafting the new documents. SPWB coordinated with State Risk Management so that insurance requirements set forth in our contracts are adequate to protect the State from the risk that is inherent to any owner in construction. Many of the provisions in our current documents are the result of tough lessons learned from prior litigation over contract disputes with the contractor. Those lawsuits resulted in multi-million dollar judgments against the State of Nevada. Finally, the development of these documents was the subject of several public meetings where industry representatives were present and provided input.

1 An excerpt of my testimony from Assembly Committee March 25, 2011 Minutes is attached.
Impact on SPWD if Contracts must be standardized

The existing contract documents are literally at the heart of every function SPWD performs. Attached is a list of documents and worksheets that are utilized. Every document listed is in some way coordinated or connected to our Owner/Contractor Agreement and/or General Conditions. All of these documents would require modification in some way if SPWD construction contract documents were revised. For example, project manager task lists, and accounting and contract administration are linked to these documents. Thus, a change in the documents would result in changes to ‘contracts’ administration and require training on the new documents for both administrative services staff and project managers as well.

Form contracts developed over the last several years are untested in the Courts. New untested contract language exposes the State of Nevada to significant risk. Our current contract language was developed by Mr. Katz, based upon his analysis of existing case law, carefully balancing the rights of the contractors and the State’s legitimate goal of minimizing its exposure to risk.

Differences between the public bodies

In connection with the development of the CMAR legislation last year it was very apparent that ‘one size does not fit all.’ State Public Works Division wears one hat all related to planning, construction and maintenance of State buildings. The Division is uniquely governed by NRS 341 and specific provisions in NRS 338 that only apply to SPWD. NRS 341 sets forth the Nevada Legislature’s role in the Division and governs how the Division must conduct its business. NRS 341 states in part that as Administrator I oversee the day-to-day affairs of the Division. The Division is also comprised of a Board made up of experts in the construction field including contractors, engineers and attorneys. The Board is responsible for development of the CIP, regulations and appeals both qualification and contractor disputes. SPWD staff is comprised of mechanical engineers, civil engineers, electrical engineers, structural engineers and architects. All with extensive construction experience. SPWD also has a dedicated DAG whose sole function is to ensure that the planning, maintenance and construction performed by SPWD is done in compliance with the law with minimal risk to the State. To perform this role, SPWD has developed literally 100’s of documents devoted to this task. Many of these documents would not have any application for local government.

By contrasts local government and other public bodies perform numerous functions including construction of public works. Often the local governments must bring in a consultant to draft their plans and specification and other bid documents. The consultant acts as the governments’ representative throughout the design, bidding and construction phase of a public works project. City councils and county boards made up of individuals that may or may not have any construction experience vote on bid disputes, change orders evaluation and negotiation, and any other significant matters that may come up during the course of construction. Given these differences, one size does not fit all.

Conclusion

SPWD has always worked with industry representatives in the development of the Divisions policies and practices. This includes the development of our current contract documents, the development of new laws and regulations and forms that are used in the management of our construction projects. I have not received any complaints about our current documents. It is my opinion that spending literally hundreds of thousands of dollars to address a process that is not broken is an unwise use of taxpayer dollars.
Project Manager 2011 Documents and Worksheets

Master Documents
1. Adopted Standards
2. Scope of Professional Services
3. General Conditions of the Contract

A Project Manager Documents and Worksheets
A01 Project Managers General Tasks List
A02a Project Budget and Schedule Sheet
A02b Project Budget and Schedule Sheet (Statewide)
A03 Professional Services Agreement Worksheet
A03a Project Schedule (Standard Format)
A03b Project Schedule (Abbreviated)
A04 Miscellaneous Services Agreement Worksheet
A05 Endorsement Worksheet
A06 Boilerplate Worksheets
A06a Boilerplate Worksheets (ARRA Projects)
A07a Recommendation to Award Letter
A07b Intent to Award Letter
A08a Owner-Contractor Agreement Worksheet
A08b Owner-Contractor Agreement Worksheet (Small Contracts)
A09a Change Order (3 Items)
A09b Change Order (10 Items)
A09c Change Order (17 Items)
A09d Change Order (24 Items)
A10 Change Order Summary Sheet
A11 Construction Change Directive
A12 Retention Reduction Worksheet
A13 Certificate of Substantial Completion Worksheet
A14 Certificate of Occupancy Request Form
A15 Schematic Design Phase Approval Form
A16 Design Development Phase Approval Form
A17 50% Construction Documents Approval Form
A18 100% Construction Documents Approval Form
A19 Green Building Design Template
A20a B&G Owner-Contractor Agreement Worksheet (Managed by SPWD)
A20b B&G Owner-Contractor Agreement Worksheet (Small Contracts - Managed by SPWD)
A20c B&G Owner-Contractor Agreement Worksheet (Small Contracts - Managed by B&G)

B Miscellaneous Documents
B01a Travel Request (In-State)
B01b Travel Request (Out-of-State)
B02 Travel Expense Claim Form
B03a Purchase Order Requisition
B03b Purchase Order Requisition (Blank)
B03c Purchase Order
B03d Purchase Order Requirements
B04a Supplemental General Conditions (Small Projects)
B04b Supplemental General Conditions (Mental Health Facilities)
B04c Supplemental General Conditions (Correctional Facilities)
B04d Supplemental General Conditions (Projects with EPM)
B04e Supplemental General Conditions (Reduced Bonding)
B04f Supplemental General Conditions (ARRA Projects)
B05 Supplemental Instructions to Bidders (Example Format)
B05a Supplemental Instructions to Bidders (ARRA Projects)
B06 Plan Check Request Form
B07a Pre-Bid Meeting Sign-In Sheet
B07b Pre-Bid Meeting Sign-In Sheet (Blank)
B07c Pre-Construction Meeting Agenda
B07d Pre-Construction Meeting Agenda (Blank)
B07e Pre-Construction Meeting Sign-in Sheet
B07f Pre-Construction Sign-in Sheet (Blank)
B08a Notice of Non-Compliance (NC)
B08b Notice of Non-Compliance (Blank)
B09a Alternate Materials and Methods Request Form
B09b Alternate Materials and Methods Request Form (Blank)
B09c Alternate Materials and Methods Firestopping Supplement
B10 Addendum (Example)
B11 Fax Cover Sheet
B12a Transmittal Cover Sheet
C CMAR Documents and Worksheets

C01 CMAR General Conditions of the Contract
C02 CMAR Request for Qualifications
C03a CMAR Request for Proposals
C03b CMAR Fee Proposal
C04 Owner-CMAR Pre-Construction Agreement
C05 CMAR GMP Proposal
C06 CMAR GMP Proposal Instructions
C07 Owner-CMAR Construction Agreement
C08 CMAR Endorsement to Agreement
C09 CMAR Intent to Award Letter
C10 Change Order (Boilerplate Version)
C10a Change Order Summary Sheet (CMAR Project Format)
C11a CMAR Progress Payment Application
C11b CMAR Progress Payment Application (Blank)
C12 CMAR GMP Contingency Summary
C13 CMAR Request for Qualifications (Worksheet)
C14 CMAR Request for Proposals (Worksheet)
C15 Owner-CMAR Pre-Construction Agreement (Worksheet)
C16 Owner-CMAR Construction Agreement (Worksheet)
C17 CMAR Endorsement to Agreement (Worksheet)
C18 CMAR Boilerplate (Worksheet)
C19 CMAR Project Schedule (CMAR Project Format)
C20a CMAR Change Order (3 Items)
C20b CMAR Change Order (10 Items)
C20c CMAR Change Order (17 Items)
C20d CMAR Change Order (24 Items)

D Contract Documents (Professional Services)
D01 Professional Services Agreement
D01a Green Building Design Template
D02 Endorsement to Agreement
D03 Miscellaneous Services Agreement
D04 Geotechnical Investigation Services Agreement
D05 Materials Testing & Inspection Services Agreement
D06 Plan Checking Services Agreement
D07 Professional Services Invoice
D08 Miscellaneous Services Invoice
D09 Open End Agreement Signature Page

E Contract Documents (Boilerplate Documents)
E01 Invitation to Bid
E01a Invitation to Bid (ARRA Projects)
E02 Instructions to Bidders
E03 Bid Proposal
E03a Affidavit of Compliance Form
E04 1% Subcontractor List
E05 48 Hour Subcontractor List
E06 Bid Bond
E07 Performance Bond
E08 Payment Bond
E09 Consent of Surety Company for Final Payment
E10a Owner-Contractor Agreement
E10b Owner-Contractor Agreement (Small Contracts)
E11 Change Order (Blank)
E12 Construction Change Directive
E13a Progress Payment Application
E13b Progress Payment Application (Blank)
E14a Inspection Request Form
E14b Overtime Inspection Request Form
E15 Certificate of Substantial Completion
E16 Notice of Completion
E17a Roofing Preventative Maintenance Agreement
E17b Roofing Warranty

F Agency Project Documents
F01 Agency Project Application Worksheet
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<td>F04</td>
<td>Owner-Contractor Agreement (Agency Project)</td>
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MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-Sixth Session
March 25, 2011

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 8:03 a.m. on Friday, March 25, 2011, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature’s website at www.leg.state.nv.us/76th2011committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau’s Publications Office (email: publications@lcbofficial.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Marilyn K. Kirkpatrick, Chair
Assemblywoman Irene Bustamante Adams, Vice Chair
Assemblyman Elliot T. Anderson
Assemblywoman Teresa Benitez-Thompson
Assemblyman John Ellison
Assemblywoman Lucy Flores
Assemblyman Ed A. Goedhart
Assemblyman Pete Livermore
Assemblywoman Dina Neal
Assemblyman Lynn D. Stewart
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

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

GUEST LEGISLATORS PRESENT:

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

Minutes ID: 638

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Assembly Committee on Government Affairs  
March 25, 2011  
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**STAFF MEMBERS PRESENT:**

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

**OTHERS PRESENT:**

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

**Chair Kirkpatrick:**

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

Assembly Bill 312: Revises provisions governing public works. (BDR 28-692)  
[The bill was not heard.] Our schedule is very full. We will now start at 8 a.m. on Mondays and 7:30 a.m. on days after that. We will be hearing anywhere
Assembly Committee on Government Affairs  
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Probably 95 percent of the terms and conditions are boilerplate concepts such as termination and contract information. We have worked closely with the construction industry in southern Nevada. We have worked with AGC and Associated Builders and Contractors (ABC). We meet to discuss and identify if there are issues with our contracts and how we can make changes to them. I would assume that if there was a problem in this regard that we would be hearing from them. They would be telling us. Our job is to seek that input. If the process is not broken, then we do not need to fix it. There were some comments that were submitted by the Nevada Public Purchasing Study Commission (Exhibit E). It does not have a representative here today. I am submitting it on the Commission’s behalf. In the document, the Commission says that it welcomes dialogue with any state or local industry or organization to improve the procurement process. The members of the Commission have worked closely with southern Nevada AGC and ABC for many years to improve the public works bidding process. They are committed to working with a northern Nevada AGC representative or anyone else in the months and years to come to fix this problem. I do not know that we need legislation to fix it.

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

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

Gustavo Nunez, Manager, State of Nevada Public Works Board:  
We recently completed an update of our contract documents including the general conditions used in conjunction with our owner-contractor agreement. This work was done at the request of our Board over a period of two years. The development of these revisions included the services of a noted expert in
the field of construction contracting and risk management. We also coordinated with state risk management so that insurance requirements set forth in our contracts are adequate to protect the state from the risk that is inherent to any owner in construction. Finally, development of this document was subject to several public hearings held by our Board where industry representatives were present and provided input.

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

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

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

Gustavo Nunez:
It is not just our construction documents that may need revisions.
White Pine County School District
Our office received a fax with respect to the Nevada Public Purchasing Study Commission soliciting input with respect to the use of a standard form construction contract for state or local government public works.

It would be beneficial to have a uniform, standard contract for public works if possible. A standard form would save time and expense with respect to legal counsel, would reduce the risk of contract errors and omissions and provide contractors with a uniform set of rules and expectations.

If you need additional information, please contact me at your convenience.

Paul Johnson, CFO
White Pine County School District
1135 Avenue C
Ely, Nevada 89301
(775) 289-4851 x125
(775) 289-3999 (fax)
(775) 293-0569 (cell)
Washoe County School District
April 11, 2012

Re: A.B. 228-Nevada public agencies’ use of Standard Form Contracts for Public Works Projects.

Dear Ms. Sullivan and Ms. Rainey,

In response to your letter regarding input on the use of standardized form contracts by Nevada agencies that construct public works projects, we offer the following.

We do not believe it would be in the best interest of Washoe County School District nor other agencies, for that matter, to use standardized contracts. First, since all agencies are represented by different legal counsel, we think it would difficult, if possible at all, to get all of the attorneys to agree on common language. Our suspicion is that the individual attorneys would require “supplemental” conditions modifying the standard contract language such that the contracts would no longer, in fact, be standard. The contract we use has been developed over decades of time and has had any number of additions and or modifications over the years due to particular situations that has affected the district either legally or financially or both. We suspect our counsel would be reluctant to eliminate language that has been added or modified to address specific issues to go to a standard form.

We within our agency, have had difficulty with an established single contract just for our projects alone. For example funding dependent (grants, ARRA funding, etc.), we have had contracts that required Federal language (such as Davis-Bacon wage rates as well as the State of Nevada Prevailing wage rates) that, in turn, required we change our standard “boiler-plate” language. So, even within our own single agency, it is difficult to have a standard set of contract conditions.

Being a School District, there are particular laws such as the Asbestos Emergency Response Act for Schools (AHERA) signed into law in 1986 that affects schools but not other agencies. We suspect that Transportation agencies, Airports, Water Authorities and others may also have particular laws that affect them but not us. Our contracts have language and entire sections that deal with AHERA and the requirements of the contractors to comply with that federal law. Dealing with these individualized requirements within a single standard contract again adds supplemental conditions that, again, modify the requirements such that the language is no longer standard. We also have other requirements regarding safety, work hours and schedules, and particular insurance requirements other agencies would not have.

We suspect that there may be certain, more general contract conditions that could be standardized and worthy of discussion and, perhaps could work (again with the approval of quite a number of attorneys). The concern with that may simply be the amount of time necessary of the individual attorneys to come to consensus when all public agencies, especially school districts, are facing some of the worst budget condition in two decades, and lack resources for such a project.

While, on the surface, the idea of all public agencies using standardized contracts seems to make sense, due to the unique requirements of each individual agency, and as pointed out above, on some occasions due to the unique requirements of differing projects within the same agency, we are unsure of the feasibility and practicality of it happening.

Sincerely,

Joe R. Gabica, A.I.A., LEEDap
Director of Planning & Design
AIA Nevada – 1st Submittal
June 6, 2012

Ms. Andrea Sullivan, NPPSC Co-Chair, and
Ms. Kathy Rainey, NPPS Co-Chair
Nevada Public Purchasing Study Commission
Carson City Legislative Building
Room 2135
401 South Carson Street
Carson City, NV 89701

RE: A.B. 228 Nevada public agencies’ use of Standard Form Contracts for Public Works Projects

Dear Ms. Sullivan and Ms. Rainey,

The American Institute of Architects Nevada Component (AIA Nevada) respectfully submits this Preliminary Position Statement in support of its testimony with respect to Assembly Bill 228, which directs the NPPSC to conduct a study of the feasibility of the use of standard form construction contracts for state or local public works projects. AIA Nevada submits the following:

**Issue:** Is it feasible for Nevada state and local government agencies to use standard form construction contracts for public works projects?

**AIA Position:** Yes, it is feasible and beneficial for state and local governments to use standard form construction contracts. Of the available standard form contracts, we recommend using AIA Contract Documents®.

**Why use AIA Contract Documents:**

*AIA Contract Documents are the Industry Standard*

- Ninety percent of contractors, architects, lawyers, and building owners surveyed agreed that AIA Contract Documents are the industry’s most widely-accepted standard form documents.¹
- Ninety percent also said that broad acceptance is a key component in selecting contract documents.
- AIA Contract Documents provide a solid base of contract provisions. A significant body of case law concerning contracts for design and construction is based largely on interpretation of the language in AIA standard forms.²
- AIA Contract Documents are time-tested, with more than 120 years of history and precedent behind them, but they are, by no means, static. The AIA is continuously monitoring new developments in the

¹ The AIA 2008 Market Survey had approximately 1,400 respondents – roughly 390 of whom were contractors, 380 architects, 300 building owners, and 300 lawyers.

² Those court decisions are discussed in The AIA Citator, published by Matthew Bender & Company, Inc., a member of LexisNexis Group. Recent cases are summarized and all cases are keyed to the specific provisions in the AIA documents to which they relate.
construction industry, and using that information to enhance the documents library with new
documents that reflect current industry trends and practices.

- Following on the release of its Guide for Sustainable Projects in May 2011, the AIA has just released
  five new documents for use on sustainable projects utilizing the design-bid-build delivery method. It
  is anticipated that additional documents will be developed for sustainable projects utilizing other
  delivery methods such as CM at Risk or CM as Adviser.

- The AIA, in conjunction with the AIA California Council, was the first to introduce an Integrated
  Project Delivery (IPD) Guide and continues to innovate by offering several different types of IPD
  agreements.

- Market research, and suggestions from current document users as well as other industry
  stakeholders, is regularly reviewed to determine whether new documents should be developed to
  address unmet needs and to inform the regular periodic review and revision of existing documents
  (generally on an 10-year cycle for key agreements and related documents).

AIA Contract Documents are fair and balanced

- The documents drafting process is based on the cooperative input and experience of the AIA Documents
  Committee, which is made up of practicing architects – including some who work for owners and
  contractors, and some who are also attorneys – who have been appointed based on their experience,
  regional diversity, and variety of practices.

- In developing documents, the AIA also seeks input from industry stakeholders and experts, including a
  variety of associations and attorneys groups representing the interests of each of the key project
  participants, to ensure that, as much as feasible, the documents are fair and balanced and that risk is
  apportioned to the party best able to handle any given risk.3

AIA Contract Documents are easy to use and backed with customer support resources

- The AIA offers the most extensive library of agreements and forms in the industry, currently more than
  120.

- AIA Contract Documents updates are well-publicized, so there are no hidden changes and users are well
  informed as documents evolve to reflect the latest industry trends and practices.

- AIA Contract Documents are grouped by family (documents coordinated to tie together various
  relationships on the same project types and delivery methods) and by series (documents reflecting their
  purpose [e.g., owner/contractor agreements found in the A series]), which makes it quicker and easier
  for users to select the documents appropriate for their projects.

3 For example, during the 2007 revisions to the flagship A201 Conventional (design-bid-build) family of
documents, the Documents Committee worked with representatives from the ABA Forum on the Construction
Industry, AIA Knowledge Communities, American College of Construction Lawyers, Associated Specialty
Contractors, American Subcontractors Association, Associated Builders and Contractors, Associated General
Contractors, Commercial Owners Association of America, Council of American Structural Engineers, and the
National Association of State Facilities Administrators.
Current AIA Contract Documents Families:

- Conventional (A201 design-bid-build)
- Construction Manager as Adviser (CMa)
- Construction Manager as Constructor (CMc) (CM at Risk)
- Design-Build
- Integrated Project Delivery (IPD)
- Interiors
- International
- Small Projects
- Digital Practice
- Construction Administration and Project Management Forms

AIA Contract Documents software is Microsoft and Excel-driven, so documents are easy to:

- edit
- share
- send via e-mail
- track changes
- auto-populate
- customize
- perform calculations

AIA Contract Documents are also available on Documents on Demand, a format for online single-use purchases of documents with locked text and open fill points. This format, or a variation of this format, may be of particular interest to governmental entities who want the standard text of the agreements locked and not editable, and who only wish to allow for the insertion of project-specific data (parties, price, time, etc.).

Support for AIA Contract Documents comes from:

- regularly-updated online resources (e.g., webinars, podcasts, video tutorials)
- help tools built into AIA Contract Documents software
- dedicated content and technical support staff

**AIA Contract Documents are Cost-Effective**

- The AIA Contract Documents library of over 120 documents is competitively priced against the products of other providers of standard form documents.
- AIA Contract Documents are available in several formats for purchasing, including single documents on Documents on Demand and unlimited annual licenses at single seat or multi-seat levels.
- The AIA will work with AIA Contract Documents users or licensees with specific needs to accommodate customized usage, licensing or pricing requirements.
AIA Contract Documents are currently used by numerous governmental entities

- AIA Contract Documents are used in some form by state agencies and/or local government entities in over twenty states, including Arizona, Connecticut, Delaware, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia and West Virginia.4
- AIA Contract Documents are recommended or required for use by several federal government agencies.5
- The AIA Contract Documents staff can work with state agencies to develop customized templates that incorporate state supplementary conditions.
- The AIA has worked with several state agencies to develop licenses for specialized uses, such as posting copyrighted documents on a public access internet site for bidding purposes.

How would using AIA Contract Documents specifically benefit State of Nevada agencies or local governments?

- Document Management
  - There are many tools available for easy management of revisions to document templates to incorporate supplemental provisions and make other revisions to standard text
    - Revisions to standard text are easily seen in tracked changes versions provided by a variance check feature in AIA Contract Documents software
    - Custom templates can be created and saved for re-use, saving the effort of recreating standard revisions for every new document
  - The AIA can also work with state or local agencies to provide customized templates that incorporate desired revisions for posting on state-specific web sites or Documents on Demand, as an alternative to use of the standard software.
- Design and Construction Administration
  - AIA Contract Documents incorporate widely accepted industry practices for design and construction, including the role of the architect in construction administration.

