

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

LCB File No. R099-15

April 18, 2016

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

AUTHORITY: §§1-6, 9 and 12, NRS 338.1375, 338.13844, as amended by section 19 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560, NRS 338.13847, 341.070 and 341.110; §§7, 8 and 10, NRS 338.1375 and 341.110; §11, NRS 338.1376 and 341.110.

A REGULATION relating to public works; revising provisions relating to certain preferences for a local business owned and operated by a veteran with a service-connected disability; revising provisions governing the qualification of bidders and subcontractors on state public works; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law previously provided that if a local business owned by a veteran with a service-connected disability of at least zero percent submits a bid for a state public work for which the estimated cost is \$100,000 or less, the bid is required to be deemed to be 5 percent lower than the bid actually submitted. (NRS 338.1384-338.13847) Assembly Bill No. 62 of the 2015 Legislative Session: (1) requires that the local business also be operated by a veteran with a service-connected disability to qualify for the preference; and (2) provides a similar 5-percent preference to a local business owned and operated by a veteran with a service-connected disability of 50 percent or more for a contract for a state public work for which the estimated cost is more than \$100,000 but less than \$250,000. (NRS 338.13844, as amended by section 19 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560)

Section 6 of this regulation provides requirements for applying for the new preference and requires the State Public Works Division of the Department of Administration to maintain on its Internet website a list of the businesses that have been determined by the Administrator of the Division to be qualified to receive the preference. **Section 9** of this regulation makes a conforming change to recognize the new preference. **Section 12** of this regulation adds criteria relating to the operation of the business to the criteria for the existing preference.

Existing law requires the State Public Works Board to adopt criteria for the qualification of bidders on contracts for state public works. (NRS 338.1375) Existing law also requires the Board to adopt criteria for the qualification of a subcontractor to be included in a bid on a state public work. (NRS 338.1376) **Section 10** of this regulation removes the requirement that the Division prepare and provide to a prime contractor an evaluation of the contractor's performance on a public work for which the estimated cost is less than \$100,000. **Section 8** of this regulation

makes the conforming change of removing a contractor evaluation as part of the criteria used to determine whether a prime contractor is qualified to bid on a contract for a state public work for which the estimated cost is less than \$100,000.

Existing regulations prescribe the criteria that must be used to determine whether: (1) a prime contractor is qualified to bid on a contract for one or more state public works for which the estimated cost is \$100,000 or more; and (2) a subcontractor is qualified to be included in a bid on a contract for a state public work. (NAC 338.240, 338.370) Part of the criteria in existing regulations is the past performance history of the contractor and subcontractor, which includes 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 contractor or subcontractor, wage and hour standards, prevailing wage rates or licensing, either against or by the contractor or subcontractor and any principal personnel or associated business entity. **Sections 7 and 11** of this regulation expand this criteria relating to past performance history to include information about any civil judgments, findings of fact, administrative proceedings, criminal convictions and binding arbitrations relating to a public work against or in favor of the prime contractor or subcontractor or his or her principal personnel or an associated business entity.

Section 1. Chapter 338 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 6, inclusive, of this regulation.

Sec. 2. *As used in NAC 338.450 and sections 2 to 6, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 3, 4 and 5 of this regulation have the meanings ascribed to them in those sections.*

Sec. 3. *“Business owned and operated by a veteran with a service-connected disability” has the meaning ascribed to it in NRS 338.13841, as amended by section 18.5 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560.*

Sec. 4. *“Local business” has the meaning ascribed to it in NRS 333.3363.*

Sec. 5. *“Veteran with a service-connected disability” has the meaning ascribed to it in NRS 338.13843.*

Sec. 6. 1. *To qualify to receive the preference set forth in subsection 2 of NRS 338.13844, as amended by section 19 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560, a business must:*

(a) Submit an application to the Administrator on a form prescribed and provided by the Board; and

(b) Certify in writing on the application and include with the application documentation evidencing that the business is:

(1) A local business; and

(2) A business owned and operated by a veteran with a service-connected disability that has been determined to be 50 percent or more by the United States Department of Veterans Affairs.

2. The Division shall:

(a) Compile and maintain a list of the businesses that the Administrator has determined are qualified to receive the preference set forth in subsection 2 of NRS 338.13844, as amended by section 19 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560; and

(b) Post the list on the Internet website maintained by the Division.

Sec. 7. NAC 338.240 is hereby amended to read as follows:

338.240 1. Except as otherwise provided in subsection 3, 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 for which the estimated cost is \$100,000 or more:

(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, the 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) A certified original statement of the bonding capacity of the prime contractor obtained for 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) 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 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 , *as amended by section 1 of Senate Bill No. 340, chapter 470, Statutes of Nevada 2015, at page 2720, NRS 338.13845* or 338.13895 during the 5 years immediately preceding the date of the application.

