

CHAPTER 338

PUBLIC WORKS

GENERAL PROVISIONS

NRS 338.010	Definitions.
NRS 338.011	Applicability: Contracts related to normal operation and normal maintenance; contracts related to emergency.
NRS 338.0115	Inapplicability of this chapter and chapters 332 and 339 of NRS to certain projects constructed by private developers.
NRS 338.0117	Qualification to receive preference in bidding: Submission of affidavit to public body certifying compliance with requirements; provisions required to be included in contract; written objections for failure to comply with requirements; liquidated damages; annual report to Legislative Commission by public body concerning such contracts.
NRS 338.0118	Adoption by local government of policies providing for use of certain recycled materials in public road and highway projects; use of such materials; exception.
NRS 338.012	Regulations of Labor Commissioner.

EMPLOYMENT

GENERAL PROVISIONS

NRS 338.013	Inclusion of identifying number from Labor Commissioner in advertisement or solicitation; reports by public bodies and contractors to Labor Commissioner.
NRS 338.015	Enforcement by Labor Commissioner and Attorney General.
NRS 338.016	Civil action to recover damages resulting from commission of offense.
NRS 338.017	Temporary disqualification of contractor after imposition of administrative penalty; notification of State Contractors' Board.
NRS 338.018	Applicability to certain contracts for construction work of Nevada System of Higher Education.

WAGES

NRS 338.020	Hourly and daily rate of wages must not be less than prevailing wage in county; rate must be included in contract and posted on-site; payment of overtime; wages paid in accordance with jurisdictional classes recognized in locality.
NRS 338.030	Procedure for determination of prevailing wage in county.
NRS 338.035	Discharge of part of obligation of contractor or subcontractor engaged on public work to pay wages by making certain contributions in name of worker.

NRS 338.040	Workers deemed to be employed on public works.
NRS 338.050	Contractual relationships: Applicability of NRS 338.010 to 338.090, inclusive.
NRS 338.060	Forfeitures when workers paid less than designated rates or willfully reported in inaccurate or incomplete manner or not reported to public body; forfeiture clause in contracts; regulation establishing sliding scale for penalties; recovery of investigative costs and attorney's fees; waiver or reduction of penalty.
NRS 338.070	Investigations of violations by public bodies; withholding of certain sums by public bodies and contractors; maintenance and inspection of records regarding employees; penalty for noncompliance.
NRS 338.075	Applicability to certain contracts for construction work of Nevada System of Higher Education.
NRS 338.080	Exemptions.
NRS 338.090	Penalties.

EMPLOYMENT PRACTICES

NRS 338.125	Fair employment practices: Contents of contracts concerning public works; breach of contract.
NRS 338.130	Preferential employment in construction of public works.
NRS 338.135	Rental or lease of trucks or truck and trailer combinations by contractors or subcontractors: Hourly rate for vehicle and services of driver.

GENERAL PROCEDURES FOR AWARDING CONTRACTS

LIMITATIONS ON GENERAL APPLICABILITY OF PROVISIONS

NRS 338.1373	Option of local governments to comply with alternative procedures; inapplicability of certain provisions to contracts awarded by Department of Transportation. [Effective through June 30, 2013.]
NRS 338.1373	Option of local governments to comply with alternative procedures; inapplicability of certain provisions to contracts awarded by Department of Transportation. [Effective July 1, 2013.]

QUALIFICATION OF BIDDERS; QUALIFICATION OF SUBCONTRACTORS ON STATE PUBLIC WORKS

NRS 338.1375	State public works: Acceptance of bids from qualified bidders only; adoption and use of criteria for qualification of bidders.
NRS 338.1376	State public works: Qualification of subcontractors; disqualification; appeal.
NRS 338.1377	Local government public works: Adoption of criteria for qualification of bidders.
NRS 338.1378	Local government public works: Advertisement required before acceptance of applications for qualification of bidders.

- NRS 338.1379 State and local government public works: Submission of application to qualify as bidder; investigation of applicant; determination; notice; period of qualification; use of criteria; confidentiality of certain financial information concerning applicant; denial or revocation of qualification in certain circumstances.
- NRS 338.1381 State and local government public works: Procedure upon appeal of denial of application to qualify as bidder or disqualification of subcontractor.
- NRS 338.1382 Local government public works: Alternative procedure for qualification of bidders.

**PREFERENCE FOR BIDS ON SMALLER CONTRACTS
SUBMITTED BY LOCAL BUSINESSES OWNED BY
VETERANS WITH SERVICE-CONNECTED DISABILITIES**

- NRS 338.1384 Definitions.
- NRS 338.13841 "Business owned by a veteran with a service-connected disability" defined.
- NRS 338.13842 "Local business" defined.
- NRS 338.13843 "Veteran with a service-connected disability" defined.
- NRS 338.13844 Amount of preference.
- NRS 338.13845 Fraudulent acts.
- NRS 338.13846 Duty of State Public Works Division to report to Legislature.
- NRS 338.13847 Regulations.

**ADVERTISING; ACCEPTANCE OF BIDS;
AWARD OF CONTRACT**

- NRS 338.1385 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before public body may commence public work itself; exemptions. [Effective through April 30, 2013.]
- NRS 338.1385 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before public body may commence public work itself; exemptions. [Effective May 1, 2013.]
- NRS 338.1386 State or local government to award contract for smaller public work to contractor or perform public work itself.
- NRS 338.13862 Requirements for awarding contract for smaller public work to contractor.
- NRS 338.13864 Attestation required before State or local government may perform certain smaller public works itself.

- NRS 338.1389 Contract for public work for which estimated cost exceeds \$250,000 must be awarded to contractor who submits best bid; certain bids deemed best bid; eligibility to receive preference in bidding; issuance of certificate of eligibility by State Contractors' Board; regulations; fees; sanctions; objections.
- NRS 338.13895 Award of contract to unlicensed or improperly licensed contractor prohibited; replacement of unacceptable subcontractor before contract is awarded; rescission of award of contract to unlicensed or improperly licensed contractor before commencement of work.
- NRS 338.139 Awarding of contract to specialty contractor: Conditions.

ADDITIONAL PROCEDURES, CONDITIONS AND LIMITATIONS RELATING TO CONTRACTS

GENERAL PROVISIONS

- NRS 338.140 Requirements and limitations relating to drafting of specifications for bids; documents generated by bidder in preparation or determination of prices included in bid.
- NRS 338.141 Bids to include certain information concerning subcontractors and prime contractors; when bids deemed not responsive with respect to subcontractors; requirements and penalties for substitution of named subcontractors.
- NRS 338.1415 Local government prohibited from accepting bid on contract for public work submitted by contractor who breached certain contracts for public works.
- NRS 338.142 Notice of protest of award of contract: Period for filing; contents; posting and disposition of bond or security; stay of action; immunity of public body from liability to bidder.
- NRS 338.1425 Prohibition against public body entering into contract with design professional who is not member of design-build team for services on public work until certain period after public body transmits certain information to licensing board of design professional; posting of such information by licensing board.

ALTERNATIVE PROCEDURES FOR LOCAL GOVERNMENTS

- NRS 338.143 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before local government may commence public work itself; exemptions. [Effective through April 30, 2013.]

- NRS 338.143 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before local government may commence public work itself; exemptions. [Effective May 1, 2013.]
- NRS 338.1435 Constructability review required before advertising for bids.
- NRS 338.1442 Local government to award contract for smaller public work to contractor or perform public work itself.
- NRS 338.1444 Requirements for awarding contract for smaller public work to contractor.
- NRS 338.1446 Attestation required before local government may perform certain smaller public works itself.
- NRS 338.147 Contract for public work for which estimated cost exceeds \$250,000 must be awarded to contractor who submits best bid; certain bids deemed best bid; eligibility to receive preference in bidding; issuance of certificate of eligibility by State Contractors' Board; regulations; fees; sanctions; objections.
- NRS 338.1475 Award of contract to unlicensed or improperly licensed contractor prohibited; replacement of unacceptable subcontractor before contract is awarded; rescission of award of contract to unlicensed or improperly licensed contractor before commencement of work.
- NRS 338.148 Awarding of contract to specialty contractor: Conditions.

PROVISIONS REQUIRED IN CONTRACTS

- NRS 338.150 Provisions requiring use of method of alternate dispute resolution before initiation of judicial action; exception.
- NRS 338.153 Provision requiring persons who provide labor, equipment, materials, supplies or services for public work to comply with all applicable state and local laws.
- NRS 338.155 Provisions relating to design professional who is not member of design-build team.