4 This is based on an informal survey of AIA components. It is possible that state agencies or local government entities in more than the states listed are using AIA Contract Documents.
5 Numerous AIA documents are used by federal agencies, often in conjunction with their own supplemental conditions developed for use with those documents. For example, the Department of Housing and Urban Development requires use of AIA documents for FHA-insured construction projects. The Department of Agriculture requires use of AIA documents for USDA-funded construction projects in multi-family and rural development programs.
• Legal Precedent
  o AIA Contract Documents provide a solid library of documents that have been reviewed and interpreted in the courts. The AIA Citator, as well as numerous construction law treatises and articles about the AIA Contract Documents, make it easy to research and understand specific provisions and issues addressed in the documents.

• Support and Training
  o AIA Contract Documents provides numerous resources to help document and software users
    ▪ The Doc Info service provides answers to questions about document content
    ▪ The Technical Support service assists with questions regarding use of software
    ▪ Many resources, including reference materials on content and training tutorials for software, are available on the AIA web site.
    ▪ Education programs in the form of webinars or in-person presentations are regularly available. The AIA Contract Documents staff can provide customized webinars or in-person educational programs to specific users upon request. For example, the Contract Documents Content team has provided a customized webinar for the USDA’s field personnel on document content.

• Current Usage in Nevada
  o At least one major state entity, the University of Nevada at Las Vegas, currently uses AIA Contract Documents.

For all of the reasons discussed above, AIA Nevada recommends adoption of the use of AIA Contract Documents by the State of Nevada. We are available to submit additional information that may be requested related to this legislative initiative.

Once again thank you for the opportunity to provide information on this important subject and to be a resource for the Commission.

Yours truly,

(Ms) Randy Lavigne, Hon. AIA
Executive Director
AIA Nevada
The Associated General Contractors of America (AGC)
June 11, 2012

VIA ELECTRONIC SUBMISSION

Kathy Rainey and Andrea Sullivan

Co-Chairs

Nevada Public Purchasing Study Commission (PPSC)

Re: Comments on Nevada Public Agencies Use of Standard Form Contracts for Public Works Projects.

Dear Ms. Rainey and Ms. Sullivan:

Thank you for your request for input in regard to the feasibility of using standard construction contracts for each contract for a state or local public work in Nevada. I am writing in regard on behalf of the Associated General Contractors of America ("AGC"). AGC is a founding drafting and endorsing organization of the ConsensusDocs coalition effort. ConsensusDocs is a coalition of 36 leading design and construction industry organizations that includes associations primarily representing state and local public works owners, including the National Association of State Facilities Administrators (NASFA). The mission of the coalition’s effort is to achieve better project results by identifying and utilizing best practices and allocate risk fairer in standard construction contracts.

I recommend that Nevada create a set of standard construction contract that utilizes the ConsensusDocs as a base for drafting standard construction contract in order to save time, money, and produce the best finished contract.

Attached is research from 2009 in which I concluded that 6 states mandate the state to use standard construction contracts, and some specify that national standard construction contracts be used. The State of South Dakota passed legislation in 2009 that preapproves the use of ConsensusDocs and other standard construction contracts. See SD Codified L § 5-18B-10). Many other jurisdictions do not need authorizing legislation and by practice or policy use standard design and construction documents, with some appropriate state and project specific modifications. Private design and construction companies routinely use standard construction contracts and train their personnel in contract administration based on the standard. This provides clarity and predictability both internally and externally.

Recently, the Iowa Department of Administrative Services (DAS) for the state of Iowa recently made efforts to comprehensively improve the way its design and construction program. The DAS is responsible for providing a wide variety of services to its State agency customers, including contracting for and administering construction projects. As part of DAS’ effort to improve results for the taxpayer, they now use modified ConsensusDocs contracts for its standard contracts. T. Ryan Lamb, Legal Counsel, DAS comments, “While there is no doubt that a successful project depends more upon on good people than a good contract, DAS has found that a straight forward
and risk-balanced contract (like the ConsensusDocs) gets the project off to a great start and puts project executives in a better position to make decisions.iii

**Benefits of Consensus**

The design and construction industry is notoriously fragmented, litigious, and slow to change. According to the U.S. Bureau of Labor Statistics, construction is the only industry that has not improved its efficiency since the 1960s. Construction contracts are part of the problem and need to be addressed. After all, the construction contract is one of the first things done in a project that sets the tone, and ultimately, each party’s performance is governed by the contract. Construction contracts often create contractual silos that prohibit rather than encourage cooperation and communication. Contracts often push risk down the contractual chain and leave the party in the least position to control and manage risk with the risk, which is converse to best practices. A recent study estimates up to 20 percent premium is added to cover the just five of the most common exculpatory/disclaimer clauses.iii This is an example of inefficiency and inflated costs that hurt taxpayers and the project. Moreover, such practices can potentially prevent the best contractors to compete for public projects or to give their best prices when they do. When an unreasonable risk “is priced into a bid,” the owner pays for the risk whether or not that risk actually occurs.

A better approach is to get all the major stakeholders at the national level to create a consensus standard contract. This provides predictability, allocates risk fairly and efficiently, and aligns project participants’ interest with the project’s success rather than project failure. Fair contracts attract the best companies to compete and provide their best prices (by eliminating unnecessary risk contingencies). Using consensus standard contract provisions also allows parties to avoid repetitively negotiating the same unfair terms. As part of my testimony, I am including a Michigan Law Review article by Kevin E. Davis that highlights some of the advantages of nationally produced standard construction contracts (note that this article was written in 2006 before the release of ConsensusDocs in September of 2007).

**ConsensusDocs Standard Design and Construction Contracts**

It is important that Nevada use not only a standard construction contract, but a fair and balanced standard. Often standard documents are so heavily modified, typically with risk-shifting killer clauses, that the “standard” documents hardly resemble the original text. Sometimes the “modifications” actually exceed the original “standard” text. This nullifies the predictability and balancing of risk that is provided in standard documents. “Pricing out” risks with unknowable ramifications causes unproductive behavior and negatively impacts owners through decreased competition and increases prices unnecessarily.

Historically, standard documents have been authored and published by a single association ultimately representing a particular segment or interest in the industry. Consequently, there is a perception (and often a reality) that such documents hold some bias towards the publishing and control association. In 2007, ConsensusDocs published the first consensus standard design and
construction contracts. These documents were updated in 2011 based upon industry feedback as well as incorporation of the latest industry developments in law and best practices.

Endorsements of the documents have grown from 20 original organizations to 36. Significantly, NASFA, Construction Owners Association of America (COAA) and Construction Users Roundtable (CURT), all major owners groups participate in drafting and endorse the ConsensusDocs contract documents.

There are currently more than 100 standard ConsensusDocs contract documents that address all project delivery methods. The documents are delivered in a MS Word compatible technology platform that easily allows project specific modifications.

I am very interested in working with the state to derive a construction contracting solution, and I would be happy to provide samples of documents for consideration. In addition, I would be interested in structuring a licensing agreement that would make it cost effective to use ConsensusDocs.

Respectfully,

Brian Perlberg, Esq.

Executive Director and Counsel of ConsensusDocs
Sr. Counsel, Construction Law and Contracts for Associated General Contractors of America

Enclosures

i https://www.consensusdocs.org/FooterSection_About/FooterSection_Testimonials
ii See M. Dennis Knight, Teams, Contracts & BIM, ASHRAE J. at 72, 75-76 (Sept. 2008).
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The board may adopt formally a contracting document, as developed by the appropriate chief procurement officer, for mandatory use by all governmental bodies.
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The Role of Nonprofits in the Production of Boilerplate

Kevin E. Davis

January 2006

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The Role of Nonprofits in the Production of Boilerplate

*Forthcoming in the Michigan Law Review*

Kevin E. Davis*

New York University School of Law

January 7, 2006

Abstract

In the United States at least, nonprofits, and in particular trade associations, seem to play a substantial role in producing ‘boilerplate’ contractual terms. There are at least four reasons to believe that it makes a difference whether boilerplate is produced by a nonprofit such as a trade association rather than a for-profit such as a law firm or a publisher of legal databases. First, because of their distinctive mandates, when making decisions some nonprofits take into account benefits and costs that for-profits treat as externalities. Second some nonprofits are relatively well placed to stimulate demand for contracts by credibly assuring prospective users of their value. Third, some nonprofits can produce contracts of a given quality at a relatively low cost because they have superior ability to attract volunteers. Fourth, nonprofits may be able to produce contracts at a relatively low cost because they enjoy preferential tax treatment. Understanding the distinctive features of production of boilerplate by nonprofits constitutes an important step towards understanding its implications for social welfare. This understanding can in turn inform analyses of the role the state ought to play in formulating contractual terms and shed light on the question of whether state intervention ought to involve encouraging or discouraging the production of boilerplate by nonprofits. This analysis also sheds light on broader questions surrounding the role of nonprofits such as trade associations in a market economy.

* I am grateful to Barry Adler, Robert Ahdieh, Clay Gillette, Marcel Kahan, Lewis Kornhauser and participants in the Michigan Law Review symposium on boilerplate as well as workshops at the University of Florida’s Levin College of Law and Yale Law School for helpful comments on earlier versions, to Ehud Kamar, Guido Ferrarini, Dan Hulsebosch and Bill Nelson for helpful conversations, and to Michael Kruse for excellent research assistance. All errors remain my own.
I. Introduction

Drafting contracts—by which I really mean the documents that embody contracts—requires investments of time, experience and ingenuity. Those investments may yield significant returns because the quality of contractual terms can be an important determinant of the gains that parties realize from trade.¹ This in turn suggests that, from an economic perspective, it is important to understand how contracts are produced. It seems particularly important to examine the production of contracts or individual contractual terms that are widely used—that is to say, “boilerplate.”² In a market-oriented society, boilerplate is the predominant feature of the network of legal obligations that provides the formal structure of economic activity. As a result, depending on the extent to which parties’ behavior tracks their formally defined obligations, the quality of boilerplate can be a crucial determinant of overall patterns of economic activity. Understanding the determinants of the quality of boilerplate is an important step towards understanding whether and how the state ought to intervene in its production.

Recent academic literature on this topic has focused on production of boilerplate by either for-profit actors—whether for their own use or for use by their clients—or the state.³ The dominant theme is that for-profit actors typically have sub-optimal incentives to invest in production of contractual terms because they often cannot capture all of the benefits that flow

¹ One way in which the quality of a contract determines the value that parties derive from a transaction is by affecting the amount of uncertainty that surrounds the meaning of the parties’ obligations. A good contract will also define the parties’ obligations in the event of various contingencies in ways that mitigate problems posed by asymmetric information. See generally Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 Yale L.J. 239 (1984) (demonstrating how the terms of a typical corporate acquisition agreement can increase the total value realized by the parties).


from those investments. As for the state, the main concern is that it lacks the competence to formulate contracts that are suited to the diverse needs of private commercial actors.

This Article takes a different tack and focuses on the role played by entities that are organized as nonprofits (“nonprofits”)—a broad category that includes charitable organizations as well as distinctly non-charitable organizations such as trade associations—in the production of boilerplate. The analysis here begins with and is motivated by the observation that, in the United States at least, nonprofits, and in particular trade associations, seem to play a substantial role in producing boilerplate. Specifically, many nonprofits produce contractual terms that seem likely to be used with little or no modification by a significant number of other parties.4

The core argument here is that, as a theoretical matter, there are at least four reasons to believe that it makes a difference whether boilerplate is produced by a nonprofit as opposed to a for-profit. The first reason is that, because of their distinctive mandates, when making decisions nonprofits sometimes take into account benefits and costs that are not recognized by for-profit organizations. Second some nonprofits are relatively well placed to stimulate demand for contracts by credibly assuring prospective users of their value. Third, some nonprofits can produce contracts of a given quality at a relatively low cost because they have superior ability to attract volunteer labor. Fourth, nonprofits can produce contracts at a relatively low cost because they enjoy preferential tax treatment.5 Understanding the reasons why nonprofits are so heavily

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5 The first of these arguments has been discussed in the literature on the production of contracts. See Goetz & Scott, supra note 3, at 293, 303; Kahan & Klausner, supra note 3, at 762; Lisa Bernstein, supra note 4 at 110-111 and Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, And Institutions, 99 Mich. L. Rev. 1724, 1742-43 (2001); and Robert B. Ahdieh, The Role of Groups in Norm Transformation: A Dramatic Sketch, in Three Parts, 6 Chi. J. Int’l L. 231, 249-252 (2005) (discussing role of groups in solving collective action and coordination problems). The second point is briefly discussed in Ahdieh, supra at 258. The third and fourth arguments do not appear to have received attention. Analogues to all of these arguments have been presented in the literature concerning the production of goods other than boilerplate. See generally Henry Hansmann, The Ownership of Enterprise 227–45 (1996); Josh Lerner & Jean Tirole, Some Simple Economics of Open Source, 50 J. Indus. Econ. 197 (2002).
involved in producing contracts constitutes an important step towards understanding whether this state of affairs is likely, from society’s perspective, to be optimal. This understanding can in turn inform analyses of whether and when the state ought to play a role in the formulation of contractual terms. It also sheds light on the question of whether state intervention in this area ought to involve encouraging or discouraging the production of boilerplate by nonprofits. Finally, this analysis provides a counterpoint to studies that focus on the socially harmful anti-competitive activities of nonprofit trade associations.⁶

Part II of this Article describes the significant roles that a range of nonprofits play in producing boilerplate in the United States. Part III discusses the reasons why production of boilerplate by nonprofits might be different from production of boilerplate by for-profits. Part IV discusses whether it is desirable from society’s perspective for nonprofits to play a substantial role in producing boilerplate. Part V discusses the legal implications of the preceding Parts. Part VI concludes.

II. Nonprofits that Produce Boilerplate

There are a number of different types of sources of boilerplate. Sometimes terms that eventually become boilerplate originate in contracts that are drafted by parties for their own use with little or no assistance from anyone else. On other occasions terms are drafted by for-profit actors—typically legal professionals—for use by other parties. These terms become boilerplate either because they are widely copied or because they are used repeatedly by the drafter or its client. Still other examples of boilerplate are drafted from the outset for widespread use and are marketed by for-profit firms as “forms” or “model contracts.” In the past these contracts were distributed in paper form. Now, however, many firms distribute their products in electronic form,

⁶ See, e.g., Alfred D. Chandler Jr., The Visible Hand: The Managerial Revolution in American Business 316-17(1977)(describing the emergence of trade associations ‘for the purpose of controlling price and production’ in the United States in the 1870s and 1880s).
and often over the Internet. Some of the more sophisticated suppliers allow parties to assemble their own contracts electronically either by picking from a range of standard terms or by responding to queries about their preferences.

Although a great deal remains to be written about the production of boilerplate under these circumstances, the focus of this Article is on another situation: the production of boilerplate by nonprofits for use by others. There is no obvious and readily available source of information on the number of occasions on which parties use contractual terms that have been drafted, in whole or in part, by nonprofits as opposed to other types of organizations. It is, however, possible to get a sense of the magnitude of nonprofits’ role in the production of boilerplate in the United States by examining the range of nonprofit organizations engaged in producing contractual terms intended for widespread use. Most of those nonprofits are trade associations. However, bar associations and a few other types of organizations are also active in this field.

A. Trade Associations

In the United States there are several industries in which trade associations are heavily involved in producing contracts. For instance, many trade associations representing various professions involved in the construction industry produce contracts. The best known of these may be the American Institute of Architects (“AIA”), which has been distributing contracts since 1888. The AIA now offers over 90 distinct contracts and documents. The AIA contracts were originally distributed in paper form. However, like many other organizations the AIA now also licenses its contracts in electronic form. In fact, the AIA contracts are embedded in a sophisticated customized software package that contains a number of potentially useful features.

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8 See, e.g., the products offered by Invisible Hand Software LLC d/b/a Quickform Contracts, http://www.quickforms.net (last visited Aug. 6, 2005).
For instance, the software allows information pertaining to a particular project to be inputted only once and then automatically entered where necessary on all of the contracts associated with a given project. The software also permits users to modify the standard terms but still view a record of the deleted material. Users can choose between licenses that allow them to print fixed or unlimited numbers of copies.9

An interesting feature of the construction industry in the United States is that there are a number of trade associations offering forms that can serve as substitutes for one another. For instance, in addition to the architects, the Associated General Contractors of America (“AGC”) offer a range of contracts that is almost as extensive as that of the AIA. Many of the AGC contracts are close substitutes for the AIA contracts and AGC’s customized software is similar in terms of the level of sophistication.10 In fact, AGC appears to have begun drafting contracts in response to perceived shortcomings in the AIA contracts. Interestingly, by way of comparison, the trade associations involved in the construction industries in England and Canada have chosen to collaborate to produce a single set of forms.11 This kind of collaboration has occurred to a more limited extent in the United States under the auspices of the Engineers Joint Contracts Documents Committee (“EJCDC”).12

10 The AGC has historically played an important role in the production of the AIA documents. The AIA has traditionally sought the endorsement of its A-Series (construction) documents from several other construction trade associations. Since 1966, however, the AIA has sought only the endorsement of the AGC. Justin Sweet, The Architectural Profession Responds to Construction Management and Design-Build: The Spotlight on AIA Documents, Law & Contemp. Probs., Winter 1983, at 69, 76.
11 In the UK, the Joint Contracts Tribunal (“JCT”) comprises the Association of Consulting Engineers, British Property Federation, Construction Confederation, Local Government Association, National Specialist Contractors Council, Royal Institute of British Architects, The Royal Institution of Chartered Surveyors, and the Scottish Building Contract Committee. This organization was established in 1931 and produces standard form contracts and other documents for the construction industry.

The Canadian Construction Documents Committee (“CCDC”) was formed in 1974 and comprises the Association of Consulting Engineers of Canada, Canadian Construction Association, Construction Specifications Canada, and the Royal Architectural Institute of Canada. The CCDC produces more than 20 standard contracts and other documents used in both the private and public sector; approximately 50,000 copies of these documents are sold annually.
12 EJCDC is a joint venture of the Associated General Contractors of America (“AGC”), the National Society of Professional Engineers/Professional Engineers in Private Practice (“NSPE/PEPP”), the American Council of
Besides the construction industry, another industry in which trade associations appear to play a significant role in drafting contracts is real estate brokerage. In the United States, state and local associations of realtors draft various contracts for use in connection with the sale of real estate. Access to the contracts is typically provided to the associations’ members as one of the benefits of membership. Many of the contracts are distributed electronically through a software package marketed by a for-profit entity that is a joint venture of the National Association of Realtors and the California Association of Realtors.13

There are other American industries in which trade associations play a prominent role in drafting contracts. For example, trade associations focusing on natural products such as cotton,14 grain and feed15, and natural gas and electricity16 draft either model contracts or terms designed to be incorporated by reference into other contracts. Another example is the entertainment industry, where associations such as the Director’s Guild of America (“DGA”), the American Federation of TV & Radio Artists (“AFTRA”), and the Writer’s Guild of America (“WGA”) are

active in drafting model contracts. Yet another example is the oil and gas industry, where the American Association of Petroleum Landmen and the American Petroleum Institute draft a number of model contracts. Most associations make their contracts available in electronic form, but the degree of sophistication with which they do so varies.

There are also a number of international trade associations involved in producing contracts. Perhaps the most prominent example is the International Chamber of Commerce (“ICC”). In this context the ICC is probably best known for two products: the Uniform Customs and Practice for Documentary Credits (“UCP”) and Incoterms (short for “International Commercial Terms”). These products are not free-standing contracts but qualify as boilerplate because they consist of terms designed to be incorporated into other contracts. The ICC has traditionally also offered a handful of model contracts for use in connection with international transactions. Recently, it began to offer a service that allows users to draft international sales contracts online. The system prompts the user to enter various categories of information—e.g., price, payment method, description of goods, governing law, etc.—and then produces a contract based on language drafted by the ICC. The contract can even be stored online and signed digitally by the counterparty.

Other international associations that draft contracts include: the Association of International Petroleum Negotiators (oil and gas); BIMCO (international shipping); the Federation of Oils, Seeds and Fats Associations (oilseeds, oils and fats, and groundnuts);

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19 An example of an organization that offers printed standard contracts rather than online documents is the Rocky Mountain Mineral Law Institute.
Grain and Feed Trade Association (grain and feed);\textsuperscript{23} the International Swaps and Derivatives Association (over-the-counter derivatives);\textsuperscript{24} and Lloyd’s of London (salvage).\textsuperscript{25}

Trade associations seem to rely heavily on volunteers in drafting contracts. Typically they enlist senior members of the industry to serve on drafting committees and then solicit comments on drafts from a broader spectrum of members.\textsuperscript{26} Volunteers are typically assisted by one or two paid staff members and, in some cases, outside counsel. It is also worth noting that, in a sense, many trade associations rely on other trade associations for assistance in drafting contracts—as evidenced by cases in which one association consults another association about, and eventually receives an endorsement of, a particular contract. For example, in the construction industry it is quite common for a number of specialized trade associations to endorse general purpose contracts prepared by organizations such as the Associated General Contractors of America or the American Institute of Architects.\textsuperscript{27}

\textbf{B. Bar Associations}

The American Bar Association produces a range of model contracts jointly with the American Law Institute. According to the joint venture’s website, the best-selling contracts include various types of real estate leases and an asset purchase agreement.\textsuperscript{28} Unlike many of the trade associations discussed above, the ABA does not seem to have any institutional structures in place to update its contracts. Rather, the contracts seem to be produced on an ad hoc basis on the initiative of specific committees within the organization.

\begin{itemize}
\item \textsuperscript{23} Grain & Feed Trade Ass’n, http://www.gaftra.com (last visited Aug. 2, 2005).
\item \textsuperscript{26} See Bernstein, \textit{supra} note 15, at 718 (“In most associations, trade rules are drafted and subsequently amended by committees of experienced industry members who serve without compensation . . . .”).
\item \textsuperscript{28} ALI-ABA Direct-to-Desktop CLE, Our Best-Selling Forms, https://d2d.ali-aba.org (follow “View All Forms” hyperlink) (last visited Aug. 2, 2005) (listing online courses, article, and forms).
\end{itemize}
C. Other Nonprofits

There are a few miscellaneous types of nonprofits besides trade associations and bar associations that produce contracts. The Rocky Mountain Mineral Law Foundation is an example of a quasi-academic nonprofit that sells a handful of model contracts for use in the mining and oil and gas industries. An intriguing recent development has been the emergence of nonprofits dedicated to drafting and disseminating contracts whose terms reflect commitments to values other than creating purely economic benefits for users. Prominent examples of these sorts of organizations are Creative Commons and the Free Software Foundation. These and other organizations freely distribute copyright licenses that are, in their view, consistent with the goal of providing greater access to copyrighted materials than default legal rules would otherwise allow. In addition to providing its own copyright licenses, the Free Software Foundation maintains a webpage analyzing the extent to which various other license agreements are consistent with its commitment to "free software." Similarly, the Open Source Initiative analyzes licenses for consistency with its definition of "open source." It is not always clear what procedures these nonprofits follow when drafting or reviewing contracts.

