

**PROPOSED REGULATION OF THE
STATE PUBLIC WORKS BOARD**

LCB File No. R189-07

December 11, 2007

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

AUTHORITY: §§1-3, NRS 338.1375.

A REGULATION relating to public works; revising the criteria to be used for determining whether a prime contractor is qualified to bid on contracts for public works of this State; and providing other matters properly relating thereto.

Section 1. NAC 338.240 is hereby amended to read as follows:

338.240 1. The following criteria must be used to determine whether a prime contractor is qualified to bid on a contract for one or more public works:

(a) The financial ability of the prime contractor to perform the contract. The prime contractor must include with the application submitted pursuant to NAC 338.250:

(1) ~~[A certified original statement of the bonding capacity of the prime contractor obtained from a surety which is authorized to issue bid, performance and payment bonds in this State and which:~~

~~———(I) Has received a rating of “A” or better, as determined by A.M. Best Company of Oldwick, New Jersey; and~~

~~———(II) For a contract that:~~

~~———(i) Is more than \$5,000,000, is classified in a financial size category of “VII” or better, as determined by A.M. Best Company of Oldwick, New Jersey, and is included on the list of approved sureties in Circular 570 of the Department of the Treasury; or~~

~~———— (ii) Is \$5,000,000 or less, is included on the list of approved sureties in Circular 570 of the Department of the Treasury.~~

~~→ The requirements of sub-subparagraphs (I) and (II) do not apply if the surety is Lloyd's of London. The certified original statement must specify the single and aggregate limits on and the available bonding capacity of the prime contractor to work on a public work.~~

~~———— (2)] Evidence that the prime contractor is properly licensed pursuant to chapter 624 of NRS.~~

~~[(3)] (2)~~ A statement regarding whether the prime contractor, principal personnel or any business entity associated with the principal personnel has filed as a debtor under the United States Bankruptcy Code during the 5 years immediately preceding the date of the application.

(3) If the prime contractor is seeking to be qualified to bid on contracts for public works in a cost category set forth in subparagraph (2), (3) or (4) of paragraph (b) of subsection 2 of NAC 338.250, a certified original statement of the bonding capacity of the prime contractor obtained from a surety which is authorized to issue bid, performance and payment bonds in this State and which:

(I) Has received a rating of "A-" or better, as determined by A.M. Best Company of Oldwick, New Jersey; and

(II) For a contract that:

(i) Is more than \$5,000,000, is classified in a financial size category of "VII" or better, as determined by A.M. Best Company of Oldwick, New Jersey, and is included on the list of approved sureties in Circular 570 of the Department of the Treasury; or

(ii) Is \$5,000,000 or less, is included on the list of approved sureties in Circular 570 of the Department of the Treasury.

↪ *The requirements of sub-subparagraphs (I) and (II) do not apply if the surety is Lloyd's of London. The certified original statement must specify the single and aggregate limits on and the available bonding capacity of the prime contractor to work on a public work.*

(b) ~~[The]~~ *If the prime contractor is seeking to be qualified to bid on contracts for public works in a cost category set forth in subparagraph (2), (3) or (4) of paragraph (b) of subsection 2 of NAC 338.250, the* qualifications of the principal personnel of the prime contractor. The prime contractor must include in the application submitted pursuant to NAC 338.250 a description of the professional qualifications and relevant experience of the principal personnel of the prime contractor and list not more than 10 public works and private construction projects, or any combination thereof, within the cost category for which the prime contractor is applying that have been successfully completed by the principal personnel. For each such successfully completed project included on the list, the prime contractor must provide:

- (1) The name of the project;
- (2) The scope of the project or work done;
- (3) The dollar amount of the project; and
- (4) The month and year of substantial completion and final completion of the project.

(c) ~~[Whether]~~ *If the prime contractor is seeking to be qualified to bid on contracts for public works in a cost category set forth in subparagraph (2), (3) or (4) of paragraph (b) of subsection 2 of NAC 338.250, whether* the prime contractor, the principal personnel or any business entity associated with the principal personnel has been found to be in breach of contract by a court of competent jurisdiction or through binding arbitration during the 5 years immediately preceding the date of the application. For each such action, the prime contractor must include in the application submitted pursuant to NAC 338.250 a description of:

(1) The circumstances surrounding the action;

(2) Whether any liquidated damages were imposed in connection with the action; and

(3) Any judgment entered against the prime contractor, the principal personnel or business entity associated with the principal personnel relating to the action.