CONTRACTS FOR TRANSPORTATION FACILITIES

- NRS 338.161 "Transportation facility" defined.
- NRS 338.162 Alternative methods of authorization.
- NRS 338.163 Submission of request to public body; contents of request.
- NRS 338.164 Request for submission of proposals by public body.
- NRS 338.166 Approval of request or proposal: Determination of public purpose; staff reports; copy of request or proposal to be furnished to affected governmental entities; fee; approval contingent on entering agreement with public body; establishment of date for development of or commencement of construction of transportation facility.
- NRS 338.167 Contract for transportation services.
- NRS 338.168 Federal, state or local assistance.

**CONTRACTS INVOLVING CONSTRUCTION
MANAGERS AT RISK**

NRS 338.169	Public body authorized to construct public work by selecting and entering into contracts with construction manager at risk.
NRS 338.1691	Qualifications for construction manager at risk.
NRS 338.1692	Advertising for proposals for construction manager at risk; contents of request for proposals; requirements for proposals.
NRS 338.1693	Procedure for selection of most qualified applicants; minimum number of proposals required; negotiation of contract for preconstruction services; availability of certain information to applicants and public.
NRS 338.16935	Contract between construction manager at risk and subcontractor for certain preconstruction services.
NRS 338.1694	Final proposals: Requests; requirements. [Repealed.]
NRS 338.1695	Ranking of applicants based on final proposals and interviews; negotiations with certain applicants for contract for preconstruction services; availability to applicants and public of certain information. [Repealed.]
NRS 338.1696	Negotiation of contract for construction of public work or portion thereof with construction manager at risk; awarding of contract if public body unable to negotiate satisfactory contract with construction manager at risk.
NRS 338.1697	Authorized provision in contract with construction manager at risk for construction of public work or portion thereof for guaranteed maximum price.
NRS 338.1698	Required and authorized provisions in contract for construction of public work or portion thereof awarded to construction manager at risk.
NRS 338.16985	Duties and powers of construction manager at risk who enters into contract for construction of public work or portion thereof.
NRS 338.1699	Subcontractors on public works for which construction manager at risk was awarded contract: Eligibility; submission of list to local government. [Repealed.]
NRS 338.16991	Contract between construction manager at risk and subcontractor to provide labor, materials or equipment on project: Eligibility; procedure for determination of qualification of subcontractor to submit proposal.
NRS 338.16995	Contract between construction manager at risk and subcontractor to provide labor, materials or equipment on project: Authority to enter into; procedure for awarding subcontracts of certain estimated value; substitution of subcontractor on such subcontracts; availability of certain information to applicants and public.

**CONTRACTS INVOLVING DESIGN-BUILD
TEAMS, PRIME CONTRACTORS OR
NONPROFIT ORGANIZATIONS****GENERAL PROVISIONS**

NRS 338.1711	Contracts for which public body is required or authorized to enter into with prime contractor or design-build team.
NRS 338.1715	Procedure for selecting design-build team.

- NRS 338.1717** **Employment of architect, general contractor, construction manager as agent, landscape architect or engineer as consultant.**
NRS 338.1718 **Contract with construction manager as agent.**

**PROCEDURES FOR AWARDING CONTRACTS TO
DESIGN-BUILD TEAMS**

- NRS 338.1721** **Qualifications of design-build team.**
NRS 338.1723 **Advertisement for preliminary proposals.**
NRS 338.1725 **Selection of finalists based on preliminary proposals; minimum number of proposals required; availability to public of certain information.**
NRS 338.1727 **Request for and submission of final proposals; selection or rejection of final proposals; awarding of contract; partial reimbursement of unsuccessful finalists in certain circumstances; contents of contract; availability to public of certain information.**

**PREFERENCE WHEN COMPETING
FOR PUBLIC WORKS**

- NRS 338.173** **Certificate of eligibility to receive preference when competing for public works to certain design professionals: Issuance; duration; ineligibility for submission of false information; regulations; fees; written objections.**

NOTIFICATION OF LICENSING BOARDS

- NRS 338.175** **Substantially incomplete or rejected plans submitted by registered architect, interior designer, residential designer or landscape architect.**
NRS 338.176 **Substantially incomplete or rejected plans submitted by licensed professional engineer or land surveyor.**

**DESIGN, CONSTRUCTION, RENOVATION AND
DEMOLITION OF PUBLIC WORKS**

GENERAL PROVISIONS

- NRS 338.177** **Lease of property acquired by local government for public work pending completion of public work.**
NRS 338.180 **Accommodation of persons with physical handicap or disability; verification of conformity with requirements; enforcement.**
NRS 338.185 **Public body to reimburse contractor for certain costs of locating underground facility of public utility.**

**ENERGY AND ENVIRONMENTAL
DESIGN REQUIREMENTS**

- NRS 338.1905** **Retrofitting of state buildings for energy efficiency: Appointment of energy retrofit coordinators and person to assist coordinators. [Effective through April 30, 2013.]**

- NRS 338.1906 Retrofitting of state buildings for energy efficiency: Duties of energy retrofit coordinators and State Board of Examiners; procedures for requesting and approving proposals; limitation on money committed beyond biennium; restrictions on approval of change orders to executed contracts; projects exempt from certain procedural requirements. [Effective through April 30, 2013.]
- NRS 338.1907 Retrofitting of local governmental buildings for energy efficiency: Duties of energy retrofit coordinators and local governments; procedures for requesting and approving proposals; restrictions on approval of change orders to executed contracts; projects exempt from certain procedural requirements. [Effective through April 30, 2013.]
- NRS 338.1908 Retrofitting of local governmental buildings, facilities and structures with consideration of use of sources of renewable energy. [Effective through April 30, 2013.]
- NRS 338.1908 Retrofitting of local governmental buildings, facilities and structures with consideration of use of sources of renewable energy. [Effective May 1, 2013, through December 31, 2021.]
- NRS 338.1908 Retrofitting of local governmental buildings, facilities and structures with consideration of use of sources of renewable energy. [Effective January 1, 2022.]

ADDITIONAL CONDITIONS AND LIMITATIONS

- NRS 338.193 Standards for plumbing fixtures.
- NRS 338.195 Survey for presence of asbestos required before renovation or demolition of public building.
- NRS 338.200 Prohibition against naming public building or structure after member of governing body.

PROGRESS PAYMENTS

GENERAL PROVISIONS

- NRS 338.400 Definitions.
- NRS 338.415 "Progress bill" defined.
- NRS 338.420 "Progress payment" defined.
- NRS 338.425 "Retainage" defined.
- NRS 338.430 "Retainage bill" defined.
- NRS 338.435 "Retainage payment" defined.
- NRS 338.455 Methods to be used for providing notice.
- NRS 338.460 Dates to be used for calculating accrual of interest on retainage.

APPLICABILITY AND LIMITATIONS

- NRS 338.480 Provisions inapplicable to certain contracts made by Department of Transportation.
- NRS 338.485 Waiver or modification of right, obligation or liability set forth in NRS 338.400 to 338.645, inclusive, prohibited; certain conditions, stipulations or provisions of contract void and unenforceable.
- NRS 338.490 Limitations on requiring release or waiver of right to receive progress payment or retainage payment.

PAYMENTS MADE BY PUBLIC BODY TO CONTRACTOR

NRS 338.510	Submittal of progress bills.
NRS 338.515	Time for making payments; amounts paid; amounts withheld as retainage; rate of interest paid on amounts withheld; powers of Labor Commissioner when worker is owed wages. [Effective through June 30, 2015.]
NRS 338.515	Time for making payments; amounts paid; amounts withheld as retainage; rate of interest paid on amounts withheld; powers of Labor Commissioner when worker is owed wages. [Effective July 1, 2015.]
NRS 338.520	Payment of outstanding balance upon occupancy, use or recording of notice of completion.
NRS 338.525	Withholding amounts for failure of contractor to comply with contract or applicable building code, law or regulation; payment of amounts withheld upon confirmation of correction of condition. [Effective through June 30, 2015.]
NRS 338.525	Withholding amounts for failure of contractor to comply with contract or applicable building code, law or regulation; payment of amounts withheld upon confirmation of correction of condition. [Effective July 1, 2015.]
NRS 338.530	Payment of interest on amounts withheld improperly. [Effective through June 30, 2015.]
NRS 338.530	Payment of interest on amounts withheld improperly. [Effective July 1, 2015.]
NRS 338.535	Public body to provide notice concerning progress payments and retainage payments to certain subcontractors and suppliers.

PAYMENTS MADE BY CONTRACTOR TO
SUBCONTRACTORS AND SUPPLIERS

NRS 338.550	Time for making payments; amounts paid.
NRS 338.555	Amounts withheld as retainage; payment of interest. [Effective through June 30, 2015.]
NRS 338.555	Amounts withheld as retainage; payment of interest. [Effective July 1, 2015.]
NRS 338.560	Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation or for claim for wages against subcontractor; payment of amounts withheld upon correction of condition. [Effective through June 30, 2015.]
NRS 338.560	Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation or for claim for wages against subcontractor; payment of amounts withheld upon correction of condition. [Effective July 1, 2015.]
NRS 338.565	Payment of interest on amounts withheld improperly.
NRS 338.570	Contractor to provide notice concerning progress payments and retainage payments to certain subcontractors and suppliers.