29 The American Law Institute and the National Conference of Commissioners on Uniform State Law have somewhat arbitrarily been excluded from the following discussion. These organizations draft the Uniform Commercial Code which, to the extent that it contains default rules that parties are free to exclude, is functionally equivalent to boilerplate drafted by trade associations. However, the fact that some of the rules drafted by these and similar organizations are mandatory rules (or at least 'sticky' defaults) that are ultimately enacted as statutes seems to make their activities qualitatively different from those of the other entities discussed in this paper (although the distinction becomes blurred in cases where boilerplate comes to be treated as binding custom). Moreover, the drafting activities of these entities have been analyzed in some depth by other commentators. See generally, George G. Triantis, Private Lawmaking and the Uniform Commercial Code in Peter Newman, ed., 3 New Palgrave Dictionary of Economics and the Law 117 (1998).


31 See, e.g., Creative Commons, About Us, http://creativecommons.org/about/history (last visited Aug. 2, 2005) ("Thus, a single goal unites Creative Commons' current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules."); Free Software Foundation, Software, Licenses, Introduction, http://www.gnu.org/licenses/licenses.html#Intro (last visited Aug. 2, 2005) ("Published software should be free software.").


34 One commentator has complained, “[W]hile open source developers pride themselves in the number of eyeballs devoted to fixing buggy software, buggy open source licenses suffer from inattention. To make matters worse, the
Finally, although they do not draft contracts themselves, it is also worth mentioning nonprofits that assist potential users by making contracts drafted by others readily accessible. At least one nonprofit research institution, Contracting and Organizations Research Institute (CORI), has begun to make contracts collected from sources such as filings with the U.S. Securities and Exchange Commission available online without charge.35

III. Differences Between Production of Boilerplate by Nonprofits and For-Profits

There are a number of reasons why it might make a difference whether boilerplate is produced by nonprofits such as trade associations as opposed to for-profits such as private law firms or established providers of legal information such as LexisNexis or Westlaw. In the first place, nonprofits and for-profits may have different objectives when drafting contracts and so may make different decisions on matters such as how much to invest in drafting or updating contracts, whether to adopt biased terms, and what price to charge for the contracts they draft. A second consideration is that the contracts drafted by nonprofits and for-profits may not be equally attractive to potential users. One reason for this is that nonprofits may generally be perceived to be more credible. Alternatively, nonprofits may be perceived to have a higher profile than other producers of boilerplate and so the contracts that they draft will be expected to attract larger numbers of other users, which may in turn make them relatively attractive to each individual user. A third factor is that nonprofits may have lower costs of production because they have superior access to volunteers. Fourth, nonprofits enjoy preferential tax treatment, which may also tend to lower their costs of producing boilerplate.

authors of the most important open source licenses do not regularly evaluate the licenses and fix them when they are broken.” Robert W. Gomulkiewicz, De-bugging Open Source Software Licensing, 64 U. Pitt. L. Rev. 75, 95 (2002). Gomulkiewicz recommends that open source software licenses be drafted by an entity that would periodically consult a wide range of interested parties. This entity would presumably be a nonprofit. See id. at 100.
It bears emphasizing that these four factors represent potential differences between nonprofits and for-profits; in practice the differences might not be significant. As a result it will not necessarily be the case that the potential differences between nonprofits and for-profits translate into significant differences between the contracts produced by nonprofits and for-profits. There are also many different types of nonprofits and so there may be significant differences between the contracts produced by different types of nonprofits. Finally, it is also worth keeping in mind the fact that there are differences among for-profits and some for-profits resemble nonprofits along the dimensions that are most relevant for present purposes. Most of the claims made below in relation to nonprofits should apply to any entity that is not absolutely committed to maximization of financial profits. Other entities that might fit this description include customer-owned cooperatives and for-profit corporations controlled by altruistic shareholders.

A. Objectives

Nonprofits and for-profits might perceive the benefits and costs of producing boilerplate for use by others differently. In particular, while for-profits might only take into account the net financial returns that they realize from producing contracts, nonprofits might take into account a broader range of factors when making decisions, factors that a for-profit would regard as ‘externalities.’ It is useful to begin by outlining those factors.

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30 The pecuniary benefits need not be limited to amounts received directly from users of contracts. The mere fact that it is difficult to charge users directly for the benefits associated with a good or service does not necessarily mean that a for-profit firm has no incentive to produce that good or service. Goods and services such as the news, television or radio programming, and Internet search engines are all produced by for-profit firms in the face of these constraints. This is typically possible because by distributing these goods from a particular location (virtual or physical) the firm creates a potential audience, access to which it then sells to advertisers. There is no reason why firms producing contracts cannot adopt a similar strategy. In fact, some relatively simple contracts are distributed by for-profit firms on this basis. See, e.g., Internet Legal Research Group, http://www.ilrg.com (last visited Aug. 4, 2005); LexisONE, http://www.lexisone.com (last visited Aug. 4, 2005). In other cases products are distributed below cost in order to demonstrate their quality and thereby promote the long-run business interests of their producer. Cf. Cheung, supra note 15, at 29–32 (providing account of how difficulties of contracting with potential beneficiaries of services were overcome by beekeepers).
1. Externalities Associated with Drafting Contracts

There are a number of factors that a third party drafting a contract for use by others could take into account besides its own (net) financial returns. For one, it might take into account the net benefits that accrue to the customers to whom it sells boilerplate terms. So, for instance, depending upon how much it cares about the welfare of its customers, a drafter with market power may or may not exploit that power by raising the price of contracts that it sells. Similarly, the drafter may or may not take into account the extent to which adopting standardized contractual terms will facilitate (or impede) anti-competitive pricing. 37 A drafter’s attitude towards its customers will also determine whether it chooses to make unobservable investments in drafting boilerplate or in updating it to reflect new developments. In many situations the profit-maximizing course of action will be to avoid truly unobservable investments in drafting and updating simply because customers will be unwilling to trust the drafter enough to pay for benefits that they cannot see. 38

Leaving aside customers, a drafter also could take into account the benefits or costs its decisions create for users who are not customers and so will not provide compensation to, or demand compensation from, the drafter. These costs and benefits can take several forms. To begin with, if, as is often the case, the drafter deals with only one of the parties to the contract in which the terms are ultimately embodied, the customer may pay the drafter to adopt terms that are biased against other parties in ways that are difficult to observe. One way or another, this approach to drafting will impose costs on the victims of the bias.


38 For a formal model that captures this idea see Edward L. Glaeser & Andrei Shleifer, Not-for-profit Entrepreneurs, 81 J. Pub. Econ. 99 (2001).
A drafter might also take into account the costs and benefits its actions generate for third parties who gain access to copies of the contract indirectly. This phenomenon — whose prevalence will depend in part upon technological factors — is potentially significant because the third parties might benefit considerably from obtaining access to the fruits of a drafter’s efforts. Referring to an existing contract can help actors identify contingencies that are likely to arise in the course of particular types of transactions and that ought to be taken into account when planning them. Starting with an existing contract at hand can also, naturally, simplify the task of finding words to express intentions about how various contingencies are to be addressed.

39 Kahan & Klausner’s empirical analysis of revisions to contracts used in the issuance of corporate bonds suggests that copying in this context is widespread. See Kahan & Klausner, supra note 3, at 745, 747. But those contracts are, as both a matter of law and of practical necessity, widely distributed and so obtaining access to them is particularly easy.

40 The state of technology can influence the ease of both copying and restricting access to contracts. On the one hand, the ability to digitize and then distribute perfect reproductions of contracts to large numbers of users at virtually no marginal cost (for example, by posting it on the Internet) has drastically increased the number of unauthorized copies that are likely to be made of a contract once any unauthorized copying occurs. On the other hand, digitization has also made it easier to limit initial access to contracts by distributing them individually rather than as parts of a package. In the past, the economies of scale associated with distributing contracts in printed form meant that it was cheaper to distribute several contracts as a package than to distribute them separately — hence, the formbook. Now, however, it is economically feasible to distribute contracts individually in electronic form.

41 Kahan & Klausner, supra note 3, at 720–21; see also Claire A. Hill, Why Contracts Are Written in “Legalese”, 77 Chi.-Kent L. Rev. 59, 67 (2001). Copyright law clearly influences the extent to which third parties can benefit from existing contracts in this way. Interestingly, in American cases involving contracts the courts have insisted upon more than a minimal amount of originality. See M. M. Bus. Forms Corp. v. Uarco, Inc., 472 F.2d 1137 (6th Cir. 1973); Donald v. Uarco Bus. Forms, 478 F.2d 764 (8th Cir. 1973); Donald v. Zack Meyer's T.V. Sales and Serv., 426 F.2d 1027 (5th Cir. 1970); Dorsey v. Old Sur. Life Ins. Co., 98 F.2d 872 (10th Cir. 1938). It has also been held that the specific language of a contract or a business form cannot be copyrighted where the use of that language is essential to expressing a particular underlying idea. Cont’l Cas. Co. v. Beardsley, 253 F.2d 702, 706 (2d Cir. 1958). Finally, even if specific language is copyrighted, that copyright is not infringed by using similar language embodying the same idea, much less by different language. Dorsey, 98 F.2d 872. See also Aldrich v. Remington Rand, Inc., 52 F. Supp. 732 (N.D. Tex. 1942) (tax bookkeeping system); Crume v. Pac. Mut. Life Ins. Co., 55 U.S.P.Q. (BNA) 267 (N.D. Ill. 1942) (reorganization of insurance company), aff’d, 140 F.2d 182 (7th Cir. 1944); Long v. Jordan, 29 F. Supp. 287 (N.D. Cal. 1939) (pension system). But see Baldwin Cooke Co. v. Keith Clark, Inc., 383 F. Supp. 650 (N.D. Ill. 1974) (distinguishing Dorsey on the basis of the sophistication and complexity of format and arrangement of the product involved); Smith v. Thompson, 43 F. Supp. 848, 850 (S.D. Cal. 1941) (distinguishing Dorsey because of evidence that the defendant was a former employee of plaintiff and upon leaving such employ immediately set himself up in business and copied in minute details the plaintiff’s method of doing business).
A drafter could also take into account the effects of its decisions on third parties who will not necessarily have access to copies of the terms that it drafts, but who either already use, or will use, terms that serve similar purposes. It is generally the case that each occasion on which a particular contractual term is used increases the likelihood of a dispute over its interpretation being litigated. This implies that each time a person uses a particular contractual term it benefits other users of the same term by increasing the rate at which judicial precedents interpreting and, hopefully, clarifying the meaning of that term can be expected to accumulate. In a similar vein, each time a person uses a particular contractual term it creates a benefit for other users of that term by increasing the incentive for actors such as potential counterparties, lawyers and financiers to invest in becoming familiar with the term. The more familiar a term is to these sorts of actors, the more valuable it is likely to be to a user. Both these points suggest that by producing terms that are or will become boilerplate a drafter can create benefits for other users of those terms.

The corollary though is that by selecting a particular term the drafter may impose costs on users of alternative terms. This is because the more widely used is a particular contractual term the less rapidly judicial precedents will accumulate around alternative terms. In addition, the more popular a given term becomes, the weaker the incentive for potential counterparties, etc. to familiarize themselves with alternative terms. Both these factors suggest that by producing boilerplate a drafter can reduce the value of alternative terms to third parties. If those third parties find it costly to switch to the new terms, for instance because it is costly to read them and

42 The “network externalities” discussed in this paragraph are discussed in more detail in Klausner, supra note 3.
43 See Kahan & Klausner, supra note 3, at 722–23; Klausner, supra note 3, at 775–79.
44 See Greely, supra note 3, at 136–37; Kahan & Klausner, supra note 3, at 723–24; Klausner, supra note 3, at 782–86.
analyze their import, then introducing the boilerplate may serve to make them worse off than before.\textsuperscript{45}

Of course, the magnitude of the externalities associated with drafting a contract will vary according to the circumstances. For instance, if an organization has a large share of the market for a given contract then the costs imposed on customers as a result of pricing above cost might be substantial. On the other hand, under these circumstances other externalities might be quite small. The larger is a drafter’s share of the market for a given contract, the fewer third parties there will be. This argument holds whether the drafter is one of the principal parties to the contract or an agent such as a law firm.\textsuperscript{46} This factor suggests that if we leave aside the externalities associated with pricing above cost, other externalities are likely to be least significant in industries characterized by high levels of industrial concentration among drafters.\textsuperscript{47} Correlatively, these externalities are likely to be most significant in industries characterized by “atomistic” contracting where no single drafter captures a large share of the social benefits of their efforts.

\textsuperscript{45} Empirical studies of corporate and sovereign bond contracts suggest that switching costs in these contexts are high, as evidenced by individual actors’ reluctance to adopt novel contracts. See Stephen J. Choi & G. Mitu Gulati, \textit{Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds}, 53 Emory L.J. 929, 982–89 (2004); Kahan & Klausner, \textit{supra} note 3, at 751–53. For a discussion of the magnitude and importance of switching costs with an emphasis on costs incurred by assignees of contracts, see Greely, \textit{supra} note 3, at 136–62. Choi and Gulati observe that the magnitude of switching costs will depend in part on the importance of speed in preparing the contract. See Choi & Gulati, \textit{supra}, at 988 (discussing concern for speed in production of documents used in connection with issuances of sovereign bonds). The introduction of technology that makes it possible to compare documents and highlight differences between them electronically at the touch of a button has almost certainly reduced the costs of switching between closely related contracts.

\textsuperscript{46} Choi & Gulati, \textit{supra} note 45, at 994; Goetz & Scott, \textit{supra} note 3, at 304; Kahan & Klausner, \textit{supra} note 3, at 737–39.

\textsuperscript{47} This is consistent with Greely’s analysis. See Greely, \textit{supra} note 3, at 158 (suggesting that in the industries he examined barriers to standardization of contracts were overcome by the efforts of participants with large market shares).
2. Nonprofits’ Responses to Externalities

Are nonprofits more sensitive than for-profits to the externalities associated with drafting contracts? The answer depends on what we are willing to assume about how nonprofits as opposed to for-profits make decisions. The most straightforward way of approaching this issue is to assume that for-profits always strive to maximize financial returns while nonprofits always faithfully pursue formally stated missions that do not involve maximizing financial returns.48 The assumption that for-profits single-mindedly strive to maximize profits implies that they ignore externalities when deciding whether and how to produce boilerplate and will only take into account benefits that can be translated into financial returns.

By contrast, if we assume that organizations are generally loyal to their missions then nonprofits in general, and trade associations in particular, are likely to respond differently to the presence of at least certain types of potential externalities. One reason for this is that trade associations may find it relatively easy to translate benefits and costs that accrue to their members into financial returns because they may be able to recover the net benefits that accrue to their members by imposing some sort of levy.49 This technique is unlikely to be available to a for-profit firm. A second factor is that the missions of trade associations are, typically, to serve the interests of their members and/or their industries.50

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48 This assumption will be relaxed below.

The Associated General Contractors of America, the voice of the construction industry, is an organization of qualified construction contractors and industry related companies dedicated to skill, integrity and responsibility. Operating in partnership with its Chapters, the Association provides a full range of services satisfying the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest.
Of course, on this view, the extent to which a nonprofit takes externalities into account will depend a great deal upon the nature of its mission, which is likely to depend in turn upon the composition of its membership. For instance, if the membership of a trade association comprises a large and representative portion of the potential users of a particular type of contract, then faithful pursuit of the association’s mission is likely to be roughly equivalent to maximization of all of those users’ net benefits.\(^5\) Such an association might sell boilerplate at or below its cost of production, even if it could maximize its financial returns by setting a higher price.\(^5\) It may also strive to produce boilerplate that is of high quality, unbiased, widely disseminated, and either similar to terms used by other actors or unlikely to cause those actors to incur undue switching cost.\(^5\)

But of course, not all trade associations have large or representative memberships. If the members of an association comprise only a small portion of the potential users of a contract then they will not have an incentive to make large investments whose benefits redound principally to non-members. Similar issues arise where the membership of a trade association is unrepresentative in the sense that the interests of its members systematically diverge from the interests of other users of a contract that it produces. For example, the views of the members of an association of manufacturers of consumer goods may well diverge from those of the other

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\(^5\) Goetz & Scott, supra note 3, at 303 (“Trade organizations provide a mechanism to internalize at least some of the gains from contractual innovation. If an organization representing a significant subset of the formulation’s potential users develops a term, it can supply the coordination necessary to overcome the free-rider problems discussed earlier.”).

\(^5\) This argument is consistent with Henry Hansmann’s more general argument that firms owned by customers might arise where the firm enjoys market power. See, Hansmann, supra note 5 at 24-25, 150, 158, 169 (1996).

\(^5\) Bernstein, supra note 5 at 1742-43(explaining why trade associations in the cotton industry are likely to produce high quality terms).
parties (i.e. consumers or suppliers) to the contracts that it drafts.\textsuperscript{54} Similarly, in the construction industry, an association exclusively representing architects may have interests that diverge from those of other potential parties to construction agreements. In these situations the association has an incentive to include unobservable but biased terms in the contracts it drafts. A trade association that is insensitive to the interests of consumers also has an incentive to invest in drafting contracts that facilitate anti-competitive behavior.

Trying to predict how nonprofits and for-profits will respond to externalities becomes even more complicated if we change our behavioral assumptions and take into account the fact that neither for-profit nor nonprofit organizations will necessarily be faithful to their formally defined roles. So for example, staff attorneys who wish to ensure that they retain their jobs might revise contracts frequently and ignore the switching costs entailed for the organization’s members. They might also take the easy route through their days by undertaking purely cosmetic revisions rather than making substantial efforts to develop new terms. Similarly, there may be volunteers who join contract drafting committees solely for the sake of raising their professional profile and contribute little to the process once appointed.

Some might argue that these sorts of agency costs are particularly significant in the nonprofit world because nonprofits have no residual financial claimants. Residual financial claimants such as the shareholders in a for-profit corporation have a strong incentive to hold agents of the organization accountable. This suggests that in nonprofits, agents, including the agents who draft contracts, may have a great deal of latitude to pursue objectives that are inconsistent with the overall missions of their organizations.\textsuperscript{55} On the other hand factors such as

\textsuperscript{54} The divergence of interest here may be more apparent than real since there are a variety of reasons why firms may find it advantageous to take the interests of their customers or suppliers into account when drafting contracts. See generally Clayton P. Gillette, \textit{Rolling Contracts as an Agency Problem}, Wis. L. Rev. 679, 690–712 (2004).

\textsuperscript{55} This is not to deny that for-profit firms can be affected by agency costs. See generally Greely, \textit{supra} note 3, at 165–66 (discussing how agency costs within for-profit firms or between those firms and their lawyers might affect drafting decisions).
the fear of competition (from either for-profits or nonprofits), professional pride or the need to attract continued financial support from members or donors might override the effects of the absence of accountability to residual financial claimants. Other possibilities are that nonprofits will attempt to maximize profits from the sale of contracts because their senior managers personally benefit from higher profits or because they use the profits to subsidize other activities. This last set of factors would cause nonprofits to respond to externalities in exactly the same way as for-profits.

B. Perceptions

1. Ability to Offer Credible Assurances

Regardless of whether nonprofits actually pursue different objectives from for-profits when drafting contracts for use by others, they may be perceived to be dedicated to pursuing different objectives. This difference in perceptions may give nonprofits an advantage over for-profits in assuring prospective users of the value of whatever terms they actually draft. More specifically, nonprofits that are believed to pursue objectives other than simply maximizing the financial returns associated with drafting contracts might be better placed than for-profits to assure prospective users about the value of the terms they draft or endorse.

The ability to assure prospective users of the value of contractual terms is important because it may be difficult for those prospective users to assess the value on their own. An independent assessment of the value of a contract would involve reading the contract, ascertaining its meaning—taking into account all relevant legal developments—and then considering whether the obligations it sets out are suitable for particular uses. All of these steps require costly investments of time and expertise. Moreover, the value of any given contract can change over time: changes in the law might alter its meaning; the circumstances in which it is being used might change so that new contingencies need to be addressed; or, alternative contracts
may be introduced that reduce the overall level of familiarity with the original contract and the
number of cases in which it is likely to be interpreted. Prospective users will want to minimize
both the costs of assessing value and the risk of adopting a low-value contract.

As we saw in the preceding section, for-profits do not necessarily have incentives to take
unobservable actions that increase or maintain the value of the boilerplate that they produce.
Specifically, prospective users of contractual terms drafted by a for-profit organization should be
concerned that relatively little effort has been invested in drafting and updating the terms; that it
contains terms that are subtly biased in favor of other parties; or, that the for-profit will revise the
contract frequently, forcing them either to incur the costs of switching to new terms or to bear the
costs associated with using non-standard terms. It may be difficult for for-profits to assuage
these concerns.

