

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

LCB File No. R099-11

Effective May 30, 2012

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

AUTHORITY: §§1-6, NRS 338.16991, 338.16995, 341.070 and 341.110; §§7-9, NRS 338.16991, 341.070 and 341.110; §§10-13, NRS 338.16995, 341.070 and 341.110.

A REGULATION relating to public works; adopting provisions governing the qualification and selection of subcontractors by construction managers at risk who have entered into a contract with a public body to construct a public work; and providing other matters properly relating thereto.

Section 1. Chapter 338 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 13, inclusive, of this regulation.

Sec. 2. *As used in sections 2 to 13, 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. *“Application for qualification” means an application submitted by a subcontractor to qualify to submit a proposal pursuant to paragraph (a) of subsection 2 of section 7 of this regulation*

Sec. 4. *“Construction manager at risk” means a contractor licensed pursuant to chapter 624 of NRS who has entered into a contract with a public body to construct a public work pursuant to NRS 338.1696.*

Sec. 5. "Proposal" means a proposal for the provision of labor, materials or equipment necessary for the construction of a public work submitted by a subcontractor pursuant to NRS 338.16995.

Sec. 6. The provisions of NRS 338.16991 and 338.16995 and sections 2 to 13, inclusive, of this regulation apply only to a subcontract for which the estimated value is at least 1 percent of the total estimated cost of the construction of the public work.

Sec. 7. 1. The advertisement for applications for qualification published by a construction manager at risk pursuant to subsection 3 of NRS 338.16991, must state that the construction manager at risk will return unopened a proposal received from a subcontractor who has not qualified to submit a proposal pursuant to NRS 338.16991.

2. To qualify to submit a proposal pursuant to NRS 338.16991, a subcontractor must:

(a) Submit to the construction manager at risk an application for qualification on a form prescribed and provided by the construction manager at risk.

(b) Be qualified by the construction manager at risk pursuant to the provisions of NRS 338.16991 before proposals are required to be submitted to the construction manager at risk for the public work on which the subcontractor wishes to submit a proposal.

3. For the purpose of ensuring that the determination of whether subcontractors are qualified to submit proposals is based on the criteria set forth in subsection 4 of NRS 338.16991, the construction manager at risk must provide to the public body or its authorized representative a copy of the application form used by the construction manager at risk to qualify subcontractors.

4. An application for qualification must:

(a) Contain the original signature of the subcontractor; and

(b) At a minimum, include the following information:

(1) The monetary limit on the applicant's license established by the State Contractors' Board pursuant to subsection 2 of NRS 624.220;

(2) A statement of the applicant's bonding capacity which is obtained from a surety authorized to issue bid, performance and payment bonds in this State;

(3) A description of the applicant's current workload and schedule;

(4) A balance sheet for the applicant which was prepared within 1 year of the notice to proceed; and

(5) Evidence of a bank account in good standing.

5. The submission of a materially incomplete or falsified application for qualification by a subcontractor and the failure of the subcontractor to disclose information required in the application may be grounds for the disqualification of the subcontractor.

6. A construction manager at risk may not delay the opening of proposals pursuant to section 12 of this regulation pending the determination or appeal of the determination of the qualification of a subcontractor who wishes to submit a proposal.

7. A construction manager at risk must determine that at least three subcontractors in each trade or scope of work necessary to provide labor, materials and equipment for a public work are qualified to submit a proposal for the public work, unless the construction manager at risk has obtained the written approval of the public body to qualify fewer than three subcontractors in a particular trade or scope of work.

Sec. 8. 1. *The construction manager at risk shall review and evaluate each application for qualification to determine whether the applicant is qualified to submit a proposal for a public work for which the construction manager at risk has entered into a contract with a*

public body. Not later than 45 days after an applicant has submitted a completed application for qualification, the construction manager at risk must determine whether the applicant is qualified to submit a proposal.

2. A construction manager at risk shall make a determination as to the qualification of each applicant in accordance with the criteria set forth in subsection 4 of NRS 338.16991.

3. In addition to the information provided by a subcontractor in an application for qualification, the construction manager at risk may consider any other verifiable information relating to the criteria set forth in subsection 2 that is provided to or discovered by the construction manager at risk or its employees regarding the application for qualification.

4. If, after reviewing an application for qualification, the construction manager at risk determines that a subcontractor is:

(a) Qualified to submit a proposal, the construction manager at risk shall provide written notice to the subcontractor and the public body or its authorized representative within 10 days after that determination.

(b) Not qualified to submit a proposal, the construction manager at risk shall provide written notice to the subcontractor and the public body or its authorized representative within 10 days after that determination. The notice must include, without limitation, the reasons on which the determination that the subcontractor was not qualified was based and must inform the subcontractor of his or her right to appeal the disqualification pursuant to subsection 7 of NRS 338.16991.

5. If, pursuant to this section, a construction manager at risk determines that a subcontractor is qualified to submit a proposal, the subcontractor is qualified for a period determined by the construction manager at risk, which must not exceed 24 months.

Sec. 9. 1. Within 10 days after receipt of notice that he or she has been determined by a construction manager at risk to be not qualified to submit a proposal, the subcontractor may appeal the determination by filing a request for a hearing with the public body with whom the construction manager at risk has entered into a contract for the construction of the public work. The request must set forth the basis for the appeal. The subcontractor may, at the time he or she files the request, submit copies of any documents that support the appeal. The subcontractor must provide a copy of the request for a hearing and any supporting documents to the construction manager at risk.

2. For each such appeal, the public body shall, in accordance with NRS 338.1381:

(a) Set the matter for a hearing;

(b) Provide notice of the hearing; and

(c) Hold the hearing at a time and place prescribed by the public body.