(e) 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 *and copy* of ~~the~~
- ~~—— (I) Any~~ *any* civil judgment, findings of fact, administrative proceeding, criminal conviction or binding arbitration relating to *a public work or to* a violation of any law pertaining to *discrimination in employment with respect to construction work performed by the prime contractor*, wage and hour standards, prevailing wage rates or licensing either against or ~~by~~ *in favor of* the prime contractor, principal personnel or business entity associated with the principal personnel ~~the~~ *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.~~ *, including, for each such action, the following:*

- (I) The name of the project;*
 - (II) The scope of work;*
 - (III) The circumstances surrounding the action;*
 - (IV) Whether any liquidated damages were imposed in connection with the action;*
- and*
- (V) The outcome of the action.*

- (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 has 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 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 Division 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.

(f) Whether the prime contractor, the principal personnel or any business entity associated with the principal personnel has been disciplined or fined by the State Contractors' Board or another state or federal agency for conduct that relates to the ability of the prime contractor to perform the work.

2. In addition to the information provided by a prime contractor:

(a) Any other verifiable information relating to the criteria set forth in subsection 1 that is provided to or discovered by the Division 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 for which the estimated cost is \$100,000 or more; 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 NAC 338.285 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 for which the estimated cost is \$100,000 or more.

3. The criteria set forth in subsection 1 are not required to be used if:

(a) The Department of Transportation requested that bidders on the contract for the public work be qualified to bid on the contract pursuant to NRS 408.333; and

(b) The public work involves the construction, reconstruction, improvement or maintenance of highways pursuant to this chapter, chapter 408 of NAC or chapter 338 or 408 of NRS.

4. As used in this section, “highway” has the meaning ascribed to it in NRS 408.070.

Sec. 8. NAC 338.245 is hereby amended to read as follows:

338.245 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 for which the estimated cost is less than \$100,000:

(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.

(b) 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 , *as amended by section 1 of Senate Bill No. 340, chapter 470, Statutes of Nevada 2015, at page 2720, NRS 338.13845* or 338.13895 during the 5 years immediately preceding the date of the application.

2. In addition to the information provided by a prime contractor ~~†~~
~~—(a) Any† , any~~ other verifiable information relating to the criteria set forth in subsection 1 that is provided to or discovered by the Division 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 for which the estimated cost is less than \$100,000 . ~~† 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 NAC 338.285 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 for which the estimated cost is less than \$100,000.†~~

Sec. 9. 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 Administrator 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 Division 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 Division will specify:

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

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

- (1) Of less than \$100,000;
- (2) Of \$100,000 to \$1,000,000;
- (3) Of \$1,000,001 to \$5,000,000; and
- (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. If the prime contractor is qualified to receive the preference set forth in *subsection 1 or 2 of NRS 338.13844, as amended by section 19 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560*, the prime contractor must indicate on the application his or her qualification for the preference.

5. An application must contain the signature of the prime contractor who is submitting the application.

6. 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. 10. NAC 338.285 is hereby amended to read as follows:

338.285 1. Within 30 days after the final completion of a public work ~~H~~*for which the estimated cost is \$100,000 or more*, the Division 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 Division 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 Division 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 Division 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 Division 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 Division 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 Division who prepared the initial evaluation deemed necessary based upon the response.

Sec. 11. NAC 338.370 is hereby amended to read as follows:

338.370 1. The following criteria will be used to determine whether a subcontractor who submits an application for qualification is qualified pursuant to NRS 338.1376 to be included in a bid:

(a) The financial ability of the subcontractor to perform the contract. The subcontractor must include with his or her application for qualification:

(1) A certified original statement of the bonding capacity of the subcontractor 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) 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 present single and aggregate limits of the subcontractor to work on a public work.

(2) If the subcontractor is going to be performing work for which he or she is required to be licensed pursuant to chapter 624 of NRS, evidence that the subcontractor is properly licensed pursuant to that chapter.

(3) A statement regarding whether the subcontractor, the 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.

(b) The qualifications of the principal personnel of the subcontractor. The subcontractor must include in his or her application for qualification a description of the professional qualifications and relevant experience of the principal personnel of the subcontractor and list not more than 10 public works and private construction projects, or any combination thereof, within the cost category for which the subcontractor is applying for qualification that have been successfully completed by the principal personnel. For each successfully completed project included on the list, the subcontractor must provide:

- (1) The name of the project or the name of the prime contractor on the project;
- (2) The scope of the project or the scope of the portion of work within the project for which the principal personnel was responsible;
- (3) The dollar amount of the project or the dollar amount of the portion of work within the project for which the principal personnel was responsible; and
- (4) The month and year of substantial completion and final completion of the contract or portion of work for which the principal personnel was responsible.