By contrast, if prospective users believe that nonprofits have an incentive to make
unobservable investments in increasing and maintaining the value of contracts that they produce,
then nonprofits ought to find it relatively easy to provide credible assurances on all these
points. So, for instance, to the extent that a nonprofit is believed to have an independent
incentive to produce high quality boilerplate users may be willing to believe that unobservable
investments in drafting and updating have been made. Similarly, concerns about subtly biased
terms disappear to the extent that the terms in question have been drafted by an organization that
is perceived to be uninterested in taking payoffs from interested parties and that has an
independent incentive to draft unbiased terms. Finally, if terms are drafted by a nonprofit that is

56 This argument is an application of Henry Hansmann’s more general argument that firms owned by customers or
without any owners at all have an advantage over other types of firms in mitigating problems of asymmetric
information. See Henry Hansmann, The Role of Nonprofit Enterprise, 89 Yale L. J. 835, 843-845 (1980); Hansmann,
supra note 5 at 27-29, 230-31, 233-37 (1996). The specific claim that the ability to pre-commit to drafting high-
value contracts can induce other parties to economize on the costs of reading contracts is made in Eric Bennett
Rasmusen, Explaining Incomplete Contracts as the Result of Contract-Reading Costs, 1 Advances in Economic
Analysis & Policy Issue 1, Article 2 (2001) at 9-10, 28.
believed to be sensitive to the costs that its drafting decisions impose upon third parties then users may be confident that the contract will not be revised any more frequently than necessary.

Of course, the practical significance of these potential differences between nonprofits and for-profits is unclear. First, for reasons identified above prospective users may perceive nonprofits to be no more likely than for-profits to take their interests into account. Here it seems particularly significant that many trade associations do not seem to be representative of the potential users of the contracts that they draft and therefore seem at least as likely as for-profits to inspire concerns about bias. On the other hand, many associations strive to address this potential concern by obtaining endorsements from other trade associations or by participating in drafting coalitions.57

The difference in credibility between nonprofits and for-profits may also be limited because for-profits might use techniques such as warranties and bonds to bolster their credibility. The first of these techniques, a warranty, essentially includes any binding offer to compensate users for harm caused by deficiencies in the contract. An offer of this sort is only effective, however, if it is possible for an adjudicator to verify the quality of the contract. Otherwise the promise of compensation will be unenforceable and the warranty will be of no value to the user. My intuition is that, along most dimensions, the quality of contracts is difficult to verify.58 This may be one reason why many producers of standard form contracts disclaim liability for their products.59

58 This is consistent with Gillian Hadfield’s broader claim that the quality of all sorts of legal services is difficult to assess. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich. L. Rev. 953 (2000).
59 For instance, The Standard Legal Network, LLC sells legal form preparation software and standard form contracts with the following disclaimer:
Another way of assuring users of the value of a contract is for the person seeking to provide the assurances to expose himself to the prospect of a substantial loss if the contract turns out to be of low value. In other words, the person can post a bond to assure the value of his product. This can be accomplished in a few different ways. One way is to establish a reputation that will be sacrificed in the event of widespread dissatisfaction with a product. So for example, clients of a law firm may believe that the risk of one of the firm’s contracts being defective is low because the firm has a valuable reputation to protect. Other sorts of bonds can be provided, though. For example, one online provider of (free) contracts states: “We’re committed to delivering the highest quality forms on the Internet—so committed, in fact, that we’ll pay $50 to any person who can demonstrate that one of our forms is not compliant with state law.” This reward operates as a type of bond, especially to the extent that it is payable to people other than users who have suffered harm. To the extent that for-profits can use these sorts of bonds to provide credible assurances of the value of contracts they should not be at a disadvantage to nonprofits.

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2. Ability to Attract Other Users

There may be another significant type of difference between perceptions of nonprofits and for-profits that produce boilerplate. It is possible that nonprofit trade associations generally have a higher profile than for-profits. This raises the possibility that the contracts produced by nonprofits will be expected to attract relatively large numbers of users. We have already seen that the value of a contractual term is influenced by the rate at which it is expected to be clarified through litigation and the likelihood that other actors in the marketplace will be familiar with it.\footnote{See supra Section III.A.1.} This in turn implies that the value of any given example of boilerplate sometimes depends upon how many other people are expected to use it in the near future. Therefore, all other things being equal, boilerplate that is expected to attract large numbers of users, whether because it stands out amidst a crowd of alternative terms or because its drafter is not expected to introduce alternative terms, will tend to be more valuable.

One might speculate that nonprofits, or at least trade associations, will generally have a higher profile than for-profits. If this is the case then users will tend to gravitate toward boilerplate produced by nonprofits simply because they expect other users to do so. However, the claim that nonprofits have a higher profile than, for example, prestigious law firms or well established providers of legal information is dubious. Moreover, even if nonprofits have a relatively high profile for-profit organizations have an offsetting advantage. Specifically, for-profits may be better placed to make credible commitments to refrain from introducing alternatives to an existing set of contractual terms. Since for-profit firms often “use” contracts as principals or as paid drafters, their profits depend upon being intimately familiar with the contracts that they use. Consequently, their switching costs may be higher than those of a nonprofit that is simply distributing a contract. Therefore, for-profit firms’ commitments to use particular contractual terms may be more credible. As a result, it is far from clear whether
nonprofits or for-profits have an advantage in convincing potential users that their terms are likely to be popular.\textsuperscript{62}

\textbf{C. Production Costs}

Nonprofits may also differ from for-profits in the sense that they face different costs of production. One reason this might be the case is because nonprofits may have superior access to volunteer labor.\textsuperscript{63} However, there may be factors that offset this advantage.

1. \textit{Access to Volunteers}

Having the option of tapping volunteers to assist in drafting contracts may be quite advantageous. One reason is that, as discussed in the previous subsection, it is difficult to assess how well a contract has been drafted. This is true not only for potential users of contracts but also for organizations that employ agents to draft contracts. Under these circumstances agents have an incentive to shirk their responsibilities. Naturally, external incentive mechanisms such as bonuses, warranties and bonds (reputational or otherwise) can mitigate this problem. To the extent that these fail, however, it will be helpful if internal factors such as altruism, professional pride or the desire to exercise and improve skills motivate agents to exert themselves. This will frequently be the case for volunteers.

A second reason why access to volunteers might be important in drafting contracts is because it may be useful to have large numbers of people assist, at least in small ways, in the drafting process. The principal reason for this is that an extraordinarily large number of

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\textsuperscript{62} For suggestions that either trade associations or law firms might be able to mitigate coordination problems, see Goetz & Scott, \textit{supra} note 3, at 293; Kahan & Klausner, \textit{supra} note 3, at 762–63 (“In this context, standard-setting would mean the development of model contract terms, which firms could adopt at their option. . . . standard-setting institutions can potentially respond to the coordination problem.”).

\textsuperscript{63} The term volunteers is used broadly here to refer to any individual or organization that provides goods or services on terms that are more favorable than fair market value. Sometimes it may be difficult to determine whether an individual or the organization with which they are affiliated is the true source of a donation. \textit{See}, e.g., Nat’l Venture Capital Ass’n, http://www.nvca.org/model_documents/working_group.html (listing individuals who assisted in drafting model contracts according to the law firm or venture capital firm with which they are affiliated) (last visited Oct. 23, 2005).
combinations of contingencies can arise in the course of the performance of even a moderately complex contract. It is very difficult for any single person, or even small group of people, to foresee all of those contingencies and accurately analyze whether the contract will be interpreted to provide appropriate guidance in each scenario. However, a large group of readers may be well suited to undertake this analysis collectively, even if each member of the group only devotes a relatively small amount of time to the task. The reason is that if the group is sufficiently diverse each member will bring different experiences to the table and will identify and focus on different sets of contingencies. In addition, allowing readers to play a role in selecting the problems upon which they focus may be a useful way to harness the private information that they possess about their own capabilities. Providing monetary compensation to members of such a large group might be prohibitively costly, because of both the transaction costs of processing payments and the difficulty of assigning a price to each contribution. If, however, the members of the group provide their services on a voluntary basis then this sort of collective enterprise becomes a viable mode of production. In fact it may be superior to production by a smaller group whose members provide their services in exchange for monetary compensation. This is the logic that has been offered to explain the success of open source software projects and other instances of what Yochai Benkler calls peer production.

Of course, it is quite possible that access to volunteers does not provide a significant advantage in the production of boilerplate. In the first place, the usefulness of volunteers is likely to depend upon how skilled they are; when it comes to drafting contracts unskilled volunteers may well hinder the process more than they help. Furthermore, it may be possible to replicate the advantages of relying on volunteers by going out of one’s way to hire highly motivated

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employees and, where appropriate, asking large numbers of them to contribute at least small amounts of time to each drafting project. A for-profit organization such as a law firm can easily adopt these practices.

If we assume that access to volunteers is advantageous it becomes worthwhile to ask: Do nonprofits have better access to volunteers? One would expect the answer to depend in part on the reasons why people do and do not volunteer. One reason for volunteering is altruism—the desire to benefit others. Some altruists may be interested in benefiting the users of a particular class of contracts, e.g. ‘the members of the grain and feed industry’, or ‘users of computer software’. However, if altruists volunteer on behalf of a for-profit organization that supplies contracts to these users, some of the benefits of their efforts are likely to flow to the owners of the organization. Not many altruists are likely to be interested in helping this particular class of beneficiaries. This suggests that most altruists will be more willing to volunteer to draft contracts on behalf of nonprofits than for-profits.

Whether or not nonprofits have superior access to volunteers also depends on the reasons why people choose not to volunteer for certain organizations. Leaving aside altruism, many people volunteer in order to socialize or to exercise and hone their professional skills or to obtain status in the eyes of their peers. There is no obvious reason why these sorts of benefits cannot be obtained by volunteering to draft contracts on behalf of a for-profit enterprise. However, for some people the direct personal benefits they could receive from volunteering on behalf of a for-profit organization might be outweighed by an aversion to gratuitously conferring benefits on the owners of a for-profit organization. This aversion might lead even people who are not exactly altruistic to prefer to volunteer for nonprofits. It is unclear, however, how prevalent this attitude is. In fields such as software development and the publication of academic journals people

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66 The existence of such an aversion seems particularly plausible when the for-profit organization is a competitor. So for instance, law firms might donate their services to a trade association but not to another private law firm.
frequently volunteer to benefit for-profit organizations.\textsuperscript{67} For-profit firms also are frequently able to induce their customers to provide volunteer labor in forms that range from responses to customer satisfaction surveys to voluntary transfers of significant technological innovations.\textsuperscript{68}

2. Other Potential Differences in Production Costs

There are other factors that might systematically influence the relative costs of producing contracts in nonprofit as opposed to for-profit organizations. Some of these might offset the effects of having superior access to volunteer labor.

One factor is that nonprofits might systematically be run more poorly than for-profits. The reasoning behind this claim has already been discussed: It may be that the absence of residual financial claimants reduces the overall level of accountability within nonprofit organizations and thus makes them inefficient producers of contracts, or for that matter, anything else. But the counterarguments listed above are also applicable here. Specifically, competitive pressures, efforts to select agents who take pride in their work, or accountability to senior managers, members or donors, might, either singly or in combination, be effective substitutes for monitoring on the part of residual claimants.

Another factor to consider is that in certain cases either nonprofits or for-profits might have privileged access to resources used to produce or distribute contracts. For instance, trade associations have privileged access to their members. This may give them an advantage both in contacting members for feedback and in distributing contracts. Alternatively, for-profit legal information services firms might have better access to the technology used to distribute contracts electronically. Or, a for-profit law firm may have better access to experienced drafters. However, it is far from obvious that these factors are economically significant since firms in one sector can

\textsuperscript{67} Benkler, \textit{supra} note 65, at 440–41 (discussing whether possibility of others benefiting discourages voluntary participation in information production).

typically obtain access to resources held by firms in another sector through contract.\footnote{An important counterexample to this general claim might be ISO, a for-profit organization that produces standard form contracts that are widely used by property and casualty insurers. ISO seems to benefit from the fact that it controls valuable actuarial data that is required to price the terms of any given policy. \textit{See generally ISO}, http://www.iso.com (last visited Oct. 23, 2005).} For example, a for-profit organization can purchase access to a trade association’s membership list. Similarly, a nonprofit organization can contract with a for-profit software developer to develop technology for distributing contracts electronically or with a law firm to draft contracts.

\textbf{D. Tax Treatment}

Nonprofits also differ from for-profits that draft boilerplate for use by others in terms of their tax treatment. Nonprofits are exempt from certain state and local taxes, most notably franchise and property taxes.\footnote{The details vary from state to state. \textit{See generally} Frances R. Hill & Barbara L. Kirschten, \textit{Federal And State Taxation Of Exempt Organizations} ¶ 14.04 (1994).} These exemptions clearly give nonprofits a competitive advantage over for-profits by lowering their relative costs of production.

Many types of nonprofits, including trade associations, also derive an advantage from being exempt from federal income tax.\footnote{I.R.C. § 501(c) (2000) (listing exempt organizations). § 501(c)(6) refers to “[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.” The revenue from the sale of these types of materials to the members of a trade association is likely to be subject to the unrelated business income tax.} Income from exempt nonprofits’ unrelated business activities is subject to a federal tax called the unrelated business income tax (“UBIT”).\footnote{I.R.C. § 511(a) (2000). In this context an unrelated business activity is one that is unrelated to the purposes that form the basis of the nonprofit’s exemption:}

However, for many nonprofits, selling or licensing contracts seems unlikely to qualify as an
unrelated business activity.\textsuperscript{73} Moreover, if the contracts are licensed in exchange for royalties the royalties are excluded from the definition of unrelated business income.\textsuperscript{74}

Exemption from income tax gives nonprofits an advantage over for-profits by reducing the nonprofits’ cost of raising capital to fund their operations.\textsuperscript{75} Consider the following example. Suppose that an organization needs to raise $10,000 to finance the production of a set of contracts (for use by other parties). Assume that the normal after-tax rate of return on an investment in a venture such as this would be 10 percent and that the tax rate is 30 percent. If the organization is a for-profit it will have to provide an investor with an after-tax return of $1,000, meaning that it will have to earn roughly $1428.57 in before-tax income. Suppose, however, that the organization is a tax-exempt nonprofit. In this case it might try to finance the business by charging its members dues in return for an implicit promise to provide goods or services at below-market prices in the future. In a sense therefore, the members can be characterized as “investors.” Assume that, like other investors, they demand a return of 10 percent on their investment. Notice that the nonprofit will only have to earn $1000 in before-tax income to generate this return. This means that the nonprofit will be able to charge a lower price for its products than a for-profit while still generating an acceptable return for its investors. Alternatively, it can charge the same price for its products and generate a relatively high return

\textsuperscript{73} In the case of a trade association any revenue derived from the distribution of material to its members that assists them in the conduct of their business seems to be clearly related to the purposes of the association. See Treas. Reg. § 1.513-1 (definition of unrelated trade of business). See Example 6 in particular:

\begin{quote}
Z is an association exempt under section 501(c)(6), formed to advance the interests of a particular profession and drawing its membership from the members of that profession. Z publishes a monthly journal containing articles and other editorial material which contribute importantly to the accomplishment of purposes for which exemption is granted the organization. Income from the sale of subscriptions to members and others in accordance with the organization’s exempt purposes, therefore, does not constitute gross income from unrelated trade or business.
\end{quote}

\textsuperscript{74} I.R.C. § 512(a), (b)(2) (2000).

for its investors, thus encouraging them to invest. The narrower is the range of sources of exempt income, the more significant will be the tax-based incentive to produce boilerplate that generates exempt income.76

IV. Welfare Implications

Many of the differences between nonprofits and for-profits that engage in the production of boilerplate for use by others should, if anything, serve to give nonprofits a competitive advantage. This conjecture is consistent with the fact that if we leave aside boilerplate produced by firms for their own use, nonprofit trade associations appear to dominate the production of many types of boilerplate. It is also worth noting that some of the distinctive features of production of boilerplate by nonprofits, and in particular their potentially greater sensitivity to externalities, credibility, and access to volunteers, might make it relatively attractive for users to obtain boilerplate externally from a nonprofit rather than producing it internally.

However, even if nonprofits enjoy competitive advantages in the production of boilerplate, it does not necessarily mean that it is in society’s best interests for nonprofits to exploit those advantages. Whether or not it is socially optimal for nonprofits to dominate the production of boilerplate depends, among other things, on the reasons why they dominate. (Other relevant factors will include the extent to which users can choose between competing nonprofit providers of boilerplate or are capable of adapting terms provided by nonprofits to suit their own purposes.)

For instance, if nonprofits dominate for-profits because of differences in their objectives, the desirability of this state of affairs depends upon which type of organization’s objectives is best aligned with society’s interests. If we assume that the principal difference between the two

76The consequences would be similar if nonprofits were not exempt from income taxation but typically were able to avoid generating taxable income by offsetting income from business activities with expenses incurred in providing benefits to members. However, Internal Revenue Code § 277 limits the scope for this practice. That provision prevents certain non-tax-exempt organizations from treating expenditures on member benefits as deductions from income generated from business activities.
types of organizations along this dimension is that nonprofits are more likely to take into account externalities, and so are more likely to make socially optimal drafting decisions, then having nonprofits dominate the production of boilerplate seems benign. However, as we have already seen, there are reasons to question the assumption that nonprofits are more likely to take into account externalities.\textsuperscript{77} Not all nonprofits are even ostensibly interested in advancing the interests of a large and representative portion of the users of the contractual terms that they draft. In the case of some of these nonprofits, deciding whether or not their missions are consistent with the interests of society is a value-laden exercise - who is to say that software ought to be free? Moreover, even those nonprofits whose mission statements are undisputedly benign may have agents who routinely deviate from those missions. Still other nonprofits may have objectives indistinguishable from for-profits because they treat the production of boilerplate as a means of generating revenue to support other activities.

The social welfare analysis seems more straightforward if nonprofits’ advantage over for-profits rests on superior access to volunteers. If there are certain people who prefer, for whatever reason, to volunteer on behalf of nonprofits rather than for-profits, then allowing nonprofits to use those volunteers enhances social welfare to the extent that it improves the welfare of the volunteers. Society also benefits from a certain amount of additional production to the extent that if barred from volunteering for a nonprofit some people would choose to engage in less productive activities.\textsuperscript{78}

The welfare analysis is slightly more complicated if nonprofits’ advantage over for-profits lies in superior ability to offer credible assurances of the value of contracts. Allowing nonprofits to dominate for-profits for this reason seems desirable if users of contracts accurately


\textsuperscript{78} See Kevin E. Davis, \textit{The Regulation of Social Enterprise}, in \textit{Between State And Market: Essays on Charities Law and Policy in Canada} 485, 496 (Jim Phillips et. al. eds., 2001).
assess nonprofits’ credibility. In this case, having nonprofits produce boilerplate minimizes the costs to society of distributing boilerplate by minimizing the costs to users of searching for appropriate boilerplate. It is a different story, however, if users regularly err in their assessments of nonprofits’ credibility. For example, it may be the case that an undeserved aura of credibility surrounds trade associations that draft boilerplate, even though they are in fact no more credible than other organizations. In this case society would be better off if boilerplate were produced by the organizations that were actually rather than merely perceived to be the most credible.

Finally, in the absence of offsetting considerations, it seems undesirable to allow nonprofits to derive any significant advantage over for-profits from their preferential tax treatment. Differential tax treatment of this sort tends to allow relatively inefficient nonprofits to offer contracts at lower cost than more efficient for-profits. This will cause society to expend more resources than necessary in producing contracts of a given quality.

In light of the above, it is difficult to say as a general matter whether it is socially optimal for nonprofits to dominate the production of boilerplate. At this point, all we can say is that there are certain conditions under which this might be an optimal state of affairs. First, in producing boilerplate nonprofits might take into account a larger proportion of the benefits to consumers and third parties than would a similarly situated for-profit. Second, nonprofits might be accurately perceived to be more credible than for-profits. Third, nonprofits might have greater access to skilled volunteer labor. Under any or all of these conditions it seems reasonable to presume that having nonprofits play a significant role in the production of boilerplate is socially desirable.

It would, of course, be nice to have direct empirical tests of whether society benefits from having nonprofits as opposed to for-profits produce boilerplate. But it is important to recognize that testing hypotheses about whether the behavior of a particular set of drafters is socially
optimal is difficult. The principal difficulty stems from the need to make judgments about whether any given drafting decision is or is not socially optimal.\(^79\) For example, in their seminal article Goetz and Scott seem to suggest that trade associations in the construction industry were too slow to draft novel contracts in response to a change in construction practices in the 1970’s. They report that the leading trade associations, the American Institute of Architects and the Associated General Contractors, took nearly ten years to produce new contracts. Goetz and Scott imply that this delay was sub-optimal.\(^80\) However, they reject with virtually no explanation the possibility that it was optimal for the trade associations to wait and gather more information about the new practices before drafting a new contract.\(^81\) In principle though, the costs associated with a faster response, in the form of either being stuck with a less than optimal contract or having to switch to a revised version, might well have outweighed the benefits of introducing a new contract.

V. Legal Implications

Understanding the relationship between the conditions under which boilerplate is produced and social welfare can have the practical benefit of informing the design of legal norms. In particular, understanding the manner in which contracts are produced can help to inform decisions about whether and how the state should become involved in the formulation of contractual terms.

A. Should the State Intervene in the Production of Contracts?

One of the main implications of the discussion to this point is that in deciding whether state intervention in the production of contracts is required it is important to consider the abilities

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\(^79\) Kahan & Klausner, *supra* note 3, at 750 (“We have no choice but to rely on our own judgment in arguing that a particular formulation of the event risk covenant is suboptimal . . . .”).

\(^80\) Goetz & Scott, *supra* note 3, at 304.

\(^81\) *Id.* at 297–98 (arguing the construction industry deliberately chose “to keep the concepts loosely defined to permit a flexible response to the perplexing changes in the economic climate”) (quoting Walter F. Pratt, Jr., *Afterword: Contracts and Uncertainty*, 46 Law & Contemp. Probs. 169, 170–71 (1983)).
of both for-profit and nonprofit organizations. There is room for disagreement about how well the state—or any given branch of it—is likely to fare if it attempts to intervene in the production of contracts. However, it seems reasonable to presume that the lower is the quality of the contracts that non-state actors are capable of producing the stronger is the case for state intervention.