(d) Whether the prime contractor, the principal personnel or any business entity associated with the principal personnel has been disqualified from the award of any contract pursuant to NRS 338.017 or 338.13895 during the 5 years immediately preceding the date of the application.

(e) ~~The~~ *If the prime contractor is seeking to be qualified to bid on contracts for public works in a cost category set forth in subparagraph (2), (3) or (4) of paragraph (b) of subsection 2 of NAC 338.250, the* past performance history of the prime contractor, the principal personnel and each business entity associated with the principal personnel during the 5 years immediately preceding the date of the application. The prime contractor must include in the application submitted pursuant to NAC 338.250:

(1) A description of:

(I) Any civil judgment, findings of fact, administrative proceeding, criminal conviction or binding arbitration relating to a violation of any law pertaining to wage and hour standards, prevailing wage rates or licensing either against or by the prime contractor, principal personnel or business entity associated with the principal personnel; and

(II) Any civil judgment, findings of fact, administrative proceeding, criminal conviction or binding arbitration relating to a violation of any law pertaining to discrimination in employment with respect to construction work performed by the prime contractor either against or by the prime contractor, principal personnel or business entity associated with the business personnel.

(2) A list of all public works and private construction projects undertaken or completed by the prime contractor, principal personnel or business entity associated with the principal personnel during the 5 years immediately preceding the date of the application for which the cost exceeded \$25,000 and for which:

(I) The prime contractor, principal personnel or business entity associated with the principal personnel failed to substantially complete the contract within the deadline for completion of the project specified in the contract, as adjusted by any change order or extension of time granted;

(II) The prime contractor, principal personnel or business entity associated with the principal personnel failed to complete any remaining requirements of the contract within 90 days after substantial completion of the contract; or

(III) The prime contractor, principal personnel or business entity associated with the principal personnel failed to complete the contract and the remaining work on the project was performed by another person.

(3) If the application is for qualification for a 2-year period, a list of not more than 10 public works and private construction projects, or any combination thereof, that the prime contractor and the principal personnel, and, if applicable, any other business entity associated with the principal personnel, have successfully completed during the 5 years immediately preceding the date of the application and for which the cost of each of those projects is within the cost category for which the prime contractor seeks qualification to submit bids. For each project included on the list, the prime contractor must provide:

(I) The name of the project;

(II) The location of the project;

(III) The cost of the project;

(IV) A brief explanation of the type of work performed on the project; and

(V) The name, address and telephone number of the owner of the project, the owner's project manager, and the architect or engineer of the project.

(4) If the application is for qualification on a specific public work, a list of all public works and private construction projects undertaken or completed by the prime contractor, principal personnel or business entity associated with the principal personnel during the 5 years immediately preceding the date of the application for which the level of complexity or special requirements of the project were similar to the complexity or special requirements specified by the Board in the application for the specific public work. For each project included on the list, the prime contractor must provide:

(I) The name of the project;

(II) The location of the project;

(III) A brief explanation of the type of work performed on the project; and

(IV) The name, address and telephone number of the owner of the project, the owner's project manager, and the architect or engineer of the project.

2. In addition to the information provided by a prime contractor ~~[-any]~~:

(a) Any other verifiable information relating to the applicable criteria set forth in subsection 1 that is provided to or discovered by the Board or its employees regarding the prime contractor may be used to determine whether the prime contractor is qualified to bid on one or more contracts for public works ~~[-]~~; and

(b) Each evaluation of the performance of the prime contractor on a public work of this State that was prepared by the staff of the Board, on a form prescribed by the Board, within

the 5 years immediately preceding the date of the application will be used to determine whether the prime contractor is qualified to bid on one or more contracts for public works.

Sec. 2. NAC 338.250 is hereby amended to read as follows:

338.250 1. To qualify to bid on one or more contracts for public works, a prime contractor must:

(a) Submit an application to the Manager on a form prescribed and provided by the Board.

(b) Be qualified before bids are required to be submitted for a public work on which the prime contractor wishes to bid. The Board will not delay the opening of bids on a public work pending the determination or appeal of the qualification of a prime contractor who wishes to bid on the public work.