PAYMENTS MADE BY SUBCONTRACTOR TO
SUBCONTRACTORS AND SUPPLIERS

NRS 338.590	Time for making payments; amounts paid.
NRS 338.595	Amounts withheld as retainage; payment of interest. [Effective through June 30, 2015.]

NRS 338.595	Amounts withheld as retainage; payment of interest. [Effective July 1, 2015.]
NRS 338.600	Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation; payment of amounts withheld upon correction of condition. [Effective through June 30, 2015.]
NRS 338.600	Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation; payment of amounts withheld upon correction of condition. [Effective July 1, 2015.]
NRS 338.605	Payment of interest on amounts withheld improperly.
NRS 338.610	Subcontractor to provide notice concerning progress payments and retainage payments to certain subcontractors and suppliers.

REMEDIES

NRS 338.630	Action by contractor for alternate writ of mandamus to compel performance by public body.
NRS 338.635	Action by subcontractor or supplier to remedy unjustified or excessive withholding.
NRS 338.640	Award of reasonable costs and attorney's fees to prevailing party.
NRS 338.645	Other rights and remedies not affected.

CHAPTER 338

PUBLIC WORKS

CROSS REFERENCES

Administration, Department of, duties of Director, NRS 232.215
Architecture, residential design and interior design, NRS ch. 623
Building codes, NRS 278.580-278.585
Counties, financing of public improvements, NRS ch. 244A
County department of public works, NRS 244.151
Employment Security Division, availability of records to public agencies, NRS 612.265
Fire protection districts, county, NRS ch. 474
Floods, control of, NRS ch. 543
General improvement districts, NRS ch. 318
Highways, NRS 408.313-408.433
Hospital districts, county, NRS 450.550-450.750
Housing authorities required to comply with wage and hour laws, NRS 315.450
Industrial insurance—
 Consolidated insurance program, NRS 616B.710-616B.737
 Contractors, submission of certificate of compliance, coverage by public agency,
 NRS 616B.627, 617.210
 Premiums and coverage compulsory, NRS 616B.618
Insects, pests and noxious weeds, control of, NRS ch. 555
Interstate waters, compacts and commissions, NRS ch. 538
Labor Commissioner, NRS ch. 607
Land surveying, NRS ch. 625
Landscape architecture, NRS ch. 623A
Lease-purchase or installment-purchase agreements, Legislative declaration, applicability of
 public works laws, NRS 350.091, 353.545, 353.590, 354.740
Legal notices and advertisements, NRS ch. 238
Libraries, county, district, consolidated and town, NRS ch. 379
Local Government Purchasing Act, NRS ch. 332
Local improvement districts, NRS ch. 309
Nevada Administrative Procedure Act, NRS ch. 233B
Prisoners, employment on public works, NRS 211.140
Renewable energy systems installed on property owned or occupied by public body,
 applicability of public works laws, NRS 701B.265, 701B.625
Utilities owned by local governments, NRS ch. 710
Vagrants, employment on public works, NRS 207.040, 207.050
Veterans' preferences, review of reports, NRS 417.105
Water conservancy districts, NRS ch. 541

REVISER'S NOTE.

Ch. 308, Stats. 2005, contains the following provisions not included in NRS:

“WHEREAS, The men and women who work in the construction industry play a significant role in the growth of the economy of this State; and

WHEREAS, The construction industry in this State is rapidly growing, and the career opportunities for the men and women who work in the construction industry are abundant; and

WHEREAS, Due to the rapid growth of the construction industry in this State, the men and women who work in the construction industry are paid wages that exceed the average wage in this State and have access to other excellent employment benefits; and

WHEREAS, Women and members of certain minority groups are underrepresented in the construction industry as compared to their representation in the population of this State; and

WHEREAS, These women and members of certain minority groups should have access to the excellent wages, benefits and career opportunities available to a person working in the construction industry; and

WHEREAS, The construction industry will greatly benefit from the influx of trained women and members of certain minority groups into the construction industry; now, therefore,

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The Legislature hereby finds and declares that:

1. Women and members of certain minority groups should be encouraged to obtain the skills and experience necessary to work in the construction industry through employment, apprenticeship programs and training related to the construction industry.

2. The construction industry should take active steps to encourage women and members of certain minority groups to obtain the training and experience necessary to succeed in the construction industry.

3. Upon receiving the training and experience required to succeed in the construction industry, both women and members of certain minority groups and the construction industry will mutually benefit from the greater inclusion of women and members of these groups in the construction industry.

Sec. 2. The Director of the Legislative Counsel Bureau shall prepare and transmit a copy of this act to:

1. The various chambers of commerce, high school vocation programs, community colleges and trade schools in this State;

2. The Association of General Contractors, the Associated Builders and Contractors and any other similar organization representing the construction industry; and

3. Any labor organization which represents workers in the construction industry and any other similar organization representing workers in the construction industry.”

ATTORNEY GENERAL'S OPINIONS.

Chapter applies to any public works project sponsored by a public body of this State.

The provisions of NRS ch. 338 apply to any public works project sponsored by a public body of this State, whether the project is federally funded or not, and where the State's prevailing wage rates are higher than federal rates and federal agencies have not prohibited enforcement of higher rates, the state labor commissioner has jurisdiction to enforce the State's rates pursuant to NRS 338.015 and 338.020. AGO 82-18 (10-26-1982)

Owner of public works project is not liable to general contractor for defective performance or nonperformance of subcontractor or supplier designated by owner. A contract for a public works project (see NRS ch. 338) sometimes requires a general contractor to use specified subcontractors or suppliers to perform certain aspects of the contract where appropriate. Since a general contractor makes his bid and enters into a contract with the owner of a public works project with the knowledge and understanding that a specified subcontractor or supplier is to be used, the general contractor accepts that condition as part of his contract. It is the general contractor's responsibility to ensure that his agreement with the subcontractor or supplier provides adequate remedies for defective performance or nonperformance of an owner designated subcontractor or supplier. Therefore, while the unique circumstances of a specific case might give rise to liability, the general rule is that the owner of a public works project is not liable to the general contractor for defective performance or nonperformance of an owner-designated subcontractor or supplier. AGO 93-10 (5-26-1993)

Architectural drawings are entitled to copyright protection and may not be reused by the State of Nevada on future public works projects without the contractual consent of the architect. Architectural drawings and specifications (see NRS ch. 623) are entitled to federal copyright protection. An architect's copyright includes the right to reproduce and use his drawings, while a client acquires ownership only of a particular copy, which entitles the client only to use that particular copy for its intended purpose. If the State of Nevada wishes to reuse on future public works projects (see NRS ch. 338) the drawings and specifications of an architect with whom it has contracted, the State must include provisions in the contract which clearly set out the rights and duties of the parties and which entitle the State to reuse such drawings and specifications. The participation of the architect on such future projects would be contemplated by his agreement to the reuse. However, if the State instead decided to engage a different architect on such a future project, the plans would have to be redrawn to the new site by the new architect to avoid violating NRS 623.270 and the original architect would first have to waive his copyright in the original plans. AGO 98-06 (3-26-1998)

Tahoe Bond Act: Grants; bidding. The Tahoe Bond Act (see ch. 361, Stats. 1995) authorizes grants only to local governments and the department of transportation for the control of erosion and the restoration of natural watercourses in the Lake Tahoe Basin. The language of the Tahoe Bond Act does not allow private individuals and nonprofit organizations to receive such grant money directly. If a local government that receives grant money desires to bid out a project for the control of erosion or the restoration of natural watercourses, NRS ch. 338 governs the bid procedures. (See also NRS 321.5951 et seq.) AGO 2000-10 (3-8-2000)

GENERAL PROVISIONS

ATTORNEY GENERAL'S OPINIONS.

