

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

LCB File No. R071-08

Effective September 18, 2008

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; providing for evaluations by the State Public Works Board of the performance of prime contractors on public works of this State; requiring the consideration of such evaluations in 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. Chapter 338 of NAC is hereby amended by adding thereto a new section to read as follows:

1. Within 30 days after the final completion of a public work, the Board or its designee will provide the prime contractor on the public work with a copy of an initial evaluation of the performance of the prime contractor on the public work. The initial evaluation must be prepared by the employee of the Board who was primarily responsible for managing the public work and must be approved by the supervisor of the employee.

2. Within 30 days after receipt of an initial evaluation pursuant to subsection 1, a prime contractor may submit to the Board or its designee a response to the initial evaluation, which must include, without limitation, any information or documentation that the prime contractor determines is relevant to the initial evaluation.

3. The Board or its designee will provide to the prime contractor a copy of the final evaluation of the performance of the prime contractor on the public work:

(a) If the prime contractor submitted a response pursuant to subsection 2, within 30 days after receipt of the response by the Board or its designee.

(b) If the prime contractor did not submit a response pursuant to subsection 2, within 60 days after provision of the initial evaluation to the prime contractor pursuant to subsection 1.

4. The final evaluation of the performance of the prime contractor on the public work:

(a) Must:

(1) Be prepared by the employee of the Board who prepared the initial evaluation and approved by the supervisor of the employee; and

(2) If the prime contractor submitted a response pursuant to subsection 2, include the response as an attachment; and

(b) If the prime contractor submitted a response pursuant to subsection 2, may include any revisions to the initial evaluation that the employee of the Board who prepared the initial evaluation deemed necessary based upon the response.

Sec. 2. 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) Evidence that the prime contractor is properly licensed pursuant to chapter 624 of NRS.

(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 *United States* 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 *United States* 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) 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) 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) 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 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 final evaluation of the performance of the prime contractor on a public work of this State that was provided to the prime contractor pursuant to section 1 of this regulation on or after September 18, 2008, and 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. 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 ~~it~~; and

(b) *Shall consider each final evaluation of the performance of the prime contractor on a public work of this State that was provided to the prime contractor pursuant to section 1 of this regulation on or after September 18, 2008, and 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.

NOTICE OF ADOPTION OF PROPOSED REGULATION
LCB File No. R071-08

The State Public Works Board adopted regulations assigned LCB File No. R071-08, which pertain to chapter 338 of the Nevada Administrative Code.

INFORMATIONAL STATEMENT

1. A description of how public comment was solicited, a summary of public response, and an explanation how other interested persons may obtain a copy of the summary.

State Public Works Board solicited public comment through notices posted at State Public Works Board in Carson City and Las Vegas, the Blasdel Building, Nevada State Library, Archives in Carson City and at the Nevada County Public Libraries and mailings to our contact database.

Date of Notice	Workshop / Hearing	Date of Workshop
2/7/08	Workshop	2/22/08
5/15/08	Hearing	6/16/08

Many oral comments were received at the workshop and hearings. A copy of the audio taped comments or the record of the proceedings may be obtained by calling State Public Works Board at (775) 684-4141 or by writing to the State Public Works Board, 515 East Musser, Room 102, Carson City, NV 89701, or by e-mailing the SPWB at dnenzel@spwb.state.nv.us.

2. The number of persons who:

	2/22/08	6/16/08
(a) Attended each hearing:	24	15
(b) Testified at each hearing:	6	0
(c) Submitted written comments:	0	0

3. A description of how comment was solicited from businesses, a summary of their response, and an explanation how other interested persons may obtain a copy of the summary.

Comments were solicited from the affected and interested contractor, unions and municipalities, by notices posted at State Public Works Board offices in Carson City and Las Vegas, Nevada State Library, and at the main public libraries in all the counties.

A copy of the audio taped comments or the record of the proceedings may be obtained by calling State Public Works Board at (775) 684-4141 or by writing to the State Public Works Board, 515 East Musser, Room 102, Carson City, NV 89701, or by e-mailing the SPWB at dnenzel@spwb.state.nv.us.

- 4. If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change.**

NAC 338 was adopted by the board.

- 5. The estimated economic effect of the regulation on the business which it is to regulate and on the public. These must be stated separately, and each case must include:**

(a) Both adverse and beneficial effects; and

This regulation should have no immediate economic impact on affected contractors.

(b) Both immediate and long-term effects.

This regulation should have no immediate or long-term effects on contractors.

- 6. The estimated cost to the agency for enforcement of the adopted regulation:**

SPWB does not estimate any cost to enforce the amendments.

- 7. A description of any regulations of other State or governmental agencies which the regulation overlaps or duplicates and a statement explaining why the duplication or overlap is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.**

Federal Law does not require the proposed regulation.

- 8. If the regulation includes provisions that are more stringent than a federal regulation that regulates the same activity, a summary of such provisions.**

Federal Law does not require the proposed regulation.

- 9. If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.**

Does not apply

- 10. Is the proposed regulation likely to impose a direct and significant economic burden upon a small business or directly restrict the formation, operation or expansion of a small business? What methods did the agency use in determining the impact of the regulation on a small business?**

No, since there is no application fee. The cost of processing applications is within the administrative costs for the qualification of bidders program.

Small business impact questionnaires were distributed to everyone in the qualification data base plus contractor's associations, other State Agencies and the proper postings.