2. The Board will specify:

(a) In the application for a specific public work, any special requirements for the specific public work that the Board prescribes.

(b) In the application for qualification for a 2-year period, the cost categories ~~of:~~

~~(1) Less~~

(1) Of less than \$1,000,000;

~~(2) One million dollars~~ *\$100,000;*

(2) Of \$100,000 to \$1,000,000;

(3) Of \$1,000,001 to \$5,000,000; and

~~[(3) More]~~

(4) Of more than \$5,000,000,

↪ for which a prime contractor may be qualified, which are based on the estimated cost of an individual public work. If a prime contractor is qualified to bid on public works in one of the cost

categories specified in this subsection, the prime contractor is eligible to bid on public works in any lower cost category.

3. If the application is for qualification for a 2-year period, the prime contractor must indicate on the application:

(a) Whether the prime contractor is interested in receiving offers to bid on public works for which the estimated cost is more than \$25,000 but less than \$100,000; and

(b) The cost category for which the prime contractor seeks to qualify to submit bids.

4. An application must contain the original signature of the prime contractor who is submitting the application. The Board will not accept a faxed or photocopied application.

5. The submission of a materially incomplete or falsified application or the failure of a prime contractor to disclose information in the application may be grounds for a delay in the qualification of the prime contractor or the denial or revocation of the qualification of a bidder.

Sec. 3. NAC 338.260 is hereby amended to read as follows:

338.260 1. The Manager shall appoint a committee consisting of a deputy manager and at least two other employees of the Board to review and score applications submitted pursuant to NAC 338.250 to determine whether a prime contractor is qualified to bid on one or more contracts for public works. Such a determination must be made within 45 days after receipt of the completed application by the Board.

2. The committee shall calculate the scores of applications based on the weights of the criteria set forth in NAC 338.240 that are prescribed by the Board. In addition to the information provided by a prime contractor in his application submitted pursuant to NAC 338.250, the committee ~~may~~:

(a) *May* consider any other verifiable information relating to the criteria set forth in NAC 338.240 that is provided to or discovered by the Board or its employees regarding the application to determine whether the prime contractor is qualified to bid on one or more contracts for public works ~~§~~; *and*

(b) Shall consider each evaluation of the performance of the prime contractor on a public work of this State that was prepared by the staff of the Board, on a form prescribed by the Board, within the 5 years immediately preceding the date of the application to determine whether the prime contractor is qualified to bid on one or more contracts for public works.

3. If, after reviewing and scoring an application, the committee determines that the prime contractor is:

(a) Qualified, the Manager shall provide written notice to the prime contractor by certified mail within 10 days after that determination. If the application was for qualification to bid for a 2-year period, the notice must indicate the date on which the qualification expires and that, for the period of qualification, the prime contractor is qualified to bid on public works for which the estimated cost does not exceed the maximum dollar amount of the cost category for which the prime contractor is qualified to submit bids.

(b) Not qualified, the Manager shall provide written notice to the prime contractor by certified mail within 10 days after that determination. Pursuant to subsection 3 of NRS 338.1379, the notice must include, without limitation, the reasons for the denial of the application and inform the prime contractor of his right to a hearing pursuant to NRS 338.1381 and NAC 338.270.

4. Except as otherwise provided in this subsection and NAC 338.280, the qualification of a prime contractor to bid on contracts for public works expires 2 years after the date on which the

committee determines that the prime contractor is qualified. The qualification of a prime contractor for a specific public work expires upon completion of that public work.

5. A prime contractor who applied for qualification for a 2-year period and whose application was denied may not reapply for qualification for a 2-year period until 1 year after the date on which the application was denied or, if the prime contractor appeals the denial of the application, 1 year after the date on which the board of appeals appointed pursuant to NAC 338.270 denies the appeal. Denial of an application for qualification on a specific public work does not prohibit the prime contractor from submitting an application for qualification for a 2-year period or qualification on another specific public work.

6. The Manager may deny a request by a prime contractor to withdraw his application regardless of whether the application is complete. Within 10 days after receipt of notice that his request to withdraw the application has been denied, the prime contractor may appeal the decision of the Manager to deny the request to withdraw the application by filing a request for a hearing with the Board pursuant to NAC 338.270. The request for a hearing must set forth the basis for the appeal. The prime contractor may, at the time he files the request for a hearing, submit copies of any documents that support his appeal.