Most of the academic literature on this topic has focused on for-profit actors and the extent to which factors such as externalities and asymmetric information limit their ability to produce contracts. This narrow focus is potentially misleading. For example, it may be reasonable to conclude that the quality of contracts generated by for-profit actors will be relatively low in industries where none of the users of the contract, or their agents, has a large share of the market. However, it would not be reasonable to conclude that the quality of contracts in these types of industries will typically be low. This is because in many industries where atomistic contracting prevails there is at least one trade association that invests in drafting standard form contracts. There may also be other nonprofits, such as a local bar association, that do the same. For any or all of the reasons set out in Part III these nonprofits might make very different drafting decisions from for-profit organizations.

For example, in some regions a paradigmatic example of an industry characterized by atomistic contracting is the real estate brokerage industry—particularly in regions where lawyers play a limited role in real estate closings. In many areas state or local realtors’ associations draft standard form contracts. All of the factors identified in Part III might, at least potentially, induce these associations to invest in producing high quality contracts. First, in relation to most terms of contracts such as agreements of purchase and sale the association’s interests should be well-aligned with those of the entire body of users, especially when its members are just as likely

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82 See, e.g., the range of jurisdictions that produce contracts for use with Zipforms, the software package produced by a joint venture of the National Association of Realtors and the California Association of Realtors. See ZipForm Desktop, Purchase ZipForm, http://www.zipform.com/order/order.asp (last visited Nov. 3, 2005).
to be involved on one side of the transaction as the other. (Listing agreements, in which brokers’ interests are consistently opposed to those of property owners are, therefore, potentially problematic.) Second, the realtor’s association is well placed to assure users that due care has been taken to update the contracts to reflect changes in the law because ultimately the people engaged to draft the contract are accountable to an important subset of users. Third, the association can tap volunteers from its membership to participate in reviewing existing contracts and proposed revisions. Fourth, these associations typically benefit from preferential tax treatment. As a result, if they engage in tax-exempt activities such as the production of standard form contracts they should be able to offer members a relatively high return on the membership dues “invested” in the association.

The more general point here is that without knowing anything about the nonprofits active in an industry it is dangerous to speculate about the quality of the contracts available to participants in that industry. This idea clearly has implications for how contract law ought to vary across industries. It also has implications for how contract law ought to vary across societies as it suggests that the nature and quality of a society’s associational life will be an important determinant of the quality of the contracts formed by the members of that society.

B. How Should the State Intervene in the Production of Contracts?

Suppose we assume that it is necessary for the state to intervene in the drafting of a particular class of contracts. In this case the idea that nonprofits can play an important role in drafting contracts has implications for the manner in which the state should intervene. Specifically, it implies that in addition to or instead of attempting to draft contracts itself, the

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83 In an interview with the author, the general counsel of the California Association of Realtors described a lengthy review and consultation process surrounding new contracts. The principal participants in the process were volunteers, aided by two staff lawyers. Interview with June Barlow, Vice President and General Counsel, California Ass’n of Realtors (July 18, 2005) (on file with author).
state might attempt to encourage nonprofits to emerge and participate in the process.\textsuperscript{84} The encouragement offered could take many forms, ranging from legal doctrines that presume the validity of terms formulated by nonprofits,\textsuperscript{85} to privileged access to government officials, to preferential tax treatment.

Consider, for example, a jurisdiction in which the quality of residential agreements of purchase and sale is perceived to be poor, perhaps on account of the atomistic structure of the real estate brokerage industry and the absence of any related trade association. A government agency could respond to this situation by drafting a set of terms to be implied by law into every agreement of purchase and sale. Alternatively though, the agency might attempt to encourage a group of real estate brokers, or perhaps a group of legal professionals, to form an association with a mandate to draft and maintain a model contract. The arguments set out in Parts III and IV suggest reasons why, if structured appropriately, such an association might do a better job than a set of for-profit actors drafting contracts independently.

A similar observation applies where a nonprofit is involved drafting contracts but is doing a poor job. There are a number of circumstances in which this might be true: The nonprofit’s membership may not be representative of the users of the contract; it may be using the income from the sale of contracts purely to fund its other activities and thus have no particular incentive to make unobservable investments in quality; it may make little use of volunteer labor; or, it may not be tax-exempt. Under these conditions there may be grounds for state intervention. But that intervention need not involve direct production of contractual terms by the state. It could also involve encouraging other nonprofits to become involved. For example, a court might threaten to

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\textsuperscript{84} For similar suggestions, see Greely, supra note 3, at 169 (suggesting that standards-setting organizations be promoted); Ronald J. Mann, “Contracting” for Credit, 104 Mich. L. Rev. __, __ (2006) (recommending that standardized credit card agreements be drafted by intermediaries such as Visa or Mastercard).

\textsuperscript{85} For a recommendation along these lines, see Choi & Gulati, supra note 24, at __.
\end{flushleft}
undertake heightened scrutiny of any standard form contract drafted by the association unless endorsements have been obtained from associations representing all potential users.86

VI. Conclusion

The irony here is that some of the most iconic products of a market-oriented society, contracts, often seem to be produced in a realm that is ordinarily presumed to be at least one step removed from a free market. Moreover, this may not be a bad thing, even according to conventional economic criteria. This has potentially significant implications for our understandings of the determinants of the quality of contractual terms, whether and how the state should intervene in the formulation of those terms, and, more generally, the role of trade associations and other nonprofits in a market economy. These topics all warrant further investigation.

Southern Nevada Water Authority
June 12, 2012

Via E-mail - krainey@lasvegasnevada.gov
Kathy Rainey, Co-Chair
Nevada Public Purchasing Study Commission

ASullivan@washoe.k12.nv.us
Andrea Sullivan, Co-Chair
Nevada Public Purchasing Study Commission

Re: A.B. 228, Standard Form Construction Documents

Dear Kathy and Andrea:

I am writing on behalf of the Southern Nevada Water Authority ("SNWA") to comment and make recommendations on the subject bill passed by the Nevada State Legislature during its 2011 session.

During the past 18 years the SNWA has bid and awarded over 100 public works contracts with a combined value totaling $3 Billion. SNWA contract documents, including the General Conditions, General Requirements and Specifications, began with a template from the Engineers Joint Contracts Documents Committee ("EJCDC") but have been customized to reflect local conditions, regulations, and laws. We have applied considerable effort to assure the documents are compliant with all applicable laws and regulations. Moreover, the documents are revised often to reflect "lessons learned" by SNWA on completed projects. In the past, we have met with representatives from contractors and sureties regarding some of our provisions and thereafter modified our documents to fairly allocate risk to all parties. We are presently reviewing and redrafting our provisions to align with those of our sister agency, the Las Vegas Valley Water District. Along with that we are converting to the Construction Specification Institute industry standard format and section numbering system.

For the reasons above and those that follow, the SNWA strongly objects to the mandated use of the particular standard form documents proposed by A.B. 228 for public works projects. Use of a "form" that may or may not contain all necessary provisions and/or use provisions that are not practical or desirable for a particular project is illogical. Our research indicates there is only one state (South Dakota) that presently mandates the use of these documents. The research also indicates that although there is considerable use by other states of standard form documents (AIA, EJCDC, AGC and DBIA), there is no mandate requiring such use. It appears that most public agencies throughout the United States use one of the available standardized contract forms but then tailor the forms to reflect their own practices and policies. We have been advised that while considering the use of standardized construction documents, some states dropped the idea once major sureties let it be known that they would not bond public projects that utilized the standardized documents.
Kathy Rainey  
Andrea Sullivan  
Nevada Public Purchasing Study Commission  
June 12, 2012  
Page 2

We also understand that there will be a recurring fee associated with use of the proposed standard form documents. The exact amount of this fee is uncertain, but will likely be substantial. In these difficult economic conditions any additional cost to public agencies should be avoided when possible.

Public works construction contracts must reflect a careful balancing by the drafters of clearly describing the work to be performed, assuring compliance with all laws, protecting public dollars and fairly allocating risk associated with the work. Rather than legislating the use of particular contract forms, the SNWA believes that any contractor or group with a concern over a particular provision or form used by a public agency in Nevada should direct those concerns to the applicable agency. Direct communication rather than mandating something that may not be workable is the best approach.

Please email or call me at (702) 862-3401 if you have questions about our position or if I can provide further clarification.

Sincerely,

Marc R. Jensen, P.E.  
Director of Engineering
Engineers Joint Contract Documents Committee (EJCDC) – 2\(^{\text{nd}}\) Submittal
June 15, 2012

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Re: Engineers Joint Contract Documents Committee
White Paper

Dear Ms. Sullivan and Ms. Rainey:

Enclosed please find the EJCDC White Paper on Standard Form Construction Contract Documents for Public Works Projects.

Thank you for allowing us to submit this paper.

Best regards,

Justin L. Weisberg, Chairman

JLW/jls
Enclosure
Background

The Engineers Joint Contract Documents Committee (EJCDC®) develops, publishes, and updates standard contract documents for the design and construction of engineered projects. EJCDC became aware of proposed legislation NV AB 228 in late February, 2012. It is our understanding that the draft legislation proposed in 2010 stemmed from a review by legislators of the Association of General Contractors (AGC) ConsensusDOCS documents as a model of a nationally recognized set of standard form construction contract documents prepared by a broad base of stakeholders. The Bill, as drafted, required governmental units in Nevada to use construction contract documents endorsed by at least one national association primarily representing the interests of public owners and at least one national association primarily representing the interests of private contractors.
EJCDC does not have information regarding the initial drafting history of the proposed NV AB 228, including whether other criteria were eliminated during the process. EJCDC recognizes the impact of public works projects upon public finances, safety and welfare and notes that a single criterion of unspecified organization endorsement will provide limited information regarding the safeguards and benefits of such documents to the public as compared to additional or alternative criteria. For example decades of successful and safe use of form documents drafted by a particular organization on numerous public projects across the United States could provide an indication that certain documents have been tested and developed by experience. Participation of public agency representatives in the document drafting process would provide information concerning the incorporation of public concerns into particular form contract documents. In comparison, the endorsement by private organizations which may have limited relative experience on subject projects without a standardized objective criteria for the endorsement of contract documents might provide limited information of the comparative benefits and protections of such documents for public use.

In 2011 the Bill was referred to the Commission to Study Governmental Purchasing (Study Commission) to study, in part, the:

- feasibility of standard form construction contract documents for public works at the state and local level,
- use of standard form construction contract documents by other states, and
- key clauses that should appear in standard form construction contracts.

In early March 2012 EJCDC contacted the Study Commission to offer assistance in conducting the study, and the Study Commission response was a request that EJCDC prepare this white paper.

**EJCDC Qualifications**

EJCDC has been in existence since 1975, and is an association of four major organizations of professional engineers and contractors, formed for the purpose of preparing fair and objective standard contract documents that reflect a reasonable allocation of risk to the parties of Owner-Engineer professional services agreements and Owner-Contractor construction contracts. The four EJCDC Sponsoring Organizations are:

- the American Society of Civil Engineers (ASCE),
- the Associated General Contractors of America (AGC),
- the National Society of Professional Engineers (NSPE), and
- the American Council of Engineering Companies (ACEC)

In addition to the Sponsoring Organizations, Liaison Organizations provide input to EJCDC in the drafting of documents. Included among those organizations are:
• American Public Works Association (APWA)
• United States Department of Agriculture – Rural Utility Service (USDA-RUS)
• International Municipal Lawyers Association (IMLA)
• Construction Management Association of America (CMAA)
• Construction Specifications Institute (CSI)

The initial step in drafting or updating an EJCDC standard contract document is typically performed by EJCDC’s General Counsel, who is a practiced professional in both professional services and construction contract law. The EJCDC committee members—engineers, attorneys, contractors, public works owners, insurers, and other professionals who are actively engaged in design, construction, and contract administration—then provide review, analysis, input, suggestions, and comments in a comprehensive, interactive process that ultimately results in the publication of a new (or newly revised) standard contract document.

EJCDC generally updates its documents on a 5-year cycle, and is currently preparing revisions to the ‘Construction Series’ documents for publication in 2013. The Construction Series documents are of the highest priority, and the 2013 documents have received the benefit of a major commitment of EJCDC resources. Therefore we believe we have a very contemporary and comprehensive perspective on the essential terms and conditions of construction contract documents.

Attributes of Well-developed Standard Form Contract Documents

Any evaluation of standard form construction contract documents should account for the goals and requirements of the parties to the respective contracts. On public works projects the considerations of the statutes, rules and regulations of a public entity are often more complex then statutes, rules and regulations that must be followed on a private contract. In addition, construction contracts are unique in that they combine goods, equipment, labor and professional services in a single procurement.

As practitioners and construction professionals, the members of the EJCDC Construction Contract Documents sub-committee have all worked on or observed capital improvement projects whose bidding and contract document packages have been assembled by drawing from various uncoordinated sources. This collective experience has guided EJCDC to develop coordinated contracts, and led us to define what we believe are the attributes of well-developed standard construction contract agreements and terms and conditions:

• Development exceeds production of only Construction Contract Form (Agreement) and General Terms and Conditions
• Bidding Requirements documents coordinated with Agreement and General Conditions
  
  o Invitation/Advertisement for Bids
  
  o Instruction to Bidders
  
  o Bid Form

• Bidding Requirements documents are not contract documents and do not contain contract requirements

  o Bidding Requirement documents strictly limited to managing the bidding and award of contract process

• Coordination with Owner-A/E Agreement providing for professional A/E services during construction.\(^1\)

• Coordination with purchase-only contract document contracts that can be assigned to the installing general contractor

Additionally, participation by a broad group of stakeholders and periodic update to reflect contemporary developments based on well-settled case law are distinguishing attributes.

\(^1\) There are significant differences between EJCDC and ConsensusDocs concerning the Engineer’s status and obligations during the construction phase of the Project. The comparison of the limited participation of the Engineer during the construction phase of the process under the ConsensusDocs 200 contrasts with the provisions concerning the status and obligations of the Engineer as a representative of the Owner as reflected in the EJCDC C-700. The dual obligation by the Engineer to the public client under a contract, and to safeguard the public safety is reflected in the public policy of Nevada under the very definition of Professional Engineering. See NRS 625.060: Any professional service which involves the application of engineering principles and data, such as surveying, consultation, investigation, evaluation, planning and design, or responsible supervision of construction or operation in connection with any public or private utility, structure, building, machine, equipment, process, work or project, wherein the public welfare or the safeguarding of life, health or property is concerned or involved.
EJCDC Views on Study Commission Objectives

- **Feasibility**

There should be little debate on whether or not contracting parties can benefit by using nationally recognized standard contract forms. The real question is whether or not the use of standard form contracts should be statutorily mandated. EJCDC was formed to promote the development of quality standard form engineering services and construction contracts for the purpose of improving the contracting environment for consulting engineers, owners, and contractors. EJCDC has historically promoted its documents through educational endeavors rather than seeking to have use of its documents required through legislative action.

The perceived advantages of mandating standard form contracts presumably stems from an interest in promoting a consistent allocation of risk between the parties, and use of risk management language that protects the general public. The perceived advantages can be summarized as follows:

- Provisions are based on well settled case law reflecting reasonable allocation of risk
- Language is taken from or shaped to conform with published appellate court decisions, thus facilitating subsequent courts and other adjudicators to consistently enforce terms and conditions
- Smaller government units usually do not have the resources to research and update in-house standard construction contract documents to keep them current with contemporary case law, insurance and surety products
- Repeated usage in a geographic/political region promotes bidder/contractor familiarity and potentially better bids
- Repeated usage in a geographical/political region promotes contract administrator familiarity, potentially resulting in more effective contract administration and a reduction of claims/disputes
- Standard administrative and procedural specification sections and technical specification sections from various sources can be coordinated with common 'front-end' documents to reduce conflicts and ambiguity
- Owner and A/E can focus drafting efforts on project-specific clauses
The potential disadvantage could be that the promulgated ‘standard’ could be too restrictive or not restrictive enough for certain entities for certain projects – this would foster extensive supplementary conditions, increasing contract drafting effort. Also, in rare instances a public works project may be so complex that it is necessary to custom-draft the project contracts from the ground up, rather than building on an established standard platform.

In general EJCDC is neutral on the question of whether a state should mandate the use of standard form contracts. However, we are firmly convinced that if a state does elect to mandate the use of standard form contracts on public works projects, public officials should have the flexibility to choose from published contract documents that are nationally recognized as standard documents, are appropriate to the proposed project and which have been developed, tested and proven over many similar projects.

On a particular public project, the AIA documents might be the selected choice for a project. AIA documents are commonly used as the basis for courthouse, library, and municipal office projects. The corresponding ConsensusDOCS documents, published by a consortium led by the Associated General Contractors of America, have features that could make them a preferred choice on some projects. EJCDC’s documents are well suited to traditional public works infrastructure projects such as sewers, wastewater treatment plants, landfills, and transportation facilities. We believe that any legislation mandating use of standard contract documents should allow a choice from the foregoing standard documents, as well as other standard documents serving niche needs. We mention this because AB228, as initially proposed, in essence would have had the effect of limiting public officials’ choice solely to standard documents endorsed by at least one national association primarily representing the interests of public owners and at least one national association that primarily represents the interests of private contractors. As we understand it, these criteria were intended to fit the ConsensusDOCS documents while excluding other recognized and respected form documents.

EJCDC documents are prepared with the participation of possibly the largest representative body of public works owners (APWA). APWA as a matter of policy does not endorse standard form contracts, and therefore EJCDC documents would not be approved under the legislation as originally proposed. The American Institute of Architects (AIA) documents would also not be approved for lack of endorsement by a national public owners association.
The ConsensusDOCS public owners' endorsement is derived from the Construction Owners Association of America (COAA). The public works owners' constituency of COAA is generally made up of public university and other institutional owners, and is marginally representative of the interests of public works entities providing core infrastructure facilities funded by local rate payers.

Standard form construction contracts function best when they are coordinated with the owner-engineer or owner-architect agreement. This is important not only to avoid inconsistencies in task and risk allocations, but also to assure that the public interest is served by providing for continued participation by the Engineer of Record so that:

- The Engineer of Record has continuing responsibility to review and approve shop drawings prepared by the construction contractor to determine compliance with the design intent

- The Engineer of Record has continuing responsibility to review and recommend modifications of the design for conformance with the design intent

- The Engineer of Record is subject to the appropriate professional standard of care

- The other obligations of the Engineer of Record to the Owner, relative to the project and as should be reflected in the Owner-Engineer Agreement, are not in conflict with the terms of the construction contract and expectations of the parties.

- The responsibility and liability of all parties likely to be participants in the project, including the Engineer of Record, are properly coordinated and allocated by methods that are fairly representative of the legal standards and practices governing the industry.
Another consideration should be the coordination between the Bidding Requirements (Instructions to Bidders) and Bid Form documents and the Agreement and General Conditions. Bidders should be exhorted to make a careful examination of the proposed contract documents, the site, reports of subsurface geotechnical conditions and underground facilities, and local conditions and factors that could affect the contract price in the Instructions to Bidders. The Bid Form should include representations by the Bidder that the Bidder has considered all these matters and is satisfied with the feasibility of the contract documents as an inducement for the owner to consider the bid. Finally the Agreement should also include these representations as an inducement to the owner to enter into the Agreement. These measures are taken to manage the claims process in determining entitlement to extra work claims and are in the public’s best interest.

These factors are pointed out to elucidate the difficulty of drafting legislation without unintended consequences, and to suggest that if legislative action is the course of action taken to promote use of standard form contracts, consideration be given to basing qualifications on document content rather than endorsements by various organizations. In the end, recognizing that several standard form alternatives are available in the market, the public owner and its legal counsel will be best able to evaluate which standard form best addresses its specific project needs within any desired statutory intent and guidance.

EJCDC Construction Documents are drafted and developed with the participation of governmental representatives, contractors, engineers and attorneys in an open forum rather than having a single law firm or small closed committee or organization employees develop the construction documents. The input by governmental representatives, contractors, engineers and attorneys at the construction subcommittee level provide well balanced documents for use on public projects.

Nevertheless leaving a governmental division with the flexibility to choose from more than one form document will allow a choice of provisions which best fit the public entity’s needs. For example, compare the mirrored indemnity obligations between the Owner and Contractor in Article 10 of ConsensusDocs 200 to the one way indemnity obligations of the Contractor to the Owner under Article 6 of the EJCDC C-700. While requiring the Owner to have the same indemnity obligations as the Contractor may provide a more balanced contract on a private project, it may not include the needs of a public municipality or take into consideration the impact of such a provision on governmental tort immunity.
• Other State Use of Standard Form Contracts

EJCDC is aware of a number of states that have lists of pre-approved standard form documents for public works projects, but their use is not necessarily mandated. The United States Department of Agriculture – Rural Utility Service encourages their grantees to use EJCDC documents.

The states of Washington and Oregon have developed APWA-WashDOT and APWA-OrDOT construction contract general conditions, and it should be noted these documents were prepared prior to APWA adopting a policy of not endorsing standard form contracts. These documents were developed for the convenience of governmental units that did not have in-house standard form documents, and are not mandated to be used. It has also been observed that some governmental units in various states will use their state’s DOT terms and conditions to form their construction contracts rather than expend the resources to develop in-house standards.

A common thread that runs through state DOT documents and the APWA-WashDOT and the APWA-OrDOT construction documents is that they are written under the presumptive case that the engineer of record for design and construction is an in-house department or employee of the public works governmental unit. When these forms are used in the case of a consulting engineer providing design and construction contract administration services, they present a number of drafting and modification challenges. Matters such as the ‘Engineer’ approving Change Orders and having stop work authority in the context of the ‘Engineer’ being an employee and (full) agent of the public works owner require careful editing to reflect that a consultant is not a party to the construction contract and should not have such extensive authority.