Absence of "agreement" between redevelopment agency and developer does not eliminate duty to comply with applicable prevailing wage laws. The provisions of NRS 279.500 state that, in certain circumstances, an agreement between a redevelopment agency and a developer must specify that the relevant development project is subject to the provisions of NRS 338.010 et seq. In relevant part, NRS 338.020 requires that mechanics and workmen employed on a public works project be paid not less than the local "prevailing wage." Although NRS 279.500 does not require specifically that a legal relationship between a redevelopment agency and a developer be memorialized in an "agreement," the statute contemplates that an agreement will exist. Because the intent of the Legislature in enacting NRS 279.500 was to protect workers employed on redevelopment projects, a failure to memorialize the legal relationship between a redevelopment agency and a developer does not excuse noncompliance with the express provisions and application of NRS 279.500 and 338.010 et seq. AGO 2001-03 (2-16-2001)

NRS 338.010 Definitions. As used in this chapter:

1. "Authorized representative" means a person designated by a public body to be responsible for the development, solicitation, award or administration of contracts for public works pursuant to this chapter.
2. "Contract" means a written contract entered into between a contractor and a public body for the provision of labor, materials, equipment or supplies for a public work.
3. "Contractor" means:
 - (a) A person who is licensed pursuant to the provisions of chapter 624 of NRS.
 - (b) A design-build team.
4. "Day labor" means all cases where public bodies, their officers, agents or employees, hire, supervise and pay the wages thereof directly to a worker or workers employed by them on public works by the day and not under a contract in writing.
5. "Design-build contract" means a contract between a public body and a design-build team in which the design-build team agrees to design and construct a public work.
6. "Design-build team" means an entity that consists of:

(a) At least one person who is licensed as a general engineering contractor or a general building contractor pursuant to chapter 624 of NRS; and

(b) For a public work that consists of:

(1) A building and its site, at least one person who holds a certificate of registration to practice architecture pursuant to chapter 623 of NRS.

(2) Anything other than a building and its site, at least one person who holds a certificate of registration to practice architecture pursuant to chapter 623 of NRS or landscape architecture pursuant to chapter 623A of NRS or who is licensed as a professional engineer pursuant to chapter 625 of NRS.

7. "Design professional" means:

(a) A person who is licensed as a professional engineer pursuant to chapter 625 of NRS;

(b) A person who is licensed as a professional land surveyor pursuant to chapter 625 of NRS;

(c) A person who holds a certificate of registration to engage in the practice of architecture, interior design or residential design pursuant to chapter 623 of NRS;

(d) A person who holds a certificate of registration to engage in the practice of landscape architecture pursuant to chapter 623A of NRS; or

(e) A business entity that engages in the practice of professional engineering, land surveying, architecture or landscape architecture.

8. "Division" means the State Public Works Division of the Department of Administration.

9. "Eligible bidder" means a person who is:

(a) Found to be a responsible and responsive contractor by a local government or its authorized representative which requests bids for a public work in accordance with paragraph (b) of subsection 1 of NRS 338.1373; or

(b) Determined by a public body or its authorized representative which awarded a contract for a public work pursuant to NRS 338.1375 to 338.139, inclusive, to be qualified to bid on that contract pursuant to NRS 338.1379 or 338.1382.

10. "General contractor" means a person who is licensed to conduct business in one, or both, of the following branches of the contracting business:

(a) General engineering contracting, as described in subsection 2 of NRS 624.215.

(b) General building contracting, as described in subsection 3 of NRS 624.215.

11. "Governing body" means the board, council, commission or other body in which the general legislative and fiscal powers of a local government are vested.

12. "Local government" means every political subdivision or other entity which has the right to levy or receive money from ad valorem or other taxes or any mandatory assessments, and includes, without limitation, counties, cities, towns, boards, school districts and other districts organized pursuant to chapters 244A, 309, 318, 379, 474, 538, 541, 543 and 555 of NRS, NRS 450.550 to 450.750, inclusive, and any agency or department of a county or city which prepares a budget separate from that of the parent political subdivision. The term includes a person who has been designated by the governing body of a local government to serve as its authorized representative.

13. "Offense" means failing to:

(a) Pay the prevailing wage required pursuant to this chapter;

(b) Pay the contributions for unemployment compensation required pursuant to chapter 612 of NRS;

(c) Provide and secure compensation for employees required pursuant to chapters 616A to 617, inclusive, of NRS; or

(d) Comply with subsection 4 or 5 of NRS 338.070.

14. "Prime contractor" means a contractor who:
- (a) Contracts to construct an entire project;
 - (b) Coordinates all work performed on the entire project;
 - (c) Uses his or her own workforce to perform all or a part of the public work;
- and
- (d) Contracts for the services of any subcontractor or independent contractor or is responsible for payment to any contracted subcontractors or independent contractors.
- ☞ The term includes, without limitation, a general contractor or a specialty contractor who is authorized to bid on a project pursuant to NRS 338.139 or 338.148.
15. "Public body" means the State, county, city, town, school district or any public agency of this State or its political subdivisions sponsoring or financing a public work.
16. "Public work" means any project for the new construction, repair or reconstruction of:
- (a) A project financed in whole or in part from public money for:
 - (1) Public buildings;
 - (2) Jails and prisons;
 - (3) Public roads;
 - (4) Public highways;
 - (5) Public streets and alleys;
 - (6) Public utilities;
 - (7) Publicly owned water mains and sewers;
 - (8) Public parks and playgrounds;
 - (9) Public convention facilities which are financed at least in part with public money; and
 - (10) All other publicly owned works and property.
- (b) A building for the Nevada System of Higher Education of which 25 percent or more of the costs of the building as a whole are paid from money appropriated by this State or from federal money.
17. "Specialty contractor" means a person who is licensed to conduct business as described in subsection 4 of NRS 624.215.
18. "Stand-alone underground utility project" means an underground utility project that is not integrated into a larger project, including, without limitation:
- (a) An underground sewer line or an underground pipeline for the conveyance of water, including facilities appurtenant thereto; and
 - (b) A project for the construction or installation of a storm drain, including facilities appurtenant thereto,
- ☞ that is not located at the site of a public work for the design and construction of which a public body is authorized to contract with a design-build team pursuant to subsection 2 of NRS 338.1711.
19. "Subcontract" means a written contract entered into between:
- (a) A contractor and a subcontractor or supplier; or
 - (b) A subcontractor and another subcontractor or supplier,
- ☞ for the provision of labor, materials, equipment or supplies for a construction project.
20. "Subcontractor" means a person who:
- (a) Is licensed pursuant to the provisions of chapter 624 of NRS or performs such work that the person is not required to be licensed pursuant to chapter 624 of NRS; and
 - (b) Contracts with a contractor, another subcontractor or a supplier to provide labor, materials or services for a construction project.

21. “Supplier” means a person who provides materials, equipment or supplies for a construction project.

22. “Wages” means:

(a) The basic hourly rate of pay; and

(b) The amount of pension, health and welfare, vacation and holiday pay, the cost of apprenticeship training or other similar programs or other bona fide fringe benefits which are a benefit to the worker.

23. “Worker” means a skilled mechanic, skilled worker, semiskilled mechanic, semiskilled worker or unskilled worker in the service of a contractor or subcontractor under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed. The term does not include a design professional.

[1 1/2:139:1937; added 1941, 389; 1931 NCL § 6179.51 1/2]—(NRS A 1969, 735; 1979, 1288; 1981, 526; 1983, 130, 1573; 1989, 1965; 1993, 392, 2131, 2247; 1995, 691; 1999, 1849, 1991, 2396, 3472, 3502; 2001, 252, 1143, 1268, 2022, 2258, 2276; 2003, 119, 124, 1518, 1986, 2411, 2489; 2005, 1793; 2011, 490, 2959)

NRS CROSS REFERENCES.

Counties, financing of public improvements, NRS ch. 244A
 Fire protection districts, county, NRS ch. 474
 Floods, control of, NRS ch. 543
 General improvement districts, NRS ch. 318
 Hospital districts, county, NRS 450.550-450.750
 Insects, pests and noxious weeds, control of, NRS ch. 555
 Interstate waters, compacts and commissions, NRS ch. 538
 Libraries, county, district, consolidated and town, NRS ch. 379
 Local improvement districts, NRS ch. 309
 Water conservancy districts, NRS ch. 541

NEVADA CASES.