3. The public body shall call a hearing to order and act upon any preliminary matters.

Unless modified by the public body, the evidence will be presented first by the subcontractor and then by the construction manager at risk, or a representative thereof. The public body may allow the presentation of additional testimony and evidence from other interested parties.

4. An appeal will be considered submitted for decision after the taking of evidence and oral argument.

5. In conducting the hearing, the public body is not bound by any technical rules of evidence.

6. If a party fails to appear at a hearing and did not request in writing or was not granted a continuance in writing, the public body may hear evidence from those persons present at the hearing and make a decision based on the available record.

7. At any time after a request for a hearing is filed by a subcontractor, any party to the matter may request that the public body issue a subpoena to compel the attendance of witnesses to testify before the public body or for the production of related books, papers and documents.

8. The public body must issue its decision on the matter during the hearing.

Sec. 10. *1. The notice of a request for proposals required by subsection 3 of NRS 338.16995 must contain:*

(a) The information required by subsection 4 of NRS 338.16995; and

(b) Plans sufficiently complete to allow a subcontractor to submit a meaningful and responsive proposal.

2. Before disseminating to subcontractors the notice of a request for proposals required by subsection 3 of NRS 338.16995, the construction manager at risk must provide to the public body or its authorized representative a copy of the notice and any instructions for proposals.

Sec. 11. *1. To be considered responsive a proposal must:*

(a) Satisfy the requirements of subsection 6 of NRS 338.16995;

(b) Be submitted:

(1) In a sealed envelope; and

(2) By a subcontractor whom the construction manager at risk determined to be qualified in the trade or scope of work for which the proposal was submitted and who attended the preproposal meeting; and

(c) Respond to the details and requirements included in the instructions related to the proposal and the bid package.

2. If a construction manager at risk has determined that three or more subcontractors are qualified to submit proposals for a trade or scope of work and has received fewer than three proposals for that trade or scope of work at the time proposals are opened, the construction manager at risk may not open any proposal for that trade or scope of work until the construction manager at risk receives from the public body or its authorized representative written directions concerning the manner in which to proceed. The public body has complete discretion to develop the written directions and the construction manager at risk must proceed in a manner consistent with the written directions developed by the public body. If the public body directs the construction manager at risk to solicit additional proposals, a subcontractor that has submitted a proposal may withdraw the proposal.

3. A construction manager at risk shall time stamp all envelopes containing proposals to provide labor, materials or equipment on a public work which are submitted by subcontractor.

Sec. 12. 1. *A construction manager at risk shall open proposals submitted by subcontractors who were qualified to submit proposals in accordance with the provisions of subsection 7 of NRS 338.16995.*

2. Before the construction manager at risk opens a proposal submitted by a subcontractor, the construction manager at risk must confirm that the proposal was:

(a) Submitted by a subcontractor who was determined to be qualified to submit a proposal in the trade or for the scope of work for which the subcontractor has submitted a proposal;

(b) Submitted by a subcontractor who attended the preproposal meeting; and

(c) Timely received by the construction manager at risk.

3. If a proposal does not satisfy the requirements of subsection 2, the construction manager at risk must return the proposal unopened to the subcontractor who submitted the proposal.

Sec. 13. 1. *The list compiled and provided to a public body or its authorized representative by a construction manager at risk pursuant to subsection 8 of NRS 338.16995 must contain:*

(a) The name, contact information, and the trade or scope of work, or, if applicable, both the trade and scope of work, of the subcontractor; and

(b) The price of the proposal submitted by the subcontractor.

↪ The list must be made available to the public upon request but the results of the bidding may only be made available to the public after the selection and approval of the best bid for each trade and scope of work.

2. The construction manager at risk must provide to the public body or its authorized representative a copy of all proposals submitted by the subcontractors, and the public body must maintain a copy of each proposal in the project file for the public work.

3. A construction manager at risk shall evaluate the proposals and select a subcontractor in accordance with the provisions of subsection 9 of NRS 338.16995. The construction manager at risk must record, document and preserve the evaluations of the proposals.

4. If requested, the construction manager at risk must meet with a subcontractor who was not selected to discuss the reasons that the subcontractor was not selected.

5. A public body or its authorized representative must confirm that the construction manager at risk has complied with the requirements of NRS 338.16995 and sections 2 to 13, inclusive, of this regulation.

**NOTICE OF ADOPTION OF PROPOSED REGULATION
LCB File No. R099-11**

The State Public Works Board adopted regulations assigned LCB File No. R099-11, 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>
11/28/11	Workshop	12/15/11
1/10/12	Hearing	2/10/12

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 Division at (775) 684-4141 or by writing to the State Public Works Division, 515 East Musser, Room 102, Carson City, NV 89701, or by e-mailing the SPWD at **hfatzer@admin.nv.gov**

2. The number of persons who:

	12/15/11	2/10/12
(a) Attended each hearing:	32	15
(b) Testified at each hearing:	10-16	6
(c) Submitted written comments:	4	4

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 Division at (775) 684-4141 or by writing to the State Public Works Division, 515 East Musser, Room 102, Carson City, NV 89701, or by e-mailing the SPWD at **hfatzer@admin.nv.gov**

- 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.**

Not applicable. Regulation was adopted with changes.

- 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**

Adverse – No adverse affects.

Beneficial – Implements the following: If a public body uses a CMAR for the construction of a public work this process sets forth the process that the CMAR must use to prequalify and select subcontractors for that public work, as required in SB 268 sections 4 and 5.

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

Implements the following: If a public body uses a CMAR for the construction of a public work this process sets forth the process that the CMAR must use to prequalify and select subcontractors for that public work, as required in SB 268 sections 4 and 5.

- 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.**

None

- 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?

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