• Key Clauses

An examination of the table of contents of various standard form construction contract documents could serve as a first order of identifying the topics of key contract clauses. The ‘key clauses’ list that follows is based on observation of various owner contracts that have been observed to not include the topics listed. Key clauses can be characterized as those clauses that provide for the allocation and management of risk by either party to the contract and other participants on the project. The list has been divided into five areas of obligation and risk management: 1) Contractor obligations; 2) Owner obligations; 3) Contractor risk management; 3) Owner risk management; 4) Owner-Engineer shared risk management relative to shop drawings; 5) Engineer of Record risk management.
o Contractor Obligations

- Contractor is solely responsible for means, methods, safety precautions and programs

- Contractor is to carefully examine the contract documents and bring all questions of conflict or ambiguity to the Engineer of Record for clarification or interpretation (No precedence of documents; i.e., specifications supersede plans, etc.)

- Contractor has continuous, uninterrupted responsibility to protect the work and property on and adjacent to the site, even in the event of extremes in weather, etc. (this doesn’t mean Contractor has to bear the risk/cost – Contractor is to mitigate the damages and make a claim)

- Contractor is responsible for the acts or omissions of subcontractors

- Contractor must continue to work during disputes

- Contractor shall indemnify and save harmless the Owner and Engineer and Engineer’s sub-consultants against all claims arising out of the Contractor’s activities

o Owner Obligations

- Prior to Bid, Owner is responsible to divulge all information known to Owner that could potentially impact the cost of the construction (this is normally not a general condition provision, and points to the importance of including coordinated bidding requirement documents in any mandate)

- Prompt payment

o Contractor Risk Management

- Owner-Engineer responsible for integrity of the design

- Contractor does not indemnify Engineer or assume Engineer’s liability for the design, drawings and specifications

- Contractor right to contract price/time adjustment for differing site conditions (aka type I and type II FAR differing site conditions)
- Contractor right to make claims in general

- Contractor right to stop work for non-payment and entitlement to damages for non-payment

  - **Contractor-Engineer Shared Risk Management relative to Shop Drawings**
    - Shop Drawings are not Contract Documents
    - Engineer’s review and approval of shop drawings is for determination that work shown on shop drawing will conform in general to Contract Documents when completed
    - Engineer’s review and approval is not for purposes of determining that Contractor means and methods will produce Work conforming with the Contract Documents
    - Engineer’s review and approval does not extend to safety precautions
    - Contractor must stamp shop drawing to indicate Contractor has reviewed and coordinated contents of submittal with field measurements and conditions, and with other components of the work
    - Contractor is responsible to identify and justify any variations from Contract requirements contained in the shop drawing
    - Engineer is not responsible for any deviations or variations from the Contract requirements not specifically called out by the Contractor

  - **Owner Risk Management**
    - Drawings and Specifications are complementary. No precedence of documents; except Contract Documents take precedence over any referenced standard. All questions of conflict or ambiguity are to be taken to the Engineer of Record for clarification or interpretation.
    - Currency of any referenced standard is the standard in effect on the date of bid
    - No provision of any referenced standard shall be effective to change duties or responsibilities of Owner, Contractor or Engineer from those set forth in the contract documents
• Clear definition of differing site subsurface conditions

• Engineer’s activity on site is to conduct observations to determine that the work is in general conformance with the Contract Documents; Engineer’s observations are for the benefit of the Owner, and contractor can not rely on Engineer’s presence on site

• Or-Equal is implied unless specifically stipulated “no like or equivalent product is acceptable” in the technical section

• Or-Equals and Substitutions are distinctly different concepts with different obligations for both the Contractor and Owner/Engineer

• Owner and Engineer are Additional Insured on all policies of insurance

• Contractor shall Indemnify and Save Harmless Owner from claims arising from Contractor’s activities

• 1-Year Correction Period (sometimes called good repair period) which is different than and separate from the Contractor’s general (implied) warranty

  o Engineer (A/E) Risk Management
    • Importance of risk management and limitation of liability clauses

    • Engineer is not responsible for Contractor’s failure to comply with contract requirements

    • Engineer is not responsible for Contractor’s means, methods, safety precautions and programs

    • Owner and Engineer are Additional Insured on all policies of insurance

    • Engineer as initial (and impartial) interpreter of questions regarding design intent

    • Quasi-judicial immunity - Owner and Contractor will not hold Engineer liable for any decision or interpretation on the intent of the Contract Documents rendered by the Engineer in good faith
- Engineer's activity on site is to conduct observations to determine that the work is in general conformance with the Contract Documents

- Engineer's authorities and responsibilities shall not give rise to any duty to perform them for the benefit of the Contractor

- Only the Owner has stop work authority - Engineer has no stop work authority

- Engineer recommends payment

- Engineer and Engineer's subconsultants are named as Additional Insureds on all policies of insurance

- Contractor shall Indemnify and Save Harmless Engineer and Engineer's subconsultants from claims arising from Contractor's activities

Simply determining that any standard form construction contract documents of any particular organization contains these key clauses will not necessarily be sufficient in approving that organization's documents as an acceptable standard. Subtle differences in the language of the clause can result in differing results in interpretation by the courts. Such an examination of the documents of various organizations publishing standard form documents exceeds the scope of this white paper. Therefore any standards that might be considered relative to appropriateness for statutory mandate should receive the scrutiny of a well-practiced construction law attorney representing the interests of the public good for the full range of construction project types for which such a standard form mandate may apply.

Summary

In sum, a limited criteria which addresses only endorsement of specific associations, will provided limited information concerning the benefit of the use of a specific form document by governmental entity on a given project. A flexible criteria would allow a governmental subdivisions to look at additional criteria including whether documents have been tested on similar projects and have a long established record of success and whether the documents are relevant to the proposed project.
Clark County Water Reclamation District
The District opposes AB 228. First, it is hard to determine, what ramifications there may be, without seeing an example of a sample form.

Second, our contracts are unique, not only to the specific design and construction requirements for wastewater treatment facilities or collection systems, but also include special conditions or provisions relating to environmental permitting, compliance with Federal and State environmental requirements, water quality requirements, and sanitary sewer overflows.

Negotiating contracts or contract language between private sector and public works entities could delay projects, result in further disputes, bid protests and litigation due to difference of opinions and interpretations of the law. These contracts could place additional liabilities on the District, if provisions or conditions relating to our industry, requirements, and/or protections are not allowed to be included.

Public works agencies should not be placed in a position of accepting outside endorsements by other entities with personal gains in the bidding process.
AN ACT relating to public works; requiring a public body to use a standard form construction contract that is endorsed by national associations representing industry professionals for a public work; and providing other matters properly relating thereto.

Revises provisions governing contracts for public works.

http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB228.pdf

negative fiscal impact-indeterminate because of various unknown factors

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Negotiating contracts or contract language between private sector and public works entities could delay projects.
Ms. Andrea Sullivan, NPPSC Co-Chair, and
Ms. Kathy Rainey, NPPSC Co-Chair
Nevada Public Purchasing Study Commission
Carson City Legislative Building
Room 2135
401 South Carson Street
Carson City, NV 89701

RE: A.B. 228 Nevada public agencies’ use of Standard Form Contracts for Public Works Projects

Dear Ms. Sullivan and Ms. Rainey,

We are writing to provide additional information as a follow-up to the AIA Nevada testimony given on June 11, 2012 and the written materials that we have previously submitted.

At the June 11th meeting, Andrea Sullivan asked if any representatives from public entities are included on the AIA Documents Committee and whether they participate in the drafting process of the documents. We have discussed this issue further with our colleagues at AIA National and learned that there is currently one Documents Committee member who works for a public institution and who very much represents the interests of such owners in his participation in the drafting process and review of documents. There are also many Documents Committee members who have large institutional and government clients. In addition, there is an AIA Documents Committee Advisory Group, comprised of architects, owners and contractors, who assist with providing input on industry trends and issues from the viewpoint of those entities in the industry. The owner representatives are from both large private and public institutions.

When the Documents Committee revises existing documents or drafts new documents, they reach out to liaisons who would be directly interested in those documents. For example, when AIA Document B181-1994 was updated and replaced by B108-2009, Owner-Architect Agreement for a Federally Funded or Federally Insured Project, the AIA worked with representatives of HUD and the USDA, two federal agencies that require or recommend the use of that document in some of their programs. During the 2007 A201 family revisions process, liaisons included NASFA and COAA, whose members include public owners. Another liaison is the ABA Forum on the Construction Industry’s Division 12, which is comprised of construction law attorneys who represent owners.
We hope this information will provide assurance that the interests of owners, including public owners, are considered in the document development and drafting process. For a more detailed description of how the AIA Documents Committee works to include the voice of the owner, you may wish to read the attached article titled 2007 AIA Contract Documents®: Key Issues of Interest to Owners. That article can be also be found at http://www.aia.org/groups/aia/documents/pdf/aiab078725.pdf.

As a result of our discussions with the members of the Commission on June 11th, our impression is that some of the larger state agencies and counties have already developed and use their own contracts and may not be interested in switching to the use of standard form documents. That said, we think there are two areas where standard form documents would still be useful. One is for smaller local entities that may prefer the convenience and ease of use of standard form documents. The AIA can work with such entities to help create customized versions of documents that could incorporate their supplemental conditions and that could be published on the AIA’s Documents on Demand service, so that users would not have to purchase AIA software. The other area that we think would be useful for any state entities, large or small, is use of AIA Forms, such as change orders and payment applications, which are already available for purchase in paper, software and on AIA Documents on Demand.

It was noted at the NSPPC meeting that a position statement had been received on the use of ConsensusDOCS. To provide further information for the Committee’s research, we are also submitting, the enclosed letter analysis, submitted to the Iowa Department of Administrative Services, and discussing potential insurance issues related to some of the ConsensusDOCS. We have previously provided the article written by Kent Holland for the Zurich A&E Briefings newsletter discussing differences between AIA documents and ConsensusDOCS.

In closing, AIA Nevada would be pleased to offer assistance regarding use of, or education about, AIA Contract Documents to state or local government entities that wish to use the documents. Thank you for the opportunity to provide this submission, and please let us know if we can be of further assistance.

Yours truly,

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2007 AIA Contract Documents®: Key Issues of Interest To Owners

Suzanne H. Harness, Esq. AIA
Kenneth W. Cobleigh, Esq.

In 2007 the American Institute of Architects released almost 40 new or revised AIA Contract Documents, including two new Digital Practice documents and many new or revised documents in the Conventional or “A201” Family. The 2007 release represents the culmination of nearly four years of work. It includes new or revised documents developed from the study and analysis of current industry trends and practices. The 2007 AIA documents were shaped in large part by input received from industry stakeholders, including over a dozen groups representing owners, contractors, designers, subcontractors, insurance and surety companies, and the attorneys who represent those interests.

Following their release, the 1997 AIA documents were criticized by owner’s groups as being overly friendly to contractors, and owners asserted that their interests were not adequately represented during the development of the 1997 documents. For the 2007 release the AIA made a deliberate effort to solicit input from owner groups, and received feedback from the American Bar Association Forum on the Construction Industry, Division 12: Owners and Lenders; the Commercial Owners Association of America; and the National Association of State Facilities Administrators.

Discussed more fully below are the following key issues of interest to owners addressed in the 2007 AIA Contract Documents:

- Expanded license for use of the architect’s instruments of service
- Express contractual definition of applicable standard of care
- Insurance coverage requirements for architects
• Architect’s indemnity to owners
• Owner as additional insured
• Reasonable restrictions on contractor’s right to demand financing information
• Owner’s right to obtain information regarding payments to subcontractors
• Owner’s right to issue joint checks
• Disclosure requirements for “related party transactions”
• New claim limitations period
• Optional third-party Initial Decision Maker
• Optional binding dispute resolution proceedings
• Liberalized consolidation and joinder provisions

Expanded License for use of Architect’s Instruments of Service

Owners groups criticized the AIA’s 1997 owner-architect agreements for not allowing the owner more liberal use of the architect’s intellectual property (the instruments of service) in the event of a termination of the agreement. The AIA recognized that provisions in AIA agreements written to protect the architect’s ownership rights were confusing and rigid. Those provisions granted the owner a limited license to use the instruments of service only to construct, use or maintain the project. They also required that, following any termination of the agreement, the architect had to be adjudged in default before the owner could use the architect’s instruments of service to complete the project. In 2007 the AIA overhauled these provisions for clarity and added provisions that now allow the owner to have access to the architect’s instruments of service to construct, use, maintain, alter, and add to the project, provided the owner has paid the architect all amounts due. Use of the architect’s instruments of service when the architect is no longer involved, such as following the owner’s termination for convenience or after the project is completed, is without liability to the architect.

(See Appendix A, B101™–2007 § 7.3, § 7.3.1, § 9.8 and § 11.9.)
Express Contractual Definition of the Standard of Care

B101™–2007, Standard Form of Agreement Between Owner and Architect, and the other owner-architect agreements in the A201 family, include a statement of the standard of care pursuant to which the architect’s performance will be measured. In large part, this is an entirely new addition to the owner-architect agreements. The AIA’s 1997 owner-architect agreements contain only a vague reference to a standard of care, noting that “[t]he Architect’s services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Project.”

Generally speaking, like all professionals, an architect must perform its duties consistent with the degree of care and competence generally expected of a reasonably skilled member of the profession. The AIA found, however, that parties often added standard of care language to contracts irrespective of this fact. The AIA also discovered that, in many cases, the general standard of care was misstated. The high occurrence of misstating the standard of care troubled the AIA because it could lead to a general misunderstanding as to the actual standard.

Accordingly, the AIA included a clear and explicit statement of the generally applicable standard of care in its 2007 revisions stating that the architect will perform its services consistent with that level of skill and care ordinarily provided by architects practicing under the same or similar circumstances. (See, e.g. Appendix A, B101–2007 § 2.2.) It is true that from state to state the applicable standard of care may be stated slightly differently, however, the above definition is generally accurate nationwide. Additionally, the definition is sufficiently flexible to adapt to each state’s particular standard of care. It is the AIA’s intent to provide the owner with a better understanding of the common law standard of care for an architect.
Insurance Coverage Requirements for Architects, Including Errors and Omissions Coverage

Another new addition to the A201 Family is the requirement in the owner-architect agreements that the architect maintain insurance. B101–2007 contains a provision requiring the parties to specify the types and limits of insurance the architect is required to maintain. Where those requirements exceed the types or levels of insurance the architect normally maintains, the owner is required to reimburse the architect for the costs of obtaining such excess insurance. (See Appendix A, B101–2007 § 2.5.)

B141™–1997 and B151™–1997 contained a similar requirement that excess insurance the owner required the architect to obtain was a reimbursable expense, however, those documents did not contain an explicit duty on the part of the architect to maintain any minimum levels or types of insurance.

The AIA added this provision after considering a number of factors. Owner’s groups demanded that such a provision be added, and many architects requested that a similar provision be added as well. Traditionally, the AIA omitted any provision regarding insurance requirements, based on the understanding that many architects did not carry insurance. In evaluating the status of the current design industry, however, the AIA reconsidered its position. The AIA found that a vast and overwhelming majority of architects already maintain insurance as part of their regular practices. Additionally, the AIA recognized that it was commonplace in today’s construction industry for owners to require such a provision in the owner-architect agreement. Accordingly, the inclusion of
this requirement makes B101–2007 consistent with the current business climate, and promotes responsible practice on the part of architects.¹

**Architect’s Indemnity to Owners on Large and Complex Projects**

Architects in the AIA Large Firm Round Table² advised the Document’s Committee that on large complex projects, owners were requiring indemnity clauses in their contracts. The AIA added indemnity text to the owner-architect agreement for large or complex projects to provide a standardized indemnity provision. AIA Document B103™–2007, Standard Form of Agreement Between Owner and Architect for a Large or Complex Project, requires that the architect indemnify and hold the owner and the owner’s officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys’ fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of their professional services. The architect’s duty to indemnify the owner is limited to the available proceeds of insurance coverage. (See Appendix A, B103–2007, § 8.1.3.)

**Owner as Additional Insured for Contractor Operations and Completed Operations**

Every edition of A201 since 1911 provided that the contractor procure certain policies of insurance. In 1911, that insurance was referred to as “accident insurance;” today it is called “liability insurance.” Regardless of the title, the insurance was, and is, 

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1 B102™–2007, Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect’s Services, and B103™–2007, Standard Form of Agreement Between Owner and Architect for a Large or Complex Project contain similar insurance provisions.

2 The AIA Large Firm Round Table is affiliated with the American Institute of Architects. For more information visit www.aia.org/about_lfroundtable.
intended to protect the contractor from claims for bodily injury, death and property
damage resulting from the contractor’s operations and completed operations at the site.

This requirement to procure insurance was in furtherance of the longstanding
policy underlying AIA documents, to place risks which are the subject of insurance on
insurance carriers, rather than on the parties to the contract. The insurance requirements
of A201 have always been coordinated with the A201 indemnity provisions relating to
bodily injury and property damage claims arising from the work. Unfortunately, over the
decades, many state legislatures, often at the behest of subcontractor organizations, have
created a crazy quilt of laws relating to the enforceability and interpretation of indemnity
provisions.

In 1997, the AIA attempted to resolve these issues by requiring a newly created
type of insurance policy, called “Project Management Protective Liability Insurance.”
This insurance brought all participants under a single policy, to deal with claims arising
during the work for risks insurable under liability coverages. Unfortunately, this approach
failed and few such policies were purchased. In investigating the reason for the failure,
the AIA discovered that the industry had developed an alternative approach: the
widespread use of “additional insured” endorsements. The AIA found that most owners
were requiring contractors to add the owner and architect as “an additional insured”
under the contractor’s liability policy and that most contractors were doing the same with
regard to their subcontractors. The insurance industry had responded by providing such
endorsements at little or no additional cost.

The AIA has removed the requirement to provide Project Management Protective
Liability Insurance and has replaced it with the solution that the industry developed.
A201™–2007, General Conditions of the Contract for Construction, requires that the contractor add the owner, the architect and the architect’s consultants as additional insureds under the contractor’s general liability policy for liability arising out of the contractor’s negligent acts or omissions during the contractor’s operations, and that the owner be added as an additional insured for liability arising out of the contractor’s negligent acts or omissions during the contractor’s completed operations. (See Appendix A, A201–2007 § 11.1.4.) The required endorsement does not require the contractor’s insurer to cover claims arising solely out the acts or omissions of the owner or architect. Also, the “professional liability exclusion” contained in virtually all general liability policies will be applicable to claims against design professionals, if the claims arise from the design professional’s professional activities, including design. The AIA has considered that the practical effect of this approach may be to cause the indemnity provisions, with the confusing statutory overlays, to become irrelevant to claims covered by the contractor’s liability insurance.

**Reasonable Restrictions on Contractor’s Right to Demand Financing Information Once Construction Begins**

Owner groups expressed serious concerns that the contractor’s right in A201–1997 to request financial information from the owner, and to stop the work upon making such a request, was too broad and contained the potential for misuse. To address that concern, A201–2007 places some restrictions on the contractor’s rights. Importantly, the owner will still be required to provide reasonable evidence that it has made financial arrangements to fulfill its obligations under the contract, and providing such information will remain a condition precedent to commencement or continuation of the work.
However, under A201–2007, once the work commences the contractor can only make such requests if (1) the owner has failed to make payments to the contractor as the contract documents require, (2) a change in the work materially changes the contract sum, or (3) the contractor identifies in writing reasonable concerns regarding the owner’s ability to make payments when due. (See Appendix A, A201–2007 § 2.2.1.)

**Owner’s Right to Obtain Information Regarding Payments to Subcontractors**

A201–2007 expressly provides the owner greater opportunity to learn of contractor-subcontractor payment problems, and to address a contractor’s failure to pay a subcontractor. A201–2007 allows the owner to request written evidence from the contractor that the contractor has properly paid subcontractors. If the contractor fails to furnish such evidence, the owner can contact subcontractors to ascertain whether they have been properly paid. The same is true for payments made to material and equipment suppliers. (See Appendix A, A201–2007 § 9.6.4 and § 9.6.5.)

**Owner’s Right to Issue Joint Checks**

In addition to the owner’s right to obtain information about subcontractor payments, A201–2007 allows the owner to issue joint checks if the architect withholds certification for payment as a result of the contractor’s failure to make payments properly to subcontractors or to lower tier subcontractors and suppliers. (See Appendix A, A201–2007 § 9.5.3.)

**Disclosure Requirements for “Related Party Transactions” in Cost-Plus Contracts**

Revisions to A102™–2007 (formerly A111™–1997), Standard Form of Agreement Between Owner and Contractor where the basis for payment is the Cost of the...
Work Plus a Fee with a Guaranteed Maximum Price, and A103™–2007 (formerly A114™–2001), Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price, require disclosure of “related party transactions.” A “related party” includes a parent, subsidiary, affiliate or other entity having common ownership or management with the contractor; entities in which stockholders, or management employees, of the contractor own an interest; any person or entity with the right to control the business or affairs of the contractor; and any member of the immediate family of any such person. If any of the costs to be reimbursed under the cost-plus contracts arise from a transaction between the contractor and a related party, the contractor must notify the owner of the specific nature of the contemplated transaction before the transaction is consummated or the costs are incurred. The owner then has the right to authorize the transaction. If the owner fails to authorize the transaction, the contractor must competitively procure the work, equipment, goods or services from some person or entity other than the related party.  

New Claim Limitations Period that Follows State Law and Applies to Owners, Contractors, and Architects

Beginning with the 1987 Edition, A201 contained a “contractual” statute of limitations. The limitations period commenced running upon one of three events: substantial completion, final completion, or the date warranty work was corrected. AIA

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3 Revisions to the cost-plus agreements also add new items to the Cost of the Work including reimbursement of bonuses, profit sharing, incentive compensation, discretionary payments, and self-insurance costs, all with prior approval of the owner. Other revisions clarify how to calculate the costs of rental equipment and items not fully consumed performing the work, and grant the owner audit rights in any cost-plus subcontract. Also, the agreements prompt the contractor and owner to insert any limitations on subcontractors’ overhead and profit for changes in the work.
owner-architect agreements included a similar provision, differing in that the third
triggering event was the date when the architect substantially completed its services. By
tying the running of the time period to a certain date, architects and contractors avoided
the uncertainty surrounding the discovery rule, and had the security of knowing a date
beyond which they would not be exposed to potential liability.