“District” denotes area with specific political or administrative boundaries and not district created by commissioner. The labor commissioner acted arbitrarily and capriciously and in excess of his statutory authority (see NRS 338.015) in determining the prevailing rate of wages to be paid by a public body in a contract for public works on the basis of merging all counties and cities in the State into two districts and establishing a rate for each district, rather than by determining the prevailing rate within the boundaries of those political subdivisions awarding contracts for public works. For purposes of the former provisions of NRS 338.020, which provides that the rate of such wages must not be less than the rate then prevailing in a county, city, town or district in which a public work is located, the term “district” denotes an area with specific political or administrative boundaries, and not a district created by a commissioner which covers vast geographic areas and includes communities outside the boundaries of any locality in which the public work is performed. *State v. City of Fallon*, 100 Nev. 509, 685 P.2d 1385 (1984)

Proposed train trench in downtown Reno constituted a “public work.” Pursuant to the definition of “public work” set forth in NRS 338.010, a railroad grade separation project (train trench) proposed for construction in downtown Reno constituted a public work as both: (1) a project financed in whole or in part from public money for public streets and alleys; and (2) a publicly owned work whose cost as a whole exceeds \$20,000. *Citizens for Pub. Train Trench Vote v. City of Reno*, 118 Nev. 574, 53 P.3d 387 (2002)

A project funded through public revenue bonds is subject to prevailing wage requirements only if it is a “public work” and involves a “public body.” Where a private nonprofit corporation financed the construction of a hospital in part through city revenue bonds, prevailing wages were not required. Under NRS 244A.763, a project funded through public economic development revenue bonds is subject to prevailing wage requirements only if it is a “public work” and involves a “public body” under NRS 338.010 and 338.020. In this case, the project did not constitute a public work or involve a public body. Additionally, no public money was used to finance it because the bonds did not involve taxpayer money or obligate county funds. (See NRS 244A.713 and 244A.725.) *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council*, 122 Nev. 218, 128 P.3d 1065 (2006)

Some private projects can be subject to prevailing wage requirements. Any joint venture between a public entity and private developer to construct a public building, if it is funded "in whole or in part from public money," would be considered a public work. (See NRS 338.010; see also NRS 244A.763 and 338.020.) For example, a private project constructed to a public agency's specifications as part of an arrangement for its eventual purchase by the agency would be a public work. *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council*, 122 Nev. 218, 128 P.3d 1065 (2006)

ATTORNEY GENERAL'S OPINIONS.

Chapter applies to any public works project sponsored by a public body of this State. Provisions of NRS ch. 338 apply to any public works project sponsored by a public body of this State, whether the project is federally funded or not, and where the State's prevailing wage rates are higher than federal rates and federal agencies have not prohibited enforcement of higher rates, the state labor commissioner has jurisdiction to enforce the State's rates pursuant to NRS 338.015 and 338.020. AGO 82-18 (10-26-1982)

Certain private projects may be public works subject to the prevailing wage laws. A private project that is constructed or retrofitted to specifications provided by a public agency as part of a plan for the eventual purchase of the project by the public agency is a public work under NRS 338.010 and, therefore, is subject to the prevailing wage laws set forth in NRS 338.020 et seq. AGO 97-22 (8-12-1997), cited, *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council*, 122 Nev. 218, at 222, 128 P.3d 1065 (2006)

NRS 338.011 Applicability: Contracts related to normal operation and normal maintenance; contracts related to emergency. The requirements of this chapter do not apply to a contract:

1. Awarded in compliance with chapter 332 or 333 of NRS which is directly related to the normal operation of the public body or the normal maintenance of its property.
2. Awarded to meet an emergency which results from a natural or artificially created disaster and which threatens the health, safety or welfare of the public. If the public body or its authorized representative determines that an emergency exists, a contract or contracts necessary to contend with the emergency may be let without complying with the requirements of this chapter. If such emergency action was taken by the authorized representative, the authorized representative shall report the contract or contracts to the public body at the next regularly scheduled meeting of the public body.

(Added to NRS by 1981, 526; A 2003, 2414)

NRS CROSS REFERENCES.

Local Government Purchasing Act, NRS ch. 332
State Purchasing Act, NRS ch. 333

NRS 338.0115 Inapplicability of this chapter and chapters 332 and 339 of NRS to certain projects constructed by private developers.

1. Except as otherwise provided in subsection 2, the provisions of this chapter and chapters 332 and 339 of NRS do not apply to a contract under which a private developer, for the benefit of a private development, constructs a water or sewer line extension and any related appurtenances:

- (a) Which qualify as a public work pursuant to NRS 338.010; and
- (b) For which the developer will receive a monetary contribution or refund from a public body as reimbursement for a portion of the costs of the project.

2. If, pursuant to the provisions of such a contract, the developer is not responsible for paying all of the initial construction costs of the project, the provisions of NRS 338.0117, 338.013 to 338.090, inclusive, and 338.1373 to 338.148, inclusive, apply to the contract.

(Added to NRS by 1995, 2648; A 1999, 2397; 2011, 41)

NRS CROSS REFERENCES.

Contractor's bonds on public works, NRS ch. 339
Local Government Purchasing Act, NRS ch. 332

NRS 338.0117 Qualification to receive preference in bidding: Submission of affidavit to public body certifying compliance with requirements; provisions required to be included in contract; written objections for failure to comply with requirements; liquidated damages; annual report to Legislative Commission by public body concerning such contracts.

1. To qualify to receive a preference in bidding pursuant to subsection 2 of NRS 338.1389, subsection 2 of NRS 338.147, subsection 3 of NRS 338.1693, subsection 3 of NRS 338.1727 or subsection 2 of NRS 408.3886, a contractor, an applicant or a design-build team, respectively, must submit to the public body sponsoring or financing a public work a signed affidavit which certifies that, for the duration of the project:

(a) At least 50 percent of all workers employed on the public work, including, without limitation, any employees of the contractor, applicant or design-build team and of any subcontractor engaged on the public work, will hold a valid driver's license or identification card issued by the Department of Motor Vehicles;

(b) All vehicles used primarily for the public work will be:

(1) Registered and partially apportioned to Nevada pursuant to the International Registration Plan, as adopted by the Department of Motor Vehicles pursuant to NRS 706.826; or

(2) Registered in this State;

(c) At least 50 percent of the design professionals working on the public work, including, without limitation, any employees of the contractor, applicant or design-build team and of any subcontractor engaged on the public work, will have a valid driver's license or identification card issued by the Department of Motor Vehicles;

(d) At least 25 percent of the suppliers of the materials used for the public work will be located in this State unless the public body requires the acquisition of materials or equipment that cannot be obtained from a supplier located in this State; and

(e) The contractor, applicant or design-build team and any subcontractor engaged on the public work will maintain and make available for inspection within this State his or her records concerning payroll relating to the public work.

2. Any contract for a public work awarded to a contractor, applicant or design-build team who submits the affidavit described in subsection 1 and who receives a preference in bidding described in subsection 1 must:

(a) Include a provision in the contract that substantially incorporates the requirements of paragraphs (a) to (e), inclusive, of subsection 1; and

(b) Provide that a failure to comply with any requirement of paragraphs (a) to (e), inclusive, of subsection 1 is a material breach of the contract and entitles the public body to liquidated damages only as provided in subsections 5 and 6.

3. A person or entity who believes that a contractor, applicant or design-build team has obtained a preference in bidding as described in subsection 1 but has failed to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 may file a written objection with the public body for which the contractor, applicant or design-build team is performing the public work. A written objection authorized pursuant to this subsection must set forth proof or substantiating evidence to support the belief of the person or entity that the contractor, applicant or design-build team has failed to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1.

4. If a public body receives a written objection pursuant to subsection 3, the public body shall determine whether the objection is accompanied by the proof or substantiating evidence required pursuant to that subsection. If the public body determines that the objection is not accompanied by the required proof or substantiating evidence, the public body shall dismiss the objection. If the public body determines that the objection is accompanied by the required proof or substantiating evidence or if the public body determines on its own initiative that proof or substantiating evidence of a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 exists, the public body shall determine whether the contractor, applicant or design-build team has failed to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 and the public body or its authorized representative may proceed to award the contract accordingly or, if the contract has already been awarded, seek the remedy authorized in subsection 5.

5. A public body may recover, by civil action against the party responsible for a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1, liquidated damages as described in subsection 6 for a breach of a contract for a public work caused by a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1. If a public body recovers liquidated damages pursuant to this subsection for a breach of a contract for a public work, the public body shall report to the State Contractors' Board the date of the breach, the name of each entity which breached the contract and the cost of the contract. The Board shall maintain this information for not less than 6 years. Upon request, the Board shall provide this information to any public body or its authorized representative.

6. If a contractor, applicant or design-build team submits the affidavit described in subsection 1, receives a preference in bidding described in subsection 1 and is awarded the contract, the contract between the contractor, applicant or design-build team and the public body, each contract between the contractor, applicant or design-build team and a subcontractor or supplier and each contract between a subcontractor and a subcontractor or supplier must provide that:

(a) If a party to the contract causes a material breach of the contract between the contractor, applicant or design-build team and the public body as a result of a failure to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1, the party is liable to the public body for liquidated damages in the amount of 1 percent of the cost of the largest contract to which he or she is a party;

(b) The right to recover the amount determined pursuant to paragraph (a) by the public body pursuant to subsection 5 may be enforced by the public body directly against the party that causes the material breach; and

(c) No other party to the contract is liable to the public body for liquidated damages.