(c) Whether the subcontractor, 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 subcontractor must include in the application for qualification 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 subcontractor, principal personnel or business entity associated with the principal personnel relating to the action.

(d) Whether the subcontractor, 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 , *as amended by section 1 of Senate Bill No. 340, chapter 470, Statutes of Nevada 2015, at page 2720, NRS 338.13845* or 338.13895 during the 5 years immediately preceding the date of the application.

(e) The past performance history of the subcontractor, the principal personnel and each business entity associated with the principal personnel during the 5 years immediately preceding the date of the application. The subcontractor must include in the application for qualification:

- (1) A description *and copy* of ~~the~~ ~~(1) Any~~ *any* civil judgment, findings of fact, administrative proceeding, criminal conviction or binding arbitration relating to *a public work or to* a violation of any law pertaining to *discrimination in employment with respect to construction work performed by the prime contractor*, wage and hour standards, prevailing wage rates or licensing either against or ~~by~~ *in*

favor of the subcontractor, 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 either against or by the subcontractor, principal personnel or business entity associated with the principal personnel relating to a violation of any law pertaining to discrimination in employment with respect to construction work. }~~

, including, for each such action, the following:

(I) The name of the project;

(II) The scope of work;

(III) The circumstances surrounding the action;

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

and

(V) The outcome of the action.

(2) A list of all public works and private construction projects undertaken or completed by the subcontractor, 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 the subcontractor, principal personnel or business entity associated with the principal personnel failed to complete:

(I) Its portion of the work in a timely manner, as adjusted by any change order or extension of time granted;

(II) Any remaining requirements of the contract or failed to complete its portion of the work within 90 days after substantial completion of the contract; or

(III) Its portion of the work and the remaining work on the project was performed by another person.

(3) A list of not more than 10 public works and private construction projects, or any combination thereof, on which the subcontractor has successfully completed his or her portion of the work during the 5 years immediately preceding the date of the application which is within the cost category for which the subcontractor seeks qualification. For each project included on the list, the subcontractor must provide:

- (I) The name of the project;
- (II) The location of the project;
- (III) The cost of the portion of the work for which the subcontractor, the principal personnel and each business entity associated with the principal personnel were responsible;
- (IV) A brief explanation of the type of work performed on the project; and
- (V) The name, address and telephone number of:
 - (i) The owner of the project;
 - (ii) The owner's project manager;
 - (iii) The architect or engineer of the project;
 - (iv) The prime contractor for the project; and
 - (v) The superintendent of the prime contractor for the project.

(f) Whether the subcontractor, the principal personnel or any business entity associated with the principal personnel has been disciplined or fined by the State Contractors' Board or another state or federal agency for conduct that relates to the ability of the subcontractor to perform the work.

2. In addition to the information provided by the subcontractor pursuant to subsection 1, any other verifiable information relating to the criteria set forth in subsection 1 that is provided to or discovered by the Division or its employees regarding the subcontractor may be used to determine whether the subcontractor is qualified to be included in a bid pursuant to NRS 338.141.

3. The Division will maintain a public list of subcontractors that have been determined not to be qualified to be included in a bid pursuant to NRS 338.141.

Sec. 12. NAC 338.450 is hereby amended to read as follows:

338.450 1. To qualify to receive the preference set forth in *subsection 1 of* NRS 338.13844, *as amended by section 19 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560*, a business must:

(a) Submit an application to the Administrator on a form prescribed and provided by the Board; and

(b) Certify in writing on the application and include with the application documentation evidencing that the business is:

(1) A local business; and

(2) A business owned *and operated* by a veteran with a service-connected disability.

2. The Division ~~will~~ *shall*:

(a) Compile and maintain a list of the businesses that the Administrator has determined are qualified to receive the preference set forth in *subsection 1 of* NRS 338.13844 ~~will~~, *as amended by section 19 of Assembly Bill No. 62, chapter 145, Statutes of Nevada 2015, at page 560*; and

(b) Post the list on the Internet website maintained by the Division.

~~3. As used in this section:~~

~~—(a) “Business owned by a veteran with a service-connected disability” has the meaning ascribed to it in NRS 338.13841.~~

~~—(b) “Local business” has the meaning ascribed to it in NRS 333.3363.~~

~~—(c) “Veteran with a service-connected disability” has the meaning ascribed to it in NRS 338.13843.]~~