These contractual limitations periods were successful in those states where the
issue was tested; however, they resulted in a perceived unfairness to owners, who viewed
the provisions as a substantial and unfair loss of rights in states that follow the discovery
rule. Owners groups urged that the AIA follow applicable state laws. Reacting to the
perceived inequity to owners, but attempting to balance the interests of architects and
contractors that could be exposed indefinitely to liability, the AIA replaced the 1997 text
with a provision requiring that causes of action must be commenced within the period
specified by applicable law, but in no event more than 10 years after the date of
substantial completion of the project. The parties waive all claims not commenced in
accordance with the revised text. These provisions apply to claims among owners,
architects and contractors. (See Appendix A, A201–2007 § 13.7 and e.g. B101–2007 §
8.1.1.)

Option for the Owner and Contractor to Name Someone Other than the Architect
as the Initial Decision Maker

The AIA received many comments about the traditional role of the architect in
making initial decisions on claims between the owner and contractor as a condition
precedent to mediation, arbitration or litigation. An initial decision on claims can help
keep the project moving, and can circumvent protracted negotiations leading nowhere.
Despite its merits, owner groups noted that owners don’t particularly like it when architects make decisions against them. Contractors voiced the opinion (not shared by architects) that architects cannot be impartial. Architects, though believing that an architect’s initial decision is in the best interest of the project, admitted they do not like being caught in the middle. In order to address these concerns, the AIA brought into the A201 Family a concept it initially developed for the 2004 Design-Build Family, the appointment of a third-party neutral. The 2007 owner-contractor agreements ask the owner and contractor to identify a neutral third-party Initial Decision Maker (IDM). (See Appendix A, A101™-2007 § 6.1.) The architect will act as the IDM if the owner and contractor do not identify someone else. (See Appendix A, A201-2007 § 15.2.1.)

**Option to Select a Binding Dispute Resolution Proceeding Other than Arbitration**

In A201–2007, as in A201–1997, an initial decision is a condition precedent to mediation, and mediation is a condition precedent to any other form of dispute resolution. However, for the first time in an AIA owner-contractor agreement, 2007 AIA agreements require the owner and contractor to select among arbitration, litigation or some other method of binding dispute resolution for any dispute they cannot settle in mediation. The same requirement is found in the 2007 owner-architect agreements. Both mediation and arbitration, unless the parties agree otherwise, will be administered by the American Arbitration Association. The parties are asked to select the binding dispute resolution procedure through the use of a checkbox similar to the following:
§ 6.2 BINDING DISPUTE RESOLUTION
For any Claim subject to, but not resolved by, mediation pursuant to Section 15.3 of AIA Document A201–2007, the method of binding dispute resolution shall be as follows:
(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

☐ Arbitration pursuant to Section 15.4 of AIA Document A201–2007
☐ Litigation in a court of competent jurisdiction
☐ Other (Specify)

Liberalized Consolidation and Joinder Provisions if Arbitration is the Chosen Binding Dispute Resolution Procedure
The revised A201–2007 also provides for more liberal consolidation of related arbitration proceedings. This includes the ability of the owner, at its election, to consolidate an arbitration involving itself and the contractor with an arbitration involving itself and the architect or some other person or entity. Similarly, the contractor, at its election, can consolidate an arbitration involving itself and the owner with an arbitration involving itself and a subcontractor or supplier. Parties to arbitrations consolidated in this manner may also consolidate other arbitrations to which they are a party, so the potential exists for all disputes sharing the same common issues to be resolved in one arbitration. Parties may also agree to voluntary joinder, and the AIA has removed the prohibition on the joinder of the architect. (See Appendix A, A201–2007 § 15.4.1 and § 15.4.4, and B101–2007 § 8.3.1 and § 8.3.4.)

If you have any questions about this article or any AIA Contract Document, write to docinfo@aia.org, or call 202.626.7526.
Appendix A
Key terms and Provisions of Interest to Owners

**A101™ – 2007**
*Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum*

§ 6.1 INITIAL DECISION MAKER
The Architect will serve as Initial Decision Maker pursuant to Section 15.2 of AIA Document A201–2007, unless the parties appoint below another individual, not a party to this Agreement, to serve as Initial Decision Maker.
*(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)*

**A102™ – 2007**
*Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*

§ 7.8 RELATED PARTY TRANSACTIONS
§ 7.8.1 For purposes of Section 7.8, the term “related party” shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Contractor; any entity in which any stockholder in, or management employee of, the Contractor owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Contractor. The term “related party” includes any member of the immediate family of any person identified above.

§ 7.8.2 If any of the costs to be reimbursed arise from a transaction between the Contractor and a related party, the Contractor shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Contractor shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Article 10. If the Owner fails to authorize the transaction, the Contractor shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Article 10.

**A201™ – 2007**
*General Conditions of the Contract for Construction*

§ 2.2.1 Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the
Owner’s ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 9.5.3 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

§ 9.6.5 Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 11.1.4 The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect’s Consultants as additional insureds for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s completed operations.

§ 13.7 TIME LIMITS ON CLAIMS
The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7.

§ 15.2 INITIAL DECISION
§ 15.2.1 Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker’s sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the
Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner’s expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 15.4.4 CONSOLIDATION OR JOINDER

§ 15.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Contractor under this Agreement.
§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

§ 2.5 The Architect shall maintain the following insurance for the duration of this Agreement. If any of the requirements set forth below exceed the types and limits the Architect normally maintains, the Owner shall reimburse the Architect for any additional cost:

(Identify types and limits of insurance coverage, and other insurance requirements applicable to the Agreement, if any.)

.1 General Liability

.2 Automobile Liability

.3 Workers’ Compensation

.4 Professional Liability

§ 7.3 Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect’s consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner’s consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

§ 7.3.1 In the event the Owner uses the Instruments of Service without retaining the author of the Instruments of Service, the Owner releases the Architect and Architect’s consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner’s use of the Instruments of Service under this Section 7.3.1. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.

§ 8.1.1 The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

§ 8.3.1 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement, any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement. A demand for arbitration
shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration.

§ 8.3.4 CONSOLIDATION OR JOINDER

§ 8.3.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 8.3.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 8.3.4.3 The Owner and Architect grant to any person or entity made a party to an arbitration conducted under this Section 8.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Architect under this Agreement.

§ 9.8 The Owner’s rights to use the Architect’s Instruments of Service in the event of a termination of this Agreement are set forth in Article 7 and Section 11.9.

§ 11.9 COMPENSATION FOR USE OF ARCHITECT’S INSTRUMENTS OF SERVICE

If the Owner terminates the Architect for its convenience under Section 9.5, or the Architect terminates this Agreement under Section 9.3, the Owner shall pay a licensing fee as compensation for the Owner’s continued use of the Architect’s Instruments of Service solely for purposes of completing, using and maintaining the Project as follows:

B103™ – 2007

Standard Form of Agreement Between Owner and Architect for a Large or Complex Project

§ 8.1.3 The Architect shall indemnify and hold the Owner and the Owner’s officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys’ fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. The Architect’s duty to indemnify the Owner under this provision shall be limited to the available proceeds of insurance coverage.
December 29, 2011

Iowa Department of Administrative Services
T. Ryan Lamb, Legal Counsel
Hoover Building, Third Floor
1305 E. Walnut
Des Moines, IA 50319

RE: Insurability and Risk Allocation under ConsensusDOCS 803

Dear Ryan:

I am writing to comment on certain insurability and risk allocation issues presented by the use of ConsensusDOCS 803. As currently proposed, ConsensusDOCS 803, the Iowa Department of Administrative Services’ (“DAS”) Standard Supplemental Terms and Conditions, and General Terms and Conditions for Service Contractors/Solicitations collectively contain uninsurable requirements and substantially change the allocation of risk on construction projects.

**Insurability**

1. **Trust and confidence.** Section 2.2 of ConsensusDOCS 803 provides for a relationship of “trust and confidence” between DAS and the Design Professional and a promise “to work together on the basis of mutual trust, good faith and fair dealing.” Professional Liability Policies generally provided coverage for breaches of professional duties, which is “negligence, defined as the failure to meet the professional standard of care legally required or reasonably expected under the circumstances in the performance or non-performance of Professional Services...” There likely is no coverage for breaches of a relationship of trust and confidence or mutual trust, good faith and fair dealing because such breaches are not negligence under Iowa law. Professional negligence in Iowa is the failure to exercise “the degree of skill, care and learning ordinarily possessed and exercised by members of that profession in good standing in similar circumstances.” *Karnes v. Keffer*.
Overton Assocs., No. 01-244/00-191 (Iowa Ct. App. Nov. 16, 2001). To the extent the relationship of trust and confidence or the promise of mutual trust, good faith and fair dealing imposes a requirement on the Design Professional in excess of ordinary skill, care, and learning, there is no insurance for such breaches.

2. Warranty and guarantee. Professional Liability Policies typically contain exclusions for "any express warranty or guarantee unless liability would have attached to the Insured in the absence of an express warranty or guarantee and such liability arises out of a Breach of Professional Duty by the Insured in the performance of Professional Services." The standard exclusion of warranties and guarantees means there is no insurance for the following warranties and guarantees contained in ConsensusDOCS 803:

2.1. Compliance with codes, laws, and regulations. Section 3.2.5 of ConsensusDOCS 803 requires that the drawings and specifications "comply with applicable codes, laws and regulations enacted at the time of their preparation at the location of the Project." Section 10.11 imposes a similar requirement. There is no insurance for such a guarantee. Furthermore, the Design Professional should not be required to make such guarantees. For example, the Americans with Disabilities Act (ADA) may in the future be interpreted by a court in a way the Design Professional cannot anticipate. Another example is that the Design Professional may be faced with conflicting regulations; ADA requirements may come into conflict with the Occupational Health and Safety Administration requirements. The Design Professional is not in a position to guarantee compliance with all codes, laws, and regulations. The Design Professional should only be required to put forth reasonable professional efforts to attempt to incorporate the requirements of the codes, laws, and regulations into the design.

2.2. Necessary revisions to secure approvals. Additionally, the requirement that the Design Professional make every revision necessary to secure governmental approvals in section 3.2.5 could be interpreted as a guarantee that the governmental authority will approve the project. There is no insurance for such a guarantee. Moreover, the Design Professional should not be required to guarantee something that is beyond its control.

2.3. Qualifications of Consultants. Section 3.4 requires the Design Professional to warrant and represent that its consultants are "duly qualified." In the normal course of business, the Design Professional will select qualified consultants. Under Iowa Administrative Code rule 193–8.2(2), there is the requirement that consultants shall "undertake to perform engineering or land surveying assignments only when qualified by education or experience in the specific technical field of professional engineering or land surveying involved." Because the Iowa Administrative Code contains detailed and specific regulations about qualifications for the performance
of design services, this matter is better left to the Examining Board than
the vague warranty to only hire “duly qualified” consultants.

3. Indemnity. The indemnity provision in section 7.1 of ConsensusDOCS 803
contains several uninsurable provisions. A standard exclusion in professional liability
policies is for claims “based upon or arising out of the liability of others assumed by the
Insured under any contract or agreement including, but not limited to, hold harmless and
indemnity clauses . . .; however, this exclusion shall not apply to liability an Insured would
have in the absence of the contract or agreement by reason of Wrongful Act of the Insured
in the performance of Professional Services.” This standard exclusion means there may be
no insurance coverage for the following indemnity provisions:

3.1. Consultants and agents. In section 7.1.1, the Design Professional promises to
indemnify DAS and certain independent contractors of DAS, such as
DAS's consultants and agents. At common law, the Design Professional
owes a duty to DAS as the owner, however, the Design Professional may
or may not owe a duty to DAS's consultant and agents. If the Design
Professional's only obligation to DAS's consultants and agents is duty to
indemnify, there is no insurance coverage for this indemnity obligation.
For this reason, DAS’s consultant’s and agent’s remedy against the Design
Professional should be in tort and the Design Professional should not be
required to indemnify anyone except DAS and DAS's officers, directors,
members, and employees.

3.2. Reasonable attorney’s fees. The general rule is that attorney’s fees are not an
element of recovery in negligence claims, at least in the absence of a
statute or contract that provides for the recovery of attorney’s fees.
Accordingly, any agreement by the Design Professional to pay for
attorney’s fees is liability assumed under contract, for which there is no
insurance. There is no professional liability insurance coverage for
“reasonable attorneys’ fees” in section 7.1.1.

3.3. Defense costs. Similarly, section 7.1.2 provides for the reimbursement of
DAS for “defense costs paid above [DAS's] percentage of liability for the
underlying claim.” In the event section 7.1.2 were to be interpreted to
require the Design Professional to be the party responsible for
reimbursement (section 7.1.2 provides DAS shall be reimbursed, however,
it never identifies the party responsible for the reimbursement), the Design
Professional has no coverage under the professional liability policy for
reimbursement of DAS's defense costs.

3.4. Delays by Design Professional. Section 5.2 requires the Design Professional to
indemnify DAS for delay damages—including claims for constructive
acceleration—accrued “by reason of any error, inconsistency or omission
of the Design Professional which violated the applicable standard of care.”
The applicable standard of care does not require plans and specifications
entirely without imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies. Section 5.2 fails to recognize that delays will occur on construction projects even with nearly perfect plans and specifications. The indemnity obligation will have the effect of making the Design Professional liable for all imperfections in the plans and specifications, even though the applicable standard of care permits some imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies.

3.5. Claim, obligation, or lien. Although section 6.3.3 does not use the phrase “indemnify” or “hold harmless,” section 6.3.3 will operate to require the Design Professional to indemnify and hold harmless DAS from and against claims by trade contractors for additional compensation arising from “the negligent performance of the Design Professional’s Services.” Similar to section 5.2 in the context of delay damages, section 6.3.3 attempts to transfer the entire responsibility for any increase in construction cost to the Design Professional. There will not be insurance coverage available for this type of indemnity claim unless DAS can recover in negligence for the damages. Because there is only insurance coverage for tort claims, DAS should simply bring the claim in tort instead of attempting to seek indemnity. DAS’s claim is much more like a tort claim than a restitution claim, for which indemnity is appropriate.

4. Design Professional Insurance. The insurance requirements in section 7.2 of ConsensusDOCS 803 impose certain requirements that generally cannot be obtained.

4.1. Services. Section 7.2.1 requires the Design Professional to obtain insurance for “claims arising out of the performance of Services under this Agreement.” ConsensusDOCS 803 defines “Services” as “the “Services provided by the Design Professional or by consultants retained by the Design Professional for the Project.” In certain circumstances the definition of Services in ConsensusDOCS 803 may be broader than the definition of Professional Services in professional liability policies, which is “those services that the insured is legally qualified to perform for others in their capacity as an architect, engineer, land surveyor, landscape architect, Agency Construction Manager,” or as otherwise defined. To the extent the Design Professional could potentially provide services other than Professional Services, as the phrase is defined in the professional liability policy, there is no insurance coverage for liability arising from these non-Professional Services.

4.2. Maximum allowable deductible. Section 7.2.4 sets the maximum allowable deductible for professional liability insurance. Different firms have different deductibles, based on many factors including its revenue and claims history. The deductible amount is not of consequence to DAS because the insurer is liable for any judgment regardless of the payment of
the deductible by the insured. The maximum allowable deductible should be decided by the insured based on its tolerance for risk without a one-size-fits-all requirement imposed by DAS.

4.3. Prior acts coverage. Section 7.2.4 also requires the purchase of “prior acts coverage.” Typically, prior acts coverage is only needed when a Design Professional switches professional liability insurers. This prior acts coverage requirement is inappropriate for the over ninety percent of Design Professionals that do not switch carriers during a project. Alternative language could require the Design Professional to maintain professional liability insurance for the duration of the project or to purchase prior acts coverage if the Design Professional switches carriers.

4.4. Ten-year tail coverage. Section 7.2.6 requires the Design Professional to maintain the professional liability insurance policy for ten years after final payment. No Design Professional can be certain that insurers will offer insurance in the future. The best commercially-available product is three-year tail coverage. The requirement of maintenance of insurance for ten years should be changed to three years.

As currently drafted, ConsensusDOCS 803, the Iowa Department of Administrative Services’ (“DAS”) Standard Supplemental Terms and Conditions, and General Terms and Conditions for Service Contractors/Solicitations contains numerous uninsurable provisions. Other provisions require insurance that is not commercially available. The inclusion of so many uninsurable provisions poses a threat to the viability of Design Professional firms in Iowa.

Risk Allocation

1. Trust and confidence. In addition to the insurability issues presented by section 2.2 of ConsensusDOCS 803, the contractual requirement that the Design Professional “accept the relationship of trust and confidence,” further “the interest of [DAS],” and the relationship be based on “mutual trust, good faith and fair dealing” has several consequences, including (1) exposing the Design Professional to significant potential liability and (2) significantly changing the relationship of the Design Professional to the owner and contractors.

First, a relationship of trust and confidence creates the possibility of a fiduciary relationship between DAS and the Design Professional. See Cemen Tech., Inc. v. Three D Indus., L.L.C., 753 N.W.2d 1, 13 (Iowa 2008) (describing a fiduciary relationship as “[a] ‘fiduciary relation’ arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.”). Disputes arising out of construction projects should be resolved based on the contractual relationships agreed to by the parties. The disputes should not be governed by nebulous concepts, such as
fiduciary duties. The introduction of relationships of trust and confidence will introduce more uncertainty into the resolution of construction claims.

Second, the traditional role of Design Professionals is not to show partiality to the Owner. For example, under AIA B101–2007, "[w]hen making such interpretations and decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions rendered in good faith." ConsensusDOCS 803 is different. ConsensusDOCS 803 requires the Design Professional to show partiality to DAS because the Design Professional must act to further the interest of DAS. The shift from the Design Professional as an impartial interpreter of the contract documents to a partial advocate of DAS's interest will result in many more claims by contractors against both DAS and the Design Professionals.

2. **Design Intent.** The Design Professional's role as contemplated by ConsensusDOCS 803 is substantially reduced. Under the ConsensusDOCS, the Design Professional will have no direct communication with DAS. Also, the Design Professional will not have involvement with change orders, unless requested by the Construction Manager. (This begs the question who on behalf of the Construction Manager, Trade Contractor, and DAS has the necessary license to modify a set of stamped plans and specifications and who will assume the associated liability for such change.) Because the Design Professional's role is more limited, the Design Professional's design intent may not be implemented properly.

3. **Standard of care.** ConsensusDOCS 803 section 2.2 contains an incomplete definition of the standard of care expected of Design Professionals in Iowa. In relevant part, it provides: "The Design Professional represents that it possesses the requisite skill, expertise, and licensing to perform the required Services." Some better language regarding the standard of care that is consistent with Iowa law is "in providing Services, the Design Professional shall perform in a manner consistent with that degree of skill, care and learning ordinarily possessed and exercised by members of that same profession currently practicing under similar circumstances at the same time and in the same or similar locality." This more accurately reflects the requirements of Iowa law.

4. **Estimating and bidding.** Under ConsensusDOCS 801 and 803, the Construction Manager is primarily responsible for cost estimating. Yet, ConsensusDOCS 803 does not include a provision that provides the Design Professional can reasonably rely on the Construction Manager's cost estimates. To the contrary, section 3.2.8.1 provides the Design Professional will be required to modify the Contract Documents without compensation if the bids received exceed the final approved estimate. If the bids received exceed the final approved estimate, the costs of the modifications should be borne by the Construction Manager because the Construction Manager is primarily responsible for cost estimating under the ConsensusDOCS.

5. **Coordination.** Section 3.2.6 provides the Design Professional shall be responsible for coordination with DAS’s own consultants. The Design Professional should
be responsible for coordination of its own consultants, however, without the power of the purse to control DAS's consultant, the Design Professional lacks the necessary tools to assume responsibility for coordination. To the extent DAS brings its own consultants to the project, DAS should be responsible for coordinating the efforts of its own consultants.

6. **Safety.** Even though the first sentence of section 3.2.9.4 disclaims that the Design Professional has responsibility for safety, the rest of the section places some responsibility for safety on the Design Professional. As a result, in personal injury cases arising out of construction projects, plaintiff attorneys will use section 3.2.9.4 to attempt to argue the Design Professional had some responsibility for safety. AIA B101—2007 section 3.6.1.2 could be modified to address this issue:

   The Design Professional shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Project, nor shall the Design Professional be responsible for the Construction Manager’s or Trade Contractor’s failure to perform the work in accordance with the requirements of the Contract Documents. The Design Professional shall be responsible for the Design Professional’s negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Construction Manager or Trade Contractor or of any other persons or entities performing portions of the Project.

Similar language should be included in the supplemental conditions.

7. **Ownership of Tangible Documents.** Pursuant to Article 10, DAS intends to take ownership of “the property rights, except for copyrights, of all documents, drawings, specifications, electronic data, and information.” For several reasons, this language is in tension with the Architectural Work Copyright Protection Act. For DAS’s actual purposes—the repair and maintenance of the facility—a nonexclusive license to use the instruments of service for a limited purpose may be more appropriate.

8. **Venue.** Sections 9.5.2 and 10.4 provide for venue for all disputes between DAS and the Design Professional in Polk County, Iowa. This is in some tension with Iowa Code section 573.16, which provides for resolution of 573 claims in the county were the improvement is located. To the extent DAS expects the Design Professional to participate in claims filed by subcontractors, sub-subcontractors, and materials suppliers as contemplated by section 6.3.3, the Design Professional will not be participating where the claim has been filed because all disputes involving the Design Professional will be venued in Polk County.
Both AIA Iowa and ACEC Iowa share the concerns set forth in this letter. Please contact me with questions or concerns.