7. A public body that awards a contract for a public work to a contractor, applicant or design-build team who submits the affidavit described in subsection 1 and who receives a preference in bidding described in subsection 1 shall, on or before July 31 of each year, submit a written report to the Director of the Legislative Counsel Bureau for transmittal to the Legislative Commission. The report must include information on each contract for a public work awarded to a contractor, applicant or design-build team who submits the affidavit described in subsection 1 and who receives a preference in bidding described in subsection 1, including, without limitation, the name of the contractor, applicant or design-build team who

was awarded the contract, the cost of the contract, a brief description of the public work and a description of the degree to which the contractor, applicant or design-build team and each subcontractor complied with the requirements of paragraphs (a) to (e), inclusive, of subsection 1.

(Added to NRS by 2011, 39; A 2011, 2576)

REVISER'S NOTE.

Ch. 20, Stats. 2011, the source of this section, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

(a) Which was not advertised in compliance with the amendatory provisions of this act;

(b) For which bids were not accepted in compliance with the amendatory provisions of this act; or

(c) For which the contract was not awarded in compliance with the amendatory provisions of this act,

is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

NRS 338.0118 Adoption by local government of policies providing for use of certain recycled materials in public road and highway projects; use of such materials; exception.

1. The governing body of a local government that undertakes a project pursuant to this chapter for the construction, reconstruction, improvement, maintenance or repair of a public road or public highway shall adopt policies that provide for the use of recycled aggregate, recycled bituminous pavement and recycled rubber from tires in the project.

2. A local government or its authorized representative which awards a contract for a public work which includes the construction, reconstruction, improvement, maintenance or repair of a public road or public highway shall ensure that the use of any recycled aggregate, recycled bituminous pavement or recycled rubber from tires, or any combination thereof, in the construction, reconstruction, improvement, maintenance or repair of the public road or public highway is not restricted unless scientific evidence satisfactory to the local government clearly indicates that the use of the recycled aggregate, recycled bituminous pavement or recycled rubber from tires for that construction, reconstruction, improvement, maintenance or repair compromises the soundness of the project.

(Added to NRS by 2011, 1602)

REVISER'S NOTES.

The source of subsection 2 of this section is section 3 of chapter 283, Statutes of Nevada 2011, at p. 1602.

Ch. 283, Stats. 2011, the source of this section, contains the following provision not included in NRS:

"The amendatory provisions of this act do not apply to:

1. A project specified in section 2 or 2.5 of this act [NRS 408.201 and subsection 1 of 338.0118, respectively] or NRS 408.313, as amended by section 2.3 of this act, which is commenced before July 1, 2011; or

2. A contract specified in NRS 338.1373, as amended by section 3 of this act [codified as subsection 2 of NRS 338.0118], which is entered into before July 1, 2011."

NRS 338.012 Regulations of Labor Commissioner. The Labor Commissioner may adopt such regulations as are necessary to enable the Labor Commissioner to carry out his or her duties pursuant to the provisions of this chapter. (Added to NRS by 1983, 1361)

ADMINISTRATIVE REGULATIONS.
Employment, NAC 338.005-338.125

EMPLOYMENT

GENERAL PROVISIONS

NRS 338.013 Inclusion of identifying number from Labor Commissioner in advertisement or solicitation; reports by public bodies and contractors to Labor Commissioner.

1. A public body that undertakes a public work shall request from the Labor Commissioner, and include in any advertisement or other type of solicitation, an identifying number with a designation of the work. That number must be included in any bid or other document submitted in response to the advertisement or other type of solicitation.

2. Each public body which awards a contract for any public work shall report its award to the Labor Commissioner within 10 days after the award, giving the name and address of the contractor to whom the public body awarded the contract and the identifying number for the public work.

3. Each contractor engaged on a public work shall report to the Labor Commissioner and the public body that awarded the contract the name and address of each subcontractor whom the contractor engages for work on the project within 10 days after the subcontractor commences work on the contract and the identifying number for the public work.

4. The public body which awarded the contract shall report the completion of all work performed under the contract to the Labor Commissioner before the final payment of money due the contractor by the public body.

(Added to NRS by 1977, 789; A 1985, 2039; 1997, 3081; 2003, 2414; 2009, 2069)

ADMINISTRATIVE REGULATIONS.
Report by contractor and subcontractors to Labor Commissioner, NAC 338.092

NRS 338.015 Enforcement by Labor Commissioner and Attorney General.

1. The Labor Commissioner shall enforce the provisions of NRS 338.010 to 338.130, inclusive.

2. In addition to any other remedy or penalty provided in this chapter, if any person, including, without limitation, a public body, violates any provision of NRS 338.010 to 338.130, inclusive, or any regulation adopted pursuant thereto, the Labor Commissioner may, after providing the person with notice and an opportunity for a hearing, impose against the person an administrative penalty of not more than \$5,000 for each such violation.

3. The Labor Commissioner may, by regulation, establish a sliding scale based on the severity of the violation to determine the amount of the administrative penalty to be imposed against the person pursuant to this section.

4. The Labor Commissioner shall report the violation to the Attorney General, and the Attorney General may prosecute the person in accordance with law.
(Added to NRS by 1973, 874; A 1993, 2248; 2001, 1146; 2003, 798; 2005, 202)

ADMINISTRATIVE REGULATIONS.

Determination of violation, NAC 338.105-338.116

NRS 338.016 Civil action to recover damages resulting from commission of offense.

1. If, after an opportunity for a hearing, an administrative penalty is imposed against a contractor on a public work for the commission of an offense:

(a) An eligible bidder, or any person who entered into a contract with the eligible bidder before bids for the contract for the public work were let, may commence a civil action against the contractor to recover damages suffered as a proximate result of the eligible bidder not being awarded the contract for the public work.

(b) There is a rebuttable presumption that the contractor was awarded the contract for the public work because the contractor's bid on the contract was based, in part, on his or her intent to commit the offense and, as a result, was lower than it otherwise would have been.

2. The court may award costs and reasonable attorney's fees to the prevailing party in any action brought pursuant to this section.

(Added to NRS by 1993, 2247; A 2003, 799)

NEVADA CASES.

"Inference" and "rebuttable presumption" contrasted. An "inference" and a "rebuttable presumption" are not the same things. A "rebuttable presumption" is a rule of law by which the finding of a basic fact gives rise to a presumed fact's existence, unless the presumption is rebutted. In contrast, an "inference" is a logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts. Although an inference may give rise to a rebuttable presumption in appropriate cases, an inference simply allows the trier of fact to determine, based on other evidence, that a fact exists. An inference is permissible, not required, and it does not shift the burden of proof. *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006)

NRS 338.017 Temporary disqualification of contractor after imposition of administrative penalty; notification of State Contractors' Board. If any administrative penalty is imposed against a person for the commission of an offense:

1. That person, and the corporate officers, if any, of that person, may not be awarded a contract for a public work:

(a) For the first offense, for a period of 3 years after the date of the imposition of the administrative penalty; and

(b) For the second or subsequent offense, for a period of 5 years after the date of the imposition of the administrative penalty.

2. The Labor Commissioner shall notify the State Contractors' Board of each contractor who is prohibited from being awarded a contract for a public work pursuant to this section.

(Added to NRS by 1993, 2247; A 2001, 1146; 2003, 2145)

ADMINISTRATIVE REGULATIONS.

Temporary disqualification of contractor or subcontractor, NAC 338.125

NRS 338.018 Applicability to certain contracts for construction work of Nevada System of Higher Education. The provisions of NRS 338.013 to 338.018, inclusive, apply to any contract for construction work of the Nevada System of Higher Education for which the estimated cost exceeds \$100,000 even if the construction work does not qualify as a public work, as defined in subsection 16 of NRS 338.010.

(Added to NRS by 2005, 2890)

REVISER'S NOTE.

The provisions of NRS 338.018 were derived from section 1 of ch. 508, Stats. 2005, which is codified at NRS 338.075.

WAGES

ADMINISTRATIVE REGULATIONS.

Wages, NAC 338.009-338.090

ATTORNEY GENERAL'S OPINIONS.

Certain private projects may be public works subject to the prevailing wage laws. A private project that is constructed or retrofitted to specifications provided by a public agency as part of a plan for the eventual purchase of the project by the public agency is a public work under NRS 338.010 and, therefore, is subject to the prevailing wage laws set forth in NRS 338.020 et seq. AGO 97-22 (8-12-1997), cited, Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council, 122 Nev. 218, at 222, 128 P.3d 1065 (2006)

NRS 338.020 Hourly and daily rate of wages must not be less than prevailing wage in county; rate must be included in contract and posted on-site; payment of overtime; wages paid in accordance with jurisdictional classes recognized in locality.

1. Every contract to which a public body of this State is a party, requiring the employment of skilled mechanics, skilled workers, semiskilled mechanics, semiskilled workers or unskilled labor in the performance of public work, must contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workers. The hourly and daily rate of wages must:

(a) Not be less than the rate of such wages then prevailing in the county in which the public work is located, which prevailing rate of wages must have been determined in the manner provided in NRS 338.030; and

(b) Be posted on the site of the public work in a place generally visible to the workers.

