

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

LCB File No. R099-09

Effective October 15, 2010

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

AUTHORITY: §§1-3, NRS 338.1375, 338.13895 and 341.110.

A REGULATION relating to public works; clarifying the criteria used for determining whether a prime contractor is qualified to bid on a contract for one or more public works; 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. 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 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 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 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 section 1 of LCB File No. R071-08, which was adopted by the State Public Works Board and filed with the Secretary of State on September 18, 2008, 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. 2. NAC 338.150 is hereby amended to read as follows:

338.150 As used in NAC 338.150 to 338.290, inclusive, *and section 1 of this regulation*, unless the context otherwise requires, the words and terms defined in NAC 338.170 to 338.231, inclusive, have the meanings ascribed to them in those sections.

Sec. 3. 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 ~~for~~ *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, 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]~~ 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]~~ **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]~~ **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]~~ *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:

(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 ~~for~~ *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 section 1 of LCB File No. R071-08, which was adopted by the State Public Works Board and filed with the Secretary of State on September 18, 2008, 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~~ *for which the estimated cost is \$100,000 or more.*

Sec. 4. 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 *or section 1 of this regulation* 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:

(a) May consider any other verifiable information relating to the criteria set forth in NAC 338.240 *or section 1 of this regulation* 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 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 LCB File No. R071-08, which was adopted by the State Public Works Board and filed with the Secretary of State on September 18, 2008, 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 contract 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.

Sec. 5. NAC 338.280 is hereby amended to read as follows:

338.280 1. The qualification of a bidder will be revoked if, after an investigation, the committee determines that:

(a) The bidder no longer meets one or more of the criteria set forth in NAC 338.240 ~~(c)~~ or *section 1 of this regulation; or*

(b) The application submitted by the bidder contained materially false information or the bidder failed to disclose materially relevant information in the application,

↳ unless, pursuant to this section, the bidder appeals the determination of the committee within the time prescribed for an appeal in subsection 3 and the board of appeals reverses the determination.

2. If the committee determines pursuant to subsection 1 that the qualification of a bidder will be revoked, the committee shall notify the Manager, in writing, of its determination. After receipt of such notification, the Manager shall provide written notice by certified mail to the bidder that the qualification of the bidder has been revoked and that the bidder may appeal the

revocation. Revocation of the qualification of a bidder becomes effective 10 days after the bidder receives notice of revocation pursuant to this subsection unless the bidder appeals the determination within the time prescribed for an appeal in subsection 3.

3. Within 10 days after receipt of notice of the revocation of his qualification pursuant to subsection 2, a bidder may appeal the determination by filing a request for a hearing with the Board. A hearing on the appeal of the revocation of qualification will be conducted by the board of appeals appointed pursuant to NAC 338.270.

4. If the board of appeals concurs with the determination of the committee, revocation of the qualification of the bidder becomes effective upon the decision of the board of appeals.

5. If the qualification of a bidder is revoked, the bidder may reapply for qualification after the period specified in subsection 5 of NAC 338.260 has elapsed, if applicable.

NOTICE OF ADOPTION OF PROPOSED REGULATION
LCB File No. R099-09

The State Public Works Board adopted regulations assigned LCB File No. R099-09, 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.

<u>Date of Notice</u>	<u>Workshop/ Hearing</u>	<u>Date of Workshop</u>
1/8/10	Workshop	1/26/10
6/22/10	Hearing	7/29/10

Many oral and nine written 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:

	1/26/10	7/29/10
(a) Attended each hearing:	8	28
(b) Testified at each hearing:	0	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.**

There were no adverse comments on the proposed regulation.

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**

None known at this time

- (b) **Both immediate and long-term effects.**

New opportunities for Service Disabled Veterans to qualify for state work.

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.