Very truly yours,

[Signature]

Jeffrey A. Stone

JAS/mc
Simmons Perrine Moyer Bergman PLC
T. Ryan Lamb
December 29, 2011
Page 9

bcc: Ricky Seely
     Dave Scott
     Bill Dikis
     Paula Dixon
     Ben Hildebrandt
     Tom Hayden
Appendix 4:

Nevada Public Purchasing Study Commission – Meeting Minutes Where AB 228 Testimony was on the Agenda:

1) February 13, 2012
2) March 12, 2012
3) April 9, 2012
4) May 14, 2012
5) June 11, 2012
February 13, 2012
I. Call to order and welcome

II. Attendance:

A. North
   Dan Marran, City of Sparks
   Joe Gabica, Washoe County School District
   Justine Chambers, Truckee Meadows Water Authority
   Shannon Berry, State of Nevada Purchasing
   Holly Luna, Douglas City School District

B. South
   Kathy Rainey, City of Las Vegas
   Susan Hobbes, Clark County Department of Aviation
   Kim Grantham, Clark County Water Reclamation
   Adleen Stidhum, Clark County
   Jim Haining, University Medical Center
   Penny Marchell, Las Vegas Convention and Visitor Authority
   Sharon Haught, Regional Transportation Commission of Southern Nevada
   Sheila Thompson, City of North Las Vegas
   Thomas Borland, Las vegas Valley Water District

C. Guests
   Mark Leavitt, Operative Plasterers and Cement Masons
   Modesto Gaxiola, (Unidentified) Laborers Organization

III. Approval of Agenda

   Moved/Seconded/Approved

IV. Approval of Minutes from the December 12, 2011 meeting

   Moved/Seconded/Approved

V. Public Comments

   None

VI. Discussion of Continued Impact of Purchasing Bills from 2011 Legislative Session

   1) There was discussion concerning the letter authored by the Legislative Council Bureau (LCB) to Assemblywoman Marilyn Kirkpatrick concerning interpretation of AB 144. There continues to be different interpretations in Southern Nevada concerning when the requirements of the preference program under AB 144 should apply.
2) There continue to be issues in multiple agencies with contractors not meeting the new self-listing requirement as a result of the changes made to NRS 338.141 via SB 268. Attempts to mitigate future problems are being attempted via additional dialog at pre-bid meetings as well as courses to be offered in northern Nevada through the AGC.

3) While the preference program authorized by SB 268 has yet to come to fruition, the reporting requirements for new contracts specific to professional engineers, architects and designers built in to SB 268 may still apply. The professional boards for each type of professional may have already established forms for local agencies to report their design contracts. At this time, the following organizations have designed forms and/or websites to report design contracts (per SB 268):

a) Nevada State Board of Professional Engineers and Land Surveyors
b) Nevada State Board of Architecture, Interior Design and Residential Design

VII. Discussion of AB 228 (Taken out of order – prior to Item VI)
   A. Review of Letter to Unions and Associations (attached)
      The letter has been distributed to the mailing list included with the letter.

   B. Opportunity for Public Testimony Specific to AB 228
      1) Mr. Modesto Gaxiola, representing a labor organization in Southern Nevada that is a member of the Southern Nevada Building and Trades Council spoke at the invitation of the letter distributed, concerning AB 228. Mr. Gaxiola indicated that his organization is in favor of requiring local agencies to use “Project Labor Agreements” (PLA’s) when contracting for public works. It was his opinion that a PLA could be used to guarantee that all contractors play by the same rules.

      2) Mr. Mark Leavitt, representing the Operative Plasterers and Cement Masons spoke at the invitation of the letter distributed, concerning AB 228. Mr. Levitt also supported the concept of a PLA due to the belief that the use of such an agreement would provide for contractors playing by the same set of rules.

      The Study Commission did not comment on the testimony offered under this item.

VIII. Miscellaneous – Good of the Order
      1) An update was offered from the City of Sparks concerning the policy discussion regarding preference policies.

      2) A discussion occurred regarding ongoing problems in multiple agencies concerning issues with obtaining bonding on contractors, correct insurance, the prompt/correct payment of sub-contractors, certified payroll issues and continuing prevailing wage reporting and investigations.

      3) A reminder was offered concerning the e-mail list of the Commission and the fact that the e-mail distribution list includes individuals/firms that are interested in agenda materials. Therefore, discussion of purchasing practices and other business not specifically about the NPPSC should be taken to the more general Nevada State Purchasing List Serve.

      4) The City of North Las Vegas will be holding a Vendor Expo at 10:30AM on April 18, 2012. Other local agencies are welcome to participate.

      5) The City of Las Vegas City Hall is relocating this week, therefore the posting address for future agendas will reflect the new address.
IX. Public Comments

None

X. Next meeting date is March 12, 2012.

XI. Adjournment

Moved/Seconded/Approved

This agenda is posted at:

Clark County Purchasing & Contracts Division
500 S. Grand Central Parkway, 4th Floor
Las Vegas, NV 89155

City of Las Vegas
City Hall Plaza
495 Main St.
Las Vegas, NV 89101

Washoe County School District
Brown Center
14101 Old Virginia Road
Reno, NV 89521

City of Sparks – City Hall
431 Prater Way
Sparks, NV 89431

NEVADA PUBLIC PURCHASING STUDY COMMISSION
(NRS 332.215)
Consisting of
Northern Nevada Consortium for Cooperative Purchasing
and
Public Purchasing Professionals Association

MEETING DATES

2012
January 9, 2012
February 13, 2012
March 12, 2012
April 9, 2012
May 14, 2012
June 11, 2012
July 9, 2012
August 13, 2012
September 10, 2012
October 8, 2012
November 12, 2012 (HOLIDAY)
December 10, 2012
March 12, 2012
MINUTES
March 12, 2012

I. Call to order and welcome

II. Attendance:

A. North
   Andrea Sullivan, Washoe County School District
   Elisa Rizzo, RTC
   Joe Gabica, Washoe County School District
   Justine Chambers, TMWA
   Susan Ball Rothe, City of Reno
   Terri Svetich, City of Reno
   Holly Luna, Douglas County School District

B. South
   Al Nayola, City of North Las Vegas (Note: Ron Corbett will be attending in the future)
   Jim Haining, University Medical Center
   Kathy Rainey, City of Las Vegas
   Kim Grantham, Clark County Water Reclamation
   Mari Bochanis, Southern Nevada Water Authority
   Penny Marchell, Las Vegas Convention and Visitors Authority
   Sharon Haught, RTC of Southern Nevada
   Sharri Mayden, UNLV
   Tom Nacos, Clark County School District
   Yoli Jones, Clark County

III. Approval of Agenda

Moved/Seconded/Approved

IV. Approval of Minutes from the February 13, 2012 meeting

Moved/Seconded/Approved

V. Public Comments

None

VI. Discussion of AB 228 - Opportunity for Public Testimony Specific to AB 228

Bob Sepold (sp?) from the EJC Committee wants to provide testimony to our group. They are not interested in general language, they are more interested in language specific to engineering construction and will provide our group a white paper for review by June 1st

Nevada Public Purchasing Study Commission - AB 228 Report
We have received opinions from Agencies with no support for Standard Contract documents.

The City of Reno is hesitant for standard contract that has to be paid for by the agencies. They are also concerned about agency regulations and specific rules that apply to each agency.

The group anticipates that it will take six months to compile the information received. All attendees of the meeting are encouraged to ensure that their agency submits a response to the group.

Dan will be asked to send out a copy of the letter and the final addresses to the membership.

The process:
- 6 meetings of public testimony (this is the 2nd)
- Compile data
- report due to the legislature on 12/31/12

VII. Discussion of Continued Impact of Purchasing Bills from 2011 Legislative Session

Talley of rejected bids due to new preference (all Nevada Contractors being awarded the contract over another Nevada Contractor)

<table>
<thead>
<tr>
<th>Agency</th>
<th>Number</th>
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<tbody>
<tr>
<td>City of Reno</td>
<td>1</td>
</tr>
<tr>
<td>WCSD</td>
<td>3</td>
</tr>
<tr>
<td>TMWA</td>
<td>1</td>
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</tbody>
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The City of Reno recently had to reject a bid because the Prime Contractor didn't list their company for the work they would be completing.

Many agencies throughout the State are having the same issues with the new statutes.

Subcontractor substitution in the new Statute means that we need to police who the subs are on a project. Some agencies are sending letters to project managers and to subs informing them who is listed as a sub on the project. Others verify through Certified Payroll.

Dan Marran and Justine Chambers will be meeting at the AGC to discuss with contractors the changes to the Statutes in a round table forum in the next few weeks.

A reminder was made that the notification requirements to the State Board of Engineer’s and Architects are in effect. Although, the regulations haven’t been passed, they are accepting award notifications to be posted to their website.

VIII. Miscellaneous – Good of the Order

IX. Public Comments

None

X. Next meeting date is March 12, 2012.

XI. Adjournment

Moved/Seconded/Approved
This agenda is posted at:

Clark County Purchasing & Contracts Division
500 S. Grand Central Parkway, 4th Floor
Las Vegas, NV 89155

City of Las Vegas
City Hall Plaza
495 Main St.
Las Vegas, NV 89101

Washoe County School District
Brown Center
14101 Old Virginia Road
Reno, NV 89521

City of Sparks – City Hall
431 Prater Way
Sparks, NV 89431

NEVADA PUBLIC PURCHASING STUDY COMMISSION
(NRS 332.215)
Consisting of
Northern Nevada Consortium for Cooperative Purchasing
and
Public Purchasing Professionals Association

MEETING DATES

2012
April 9, 2012
May 14, 2012
June 11, 2012
July 9, 2012
August 13, 2012
September 10, 2012
October 8, 2012
November 12, 2012 (HOLIDAY)
December 10, 2012
April 9, 2012
I. Call to order and welcome

II. Attendance:

A. North
   Andrea Sullivan, Washoe County School District
   Justine Chambers, TMWA
   Honey Charla, City of Reno
   Susan Ball Rothe, City of Reno

B. South
   Jim Haining, University Medical Center
   Ron Corbett, City of North Las Vegas
   Kathy Ogle, City of Henderson
   Kathy Rainey, City of Las Vegas
   Mari Bochanis, Southern Nevada Water Authority
   Sharon Haught, Regional Transportation Commission of Southern Nevada
   Susan Hobis, Clark County Department of Aviation
   Thomas Borland, Las Vegas Valley Water District
   Tom Nacos, Clark County School District
   Yoli Jones, Clark County
   Paula Gonsolas, UNLV

III. Approval of Agenda

   Moved: Justine Chambers / Seconded: Yoli Jones/Approved

IV. Approval of Minutes from the February 13, 2012 meeting

   Moved: Justine Chambers / Seconded: Jim Haining/Approved

V. Public Comments

   None

VI. Discussion of AB 228 - Opportunity for Public Testimony Specific to AB 228

   No Testimony given - no public attended.
VII. Discussion of Continued Impact of Purchasing Bills from 2011 Legislative Session

The AGC, City of Sparks, and TMWA are having a round table discussion on May 10th at 2:00 p.m. to discuss what has changed in the last year for public works bidding. Kathy Rainey wanted to know if minutes would be kept for the meeting and would like if copy if they are. Several members of the group wanted a copy of the flyer sent to their agencies.

City of Las Vegas reported they haven't had any issues.

Is the Engineer’s Board providing preference certificates yet? Clark County reported that they know they are not providing the certificates yet. They are aware of this because they have a problem with the posting form which says to post after award of contract and the statute says to post before.

VIII. Miscellaneous – Good of the Order

It is time to think about next session and resurrection of NRS 332 BDR without the unwanted language that was added last session.

NRS 338: Agencies are having problems with the penalties being waived in prevailing wage investigations. The actually penalty assessed doesn't cover the cost of investigation. The Public Works “watchdog” group in County of Las Vegas isn't going as well as they had hoped with monitoring prevailing wage projects.

Volunteers for Sub-Committees were requested and the following expressed interest in:

NRS 332  Tom Nacos, Chair
Andrea Sullivan
Kathy Rainey
Thomas Borland
Yoli Jones

NRS 338 Kathy Rainey, Chair
Yoli Jones
Justine Chambers
Kathy Ogle
Susan Hobis,
Honey Charla
Penny Marchell (volunteered in their absence)
Dan Marran (volunteered in their absence)

It was mentioned that the school districts had expressed interest in receiving the letter regarding AB 228 and that they weren’t included in the original distribution since the statute was specific to public works. Kathy Rainey said it would be distributed to all 17 counties.

IX. Public Comments

None

X. Next meeting date is May 14, 2012

XI. Adjournment

Moved: Justine Chambers/Seconded: Jim Haining /Approved
This agenda is posted at:

Clark County Purchasing & Contracts Division
500 S. Grand Central Parkway, 4th Floor
Las Vegas, NV 89155

City of Las Vegas
City Hall Plaza
495 Main St.
Las Vegas, NV 89101

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NEVADA PUBLIC PURCHASING STUDY COMMISSION
(NRS 332.215)
Consisting of
Northern Nevada Consortium for Cooperative Purchasing
and
Public Purchasing Professionals Association

MEETING DATES

2012
June 11, 2012
July 9, 2012
August 13, 2012
September 10, 2012
October 8, 2012
November 12, 2012 (HOLIDAY)
December 10, 2012
May 14, 2012
MINUTES
Monday, May 14, 2012

I. Call to order and welcome

II. Attendance:

A. North
   Andrea Sullivan, Washoe County School District
   Dan Marran, City of Sparks
   Holly Luna, Douglas County School District
   Joe Gabica, Washoe County School District
   Justine Chambers, Truckee Meadows Water Authority

B. South
   Jean Hutton, Clark County Water Reclamation
   Jim Haining, University Medical Center
   Kathy Ogle, City of Henderson
   Kathy Rainey, City of Las Vegas
   Kim Grantham, Clark County Water Reclamation
   Penny Marchell, Las Vegas Convention and Visitor Authority
   Ron Corbett, City of North Las Vegas
   Sharon Hauht, Regional Transportation Commission of Southern Nevada
   Susan Hobbes, Clark County Department of Aviation

III. Approval of Agenda (for possible action)
      Moved/Seconded/Approved

IV. Approval of Minutes from the April 9, 2012 meeting (for possible action)
      Moved/Seconded/Approved

V. Public Comments:
      None

VI. Discussion of AB 228

A. Opportunity for Public Testimony Specific to AB 228
      None

VII. Discussion of Continued Impact of Purchasing Bills from the 2011 Legislative Session

   AB144 – The Southern Nevada section of the AGC has started a committee to discuss potential
   changes that may be proposed to the law, originally altered by AB 144 of the 2011 session. Proposed
   changes coming from this committee of contractors and local agencies would potentially
   be proposed during the 2013 session. The group has established a schedule to meet every other
   week and includes some members of the study commission who will continue to report back.

   There was additional discussion of the immediate impact of the new preference language. In all
cases where the preference has affected the outcome (ranking) of bids, it has done so in awarding the contract to one NV firm over another NV firm (that does not request preferential consideration) and results in the local government paying more than the market requires for the work being bid.

**AGC (North) Workshop** – There was a review of the workshop discussion held at the Northern Nevada Section of the AGC on May 10th. The session was led by Dan Marran (City of Sparks) and Justine Chambers (TMWA) and offered as a review of the new rules that came from the 2011 Legislative Session that have affected bids in the region. The focus of the workshop was on the continued use of the Certificate of Eligibility for bidder's preference in light of AB 144, self-listing and other reporting requirements due to SB 268 and new retention rules. The workshop did not touch on CMAR issues. Attendance at the event included 62 people representing local contractors, suppliers and local government agencies.

**AB330** – There was discussion concerning the methods members were employing to evaluate what services needed to be reported to the State with respect to the privatization of contracted services, as required by AB330.

**VIII. Discussion of NRS 332 and NRS 338 sub-committees and possible language to be examined for the 2013 Legislative Session**

**NRS 332** – Jim Haining, acting as Chair of the NRS 332 sub-committee has sent the red-line draft of changes from the 2011 Session to the members of the committee for review and comment. No further action at this stage.

**NRS 338** – No action to-date. Members that were volunteered in during their absence last month affirmed their willingness to participate in the group.

**Labor Commissioner** – Based on local discussion of issues concerning wage investigations and the levying of fines, it was determined that the Commission would invite the new Labor Commissioner to attend a future meeting of the Study Commission, likely in the summer or fall.

**IX. Miscellaneous – Good of the Order**
Penny Marchell of the Las Vegas Convention and Visitors Authority reminded members about the event being planned in southern Nevada (“Commitment to Our Community”) that will function a a reverse trade show to market to businesses interested in marketing to local government,

**X. Public Comments:**
None

**XI. Next meeting date is June 11, 2012**

**XII. Adjournment**

**Future Meeting Dates:**
- June 11, 2012
- July 9, 2012
- August 13, 2012
- September 10, 2012
- October 8, 2012
- November 12, 2012 (Holiday)
- December 10, 2012

Nevada Public Purchasing Study Commission - AB 228 Report
June 11, 2012
I. Call to order and welcome

II. Attendance:

A. North
   Andrea Sullivan, Washoe County School District
   Dan Marran, City of Sparks
   Justine Chambers, Truckee Meadows Water Authority
   Mark Korinek, Carson City School District
   Shannon Berry, NV State Purchasing

B. South
   Kathy Rainey, City of Las Vegas
   Kim Grantham, Clark County Water Reclamation
   Mari Bochanis, Southern Nevada Water Authority
   Penny Marchell, Las Vegas Convention and Visitor Authority
   Ron Corbett, City of North Las Vegas
   Sharri Mayden, UNLV
   Thomas Borland, Las Vegas Valley Water District

C. Public – Noted under Item IV

III. Approval of Agenda
   Moved/Seconded/Approved

IV. Approval of Minutes from the May 14, 2012 meeting
   Moved/Seconded/Approved

V. Public Comments:
   None

VI. Discussion of AB 228

A. Opportunity for Public Testimony Specific to AB 228
   The American Institute of Architects (AIA) Nevada Chapter was represented by:
   Randy Levigne – Executive Director
   Max Hershenow – President, AIA Nevada
   Jeff Roberts – Vice-President, AIA Nevada
   David Forman – Executive Director, UNLV Planning & Construction

   Testimony was heard in support of consideration of adopting a standardized contract
document for public construction in Nevada. In this case, the speakers advocated the use of the
AIA standard contract documents for this purpose. A letter and other documents supporting
this position was also submitted to the Commission and will be included in any appendix to the
report submitted to the LCB in response to the requirements of AB 228.
The AIA document was represented as the “industry standard” and easily defensible due to the long history of the program. There are multiple contract types available as it was represented that there are 120 contract types, representing multiple types of project delivery methods. The documents are marketed as “fair, balanced and continually updated” using the input of architects, engineers, contractors and attorneys. While there is a cost associated with using the program, it was noted in the testimony that the use of the documents was “affordable.” It was noted that 20 states are using AIA documents at some level.

David Forman of UNLV testified that the campus has been using AIA contract forms for 4 years and that their reason for adoption was due to the industry familiarity with the contract forms and the decades of case law already established concerning the contract language.

Questions were offered to the AIA representatives that also detailed concerns of commission members regarding the wholesale replacement of legacy contract forms with something new. In the case of the documents that are recommended by the AIA, it was noted that the composition and continued revision of forms did not seem to take the interest of the project owner in to account and that with 120 different contract types, it would be difficult to argue that a move to such a program would necessarily be a move toward standardization between agencies or any easier to defend if challenged in court.

The Co-Chair (Rainey) requested the opportunity to review sample documents to try to evaluate the differences between those suggested and those already in use.

B. Other

It was noted that the published deadline for testimony or submittals set by the Commission in relation to the requirements of AB 228 is June 15, 2012.

VII. Discussion of Continued Impact of Purchasing Bills from the 2011 Legislative Session

Prevailing Wage Complaints/Hearings - There have been repeated examples of cases where a “pre-hearing” conference has been facilitated by representatives of the Office of the Labor Commissioner that works to settle wage investigations before getting to a formal hearing. In these cases the representative acts as some manner of arbitrator and the discussion will often result in potential penalties against the offending contractor being waived, after they cure the deficiency at hand. This issue will be brought up at a future meeting of the Commission, when the Labor Commissioner will be a guest.

VIII. Discussion of NRS 332 and NRS 338 sub-committees and possible language to be examined for the 2013 Legislative Session

NRS 338 – The Southern Nevada Chapter of the AGC has sponsored a series of meeting to discuss “clean-up” of the language that resulted from AB 144 for the stated purpose of removing “confusion” in its interpretation. Among the changes being discussed are revisions to the reporting requirements and penalties associated with the preference program, a delay in the required submittal of the affidavit that commits the GC to the preference requirement and the removal of the drivers’ license data reporting on projects where preference is not a consideration. The series of meetings is intended to form a consensus before an AGC Meeting with Assemblywoman Kirkpatrick.

Co-Chair Rainey indicated that she has developed a form that is used to track construction projects, with the ability to report the applicability and actual use of the preference program as currently designed. This data will be useful in the continued discussion as to whether the current program is having any manner of effect on bid results (positive or negative).
IX. Miscellaneous – Good of the Order
Penny Marchell of the Las Vegas Convention and Visitors Authority reminded members about the event being planned in southern Nevada in September (“Commitment to Our Community”) that will function as a reverse trade show, to market to businesses interested in marketing to local government. The event will be free to the public and public agencies and has been getting a good response to date.

X. Public Comments:
None

XI. Next meeting date is July 9, 2012

XII. Adjournment

Future Meeting Dates:
July 9, 2012
August 13, 2012
September 10, 2012
October 8, 2012
November 12, 2012 (Holiday)
December 10, 2012
January 14, 2012
February 11, 2012
March 11, 2012
April 8, 2012
May 13, 2012