2. When public work is performed by day labor, the prevailing wage for each class of mechanics and workers so employed applies and must be stated clearly to such mechanics and workers when employed.

3. Except as otherwise provided in subsection 4, a contractor or subcontractor shall pay to a mechanic or worker employed by the contractor or subcontractor on the public work not less than one and one-half times the prevailing rate of wages applicable to the class of the mechanic or worker for each hour the mechanic or worker works on the public work in excess of:

(a) Forty hours in any scheduled week of work by the mechanic or worker for the contractor or subcontractor, including, without limitation, hours worked for the contractor or subcontractor on work other than the public work; or

(b) Eight hours in any workday that the mechanic or worker was employed by the contractor or subcontractor, including, without limitation, hours worked for the contractor or subcontractor on work other than the public work, unless by mutual agreement the mechanic or worker works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

4. The provisions of subsection 3 do not apply to a mechanic or worker who is covered by a collective bargaining agreement that provides for the payment of wages at not less than one and one-half times the rate of wages set forth in the collective bargaining agreement for work in excess of:

(a) Forty hours in any scheduled week of work; or

(b) Eight hours in any workday unless the collective bargaining agreement provides that the mechanic or worker shall work a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

5. The prevailing wage and any wages paid for overtime pursuant to subsection 3 or 4 to each class of mechanics or workers must be in accordance with the jurisdictional classes recognized in the locality where the work is performed.

6. Nothing in this section prevents an employer who is signatory to a collective bargaining agreement from assigning such work in accordance with established practice.

[1:139:1937; A 1941, 389; 1931 NCL § 6179.51]—(NRS A 1969, 736; 1973, 874; 1983, 131; 1985, 2040; 2003, 1741; 2005, 812)

NEVADA CASES.

“District” denotes an area with specific political or administrative boundaries and not a district created by the commissioner. The labor commissioner acted arbitrarily and capriciously and in excess of his statutory authority (see NRS 338.015) in determining the prevailing rate of wages to be paid by a public body in a contract for public works on the basis of merging all counties and cities in the State into two districts and establishing the rate for each district, rather than by determining the prevailing rate within the boundaries of those political subdivisions awarding contracts for public works. For the purposes of the former provisions of NRS 338.020, which provides that the rate of such wages must not be less than the rate then prevailing in the county, city, town or district in which the public work is located, the term “district” denotes an area with specific political or administrative boundaries, and not a district created by the commissioner which covers vast geographic areas and includes communities outside the boundaries of any locality in which the public work is performed. *State v. City of Fallon*, 100 Nev. 509, 685 P.2d 1385 (1984)

A project funded through public revenue bonds is subject to prevailing wage requirements only if it is a “public work” and involves a “public body.” Where a private nonprofit corporation financed the construction of a hospital in part through city revenue bonds, prevailing wages were not required. Under NRS 244A.763, a project funded through public economic development revenue bonds is subject to prevailing wage requirements only if it is a “public work” and involves a “public body” under NRS 338.010 and 338.020. In this case, the project did not constitute a public work or involve a public body. Additionally, no public money was used to finance it because the bonds did not involve taxpayer money or obligate county funds. (See NRS 244A.713 and 244A.725.) *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council*, 122 Nev. 218, 128 P.3d 1065 (2006)

Some private projects can be subject to prevailing wage requirements. Any joint venture between a public entity and private developer to construct a public building, if it is funded “in whole or in part from public money,” would be considered a public work. (See NRS 338.010; see also NRS 244A.763 and 338.020.) For example, a private project constructed to a public agency’s specifications as part of an arrangement for its eventual purchase by the agency would be a public work. *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council*, 122 Nev. 218, 128 P.3d 1065 (2006)

FEDERAL AND OTHER CASES.

An action for injunctive relief is not barred by the U.S. 11th amendment. Where a subcontractor that provided precast bridge segments for use on a public works project brought an action in federal court for injunctive relief prohibiting the labor commissioner from enforcing or attempting to apply Nevada’s prevailing wage law (see NRS 338.020) to work performed constructing the bridge segments at a production facility 11 miles away from the site of the public work (see NRS 338.040), the action was not barred by the U.S. 11th amendment because an exception to state immunity from suit applies to actions for injunctive relief. Similarly, the suit was not barred by the doctrine of absolute immunity for

state officials (see NRS 41.032) because absolute immunity applies only to suits for damages and does not preclude a suit for declaratory or injunctive relief. *Meadow Valley Contractors, Inc. v. Johnson*, 89 F. Supp. 2d 1180 (D. Nev. 2000)

An action for injunctive relief against the labor commissioner was dismissed by the federal court under the abstention doctrine. An action for injunctive relief prohibiting the labor commissioner from enforcing or attempting to apply Nevada's prevailing wage law (see NRS 338.020) against the plaintiff was dismissed by the federal court under the abstention doctrine, which provides that federal courts must refrain from enjoining state administrative proceedings that are judicial in nature, because: (1) there currently existed an ongoing state adjudicatory administrative proceeding worthy of deference; (2) state control of the distribution of funding for public works and the maintenance of a prevailing wage for workers were matters of vital importance to Nevada; and (3) the state proceedings would provide the plaintiff with the opportunity to raise its federal concerns. *Meadow Valley Contractors, Inc. v. Johnson*, 89 F. Supp. 2d 1180 (D. Nev. 2000)

ATTORNEY GENERAL'S OPINIONS.

Payment of prevailing wage in a locality on public works does not apply to public bodies and their employees. Ch. 139, Stats. 1937 (cf. NRS 338.020), providing for the payment of prevailing wage in a locality on public works, does not apply to public bodies and their employees. AGO 227 (4-2-1937)

Workmen employed by the day and paid directly by public bodies are to be paid prevailing wage in the locality. Workmen employed by the day and paid directly by public bodies in the repair, reconstruction and maintenance of public highways, roads, streets and alleys come within ch. 139, Stats. 1937 (cf. NRS 338.020), providing for the payment of prevailing wage in the locality. AGO 171 (11-3-1944)

Probationary period before apprenticeship subject to prevailing wage requirement. A person hired for a short probationary period before entering into an apprenticeship agreement pursuant to NRS ch. 610 is not exempted from the prevailing wage requirements for workers on public works projects set forth in NRS 338.020 et seq. Under NRS 338.080, only apprentices are exempted. AGO 80-18 (5-29-1980)

Chapter applies to any public works project sponsored by a public body of this State. The provisions of NRS ch. 338 apply to any public works project sponsored by a public body of this State, whether the project is federally funded or not, and where the State's prevailing wage rates are higher than federal rates and federal agencies have not prohibited enforcement of higher rates, the state labor commissioner has jurisdiction to enforce the State's rates pursuant to NRS 338.015 and 338.020. AGO 82-18 (10-26-1982)

A truck driver is entitled to prevailing wage whenever he is on a public work site and delivers materials necessary to work being performed on the site. A truck driver who delivers materials to a public work site in Nevada must be paid prevailing wage (see NRS 338.020) for any time that his work satisfies the two-part test set forth in NRS 338.040; i.e., whenever he is both physically on the public work site and the delivery is necessary to the work being performed on site. AGO 93-01 (3-16-1993)

Rescinded, AGO 95-07 (5-30-1995)

Truck drivers who deliver materials are not entitled to prevailing wage when they deliver materials to a public works project. Truck drivers who drive trucks to the site of a public works project located in Nevada to deliver materials for immediate use at the site do not have to be paid prevailing wage in accordance with NRS 338.020. Such drivers are either sellers or suppliers not subject to prevailing wage requirements. Further, the function of delivering and unloading materials would not constitute work on the job site (see NRS 338.040). AGO 95-07 (5-30-1995)

Applicability of prevailing wage statute to Tahoe Bond Act projects. Projects constructed pursuant to the Tahoe Bond Act (see ch. 361, Stats. 1995) are subject to the prevailing wage statute (see NRS 338.020) only if the project is publicly owned. If such projects are constructed on private ground whose title is not in a public body, the requirements of NRS 338.020 do not apply. (See also NRS 321.5951 et seq.) AGO 2000-10 (3-8-2000)

Absence of "agreement" between redevelopment agency and developer does not eliminate duty to comply with applicable prevailing wage laws. The provisions of NRS 279.500 state that, in certain circumstances, an agreement between a redevelopment agency and a developer must specify that the relevant development project is subject to the provisions of NRS 338.010 et seq. In relevant part, NRS 338.020 requires that mechanics

and workmen employed on a public works project be paid not less than the local "prevailing wage." Although NRS 279.500 does not require specifically that a legal relationship between a redevelopment agency and a developer be memorialized in an "agreement," the statute contemplates that an agreement will exist. Because the intent of the Legislature in enacting NRS 279.500 was to protect workers employed on redevelopment projects, a failure to memorialize the legal relationship between a redevelopment agency and a developer does not excuse noncompliance with the express provisions and application of NRS 279.500 and 338.010 et seq. AGO 2001-03 (2-16-2001)

NRS 338.030 Procedure for determination of prevailing wage in county.

1. The public body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain from the Labor Commissioner the prevailing wage in the county in which the public work is to be performed for each craft or type of work.

2. To establish a prevailing wage in each county, including Carson City, the Labor Commissioner shall, annually, survey contractors who have performed work in the county. Within 30 days after the determination is issued:

(a) A public body or person entitled under subsection 5 to be heard may submit an objection to the Labor Commissioner with evidence to substantiate that a different wage prevails; and

(b) Any person may submit information to the Labor Commissioner that would support a change in the prevailing wage of a craft or type of work by 50 cents or more per hour in any county.

3. The Labor Commissioner shall hold a hearing in the locality in which the work is to be executed if the Labor Commissioner:

(a) Is in doubt as to the prevailing wage; or

(b) Receives an objection or information pursuant to subsection 2.

➤ The Labor Commissioner may hold only one hearing a year on the prevailing wage of any craft or type of work in any county.

4. Notice of the hearing must be advertised in a newspaper nearest to the locality of the work once a week for 2 weeks before the time of the hearing.

5. At the hearing, any public body, the crafts affiliated with the State Federation of Labor or other recognized national labor organizations, and the contractors of the locality or their representatives must be heard. From the evidence presented, the Labor Commissioner shall determine the prevailing wage.

6. The wages so determined must be filed by the Labor Commissioner and must be available to any public body which awards a contract for any public work.

7. Nothing contained in NRS 338.020 to 338.090, inclusive, may be construed to authorize the fixing of any wage below any rate which may now or hereafter be established as a minimum wage for any person employed upon any public work, or employed by any officer or agent of any public body.

[2:139:1937; 1931 NCL § 6179.52]—(NRS A 1985, 2040; 2001, 1147; 2003, 2414)

NRS CROSS REFERENCES.

Hearings by Labor Commissioner, NRS 607.205-607.215

NEVADA CASES.

Commissioner was required to conduct a hearing on the discrepancy between wages established by the commissioner and the prevailing community rate. Where certain political subdivisions of this state presented the labor commissioner with substantial evidence that there was a discrepancy between the prevailing rate of wages established by the commissioner to be paid by a public body in a contract for public works and the actual rate prevailing in their communities, the commissioner was required under NRS 338.030 to conduct a hearing pursuant to the provisions of NRS ch. 233B governing contested cases

(see NRS 233B.121 et seq.), and to base his final determination of the prevailing rate upon evidence presented at that hearing. *State v. City of Fallon*, 100 Nev. 509, 685 P.2d 1385 (1984), cited, *Labor Comm'r v. Littlefield*, 123 Nev. 35, at 42, 153 P.3d 26 (2007)

Elimination of job classification from the prevailing wage list constitutes action under section. In rendering a decision in a contested case, the Labor Commissioner eliminated the classification of "field soils tester" from the prevailing wage list. The Supreme Court held that: (1) an action taken by the Labor Commissioner which has the effect of removing an entire classification from the prevailing wage list constitutes an action under NRS 338.030 and administrative rulemaking under the Administrative Procedures Act (see NRS ch. 233B) to which the requirements for notice and hearing pursuant to NRS 233B.060 applied; and (2) the failure of the Commissioner to comply with the notice and hearing requirements of NRS 233B.060 rendered his decision invalid. *Southern Nev. Oper. Eng'rs Contract Compliance Trust v. Johnson*, 121 Nev. 523, 119 P.3d 720 (2005)

Additions, deletions and substantial modifications of worker classifications by the Labor Commissioner amount to regulations. The Nevada Supreme Court concluded that the Labor Commissioner's decision to delete soils tester and equipment greaser classifications from the annual prevailing wage list was not merely an interpretive ruling, but constituted rulemaking governed by the Administrative Procedure Act (APA). (See NRS 338.030, 338.040, and ch. 233B.) Because the addition, deletion or substantial modification of worker classifications establishes a directive of general applicability instructing whether certain worker groups are entitled to the applicable prevailing wage, such determinations constitute rulemaking, requiring compliance with the APA's notice and hearing requirements. (See NRS 233B.038 and 233B.039.) The Court also concluded that there is no express or implied exemption from the APA for such determinations and that policy considerations support compliance with the APA. *Labor Comm'r v. Littlefield*, 123 Nev. 35, 153 P.3d 26 (2007), see also *Southern Nevada Op. Eng'rs Contract Compliance Trust v. Labor Comm'r*, 121 Nev. 523, 119 P.3d 720 (2005)

NRS 338.035 Discharge of part of obligation of contractor or subcontractor engaged on public work to pay wages by making certain contributions in name of worker. The obligation of a contractor engaged on a public work or a subcontractor engaged on a public work to pay wages in accordance with the determination of the Labor Commissioner may be discharged in part by making contributions to a third person pursuant to a fund, plan or program in the name of the worker.

(Added to NRS by 1983, 1574; A 2003, 2415; 2005, 813)

ADMINISTRATIVE REGULATIONS.

Contributions, NAC 338.0097

NRS 338.040 Workers deemed to be employed on public works.

1. Except as otherwise provided by specific statute, workers who are:
 - (a) Employed at the site of a public work; and
 - (b) Necessary in the execution of the contract for the public work,
 ➔ are deemed to be employed on public works.
 2. The Labor Commissioner shall adopt regulations to define the circumstances under which a worker is:
 - (a) Employed at the site of a public work; and
 - (b) Necessary in the execution of the contract for the public work.
- [3:139:1937; A 1941, 389; 1931 NCL § 6179.53]—(NRS A 2001, 1147)

ADMINISTRATIVE REGULATIONS.

Interpretation of terms, NAC 338.009

NEVADA CASES.

Meaning of "at the site of the work" under former version of section. Before 2001, NRS 338.040 provided that "[w]orkmen employed by contractors or subcontractors or by public bodies 'at the site of the work' and necessary in the execution of any contract for public works are deemed to be employed on public works." For the purposes of this former

version of NRS 338.040, “at the site of the work” did not limit prevailing wage coverage to only those persons performing work at the main project site, but extended such prevailing wage coverage to include persons who were employed at locations other than the main project site, provided that such persons were performing work necessary to the execution of the public works contract in question. *State v. Granite Constr. Co.*, 118 Nev. 83, 40 P.3d 423 (2002)

Prohibition against providing public benefits to undocumented aliens does not apply to requirement to pay prevailing rate of wage on public work. The prohibition against payments to an undocumented alien of costs or expenses related to a state or local public benefit (see NRS 422.065) does not apply to the requirement that contractors on a public work pay workers a prevailing rate of wage (see NRS 338.040 and 338.050) because: (1) a contractor on a public work is not providing the public benefit contract and is not included in the express terms excusing payment; and (2) the language of NRS 338.040 and 338.050 evidences the intent of the Legislature that any worker falling within the purview of the prevailing wage laws must be paid accordingly, regardless of immigration status. *City Plan Dev. v. Office of Labor Comm’r*, 121 Nev. 419, 117 P.3d 182 (2005)

Additions, deletions and substantial modifications of worker classifications by the Labor Commissioner amount to regulations. The Nevada Supreme Court concluded that the Labor Commissioner’s decision to delete soils tester and equipment greaser classifications from the annual prevailing wage list was not merely an interpretive ruling, but constituted rulemaking governed by the Administrative Procedure Act (APA). (See NRS 338.030, 338.040, and ch. 233B.) Because the addition, deletion or substantial modification of worker classifications establishes a directive of general applicability instructing whether certain worker groups are entitled to the applicable prevailing wage, such determinations constitute rulemaking, requiring compliance with the APA’s notice and hearing requirements. (See NRS 233B.038 and 233B.039.) The Court also concluded that there is no express or implied exemption from the APA for such determinations and that policy considerations support compliance with the APA. *Labor Comm’r v. Littlefield*, 123 Nev. 35, 153 P.3d 26 (2007), see also *Southern Nevada Op. Eng’rs Contract Compliance Trust v. Labor Comm’r*, 121 Nev. 523, 119 P.3d 720 (2005)

ATTORNEY GENERAL’S OPINIONS.

Truck driver is entitled to the prevailing wage whenever he is on a public work site and delivers materials necessary to the work being performed on the site. A truck driver who delivers materials to a public work site in Nevada must be paid the prevailing wage (see NRS 338.020) for any time that his work satisfies the two-part test set forth in NRS 338.040; i.e., whenever he is both physically on the public work site and the delivery is necessary to the work being performed on the site. AGO 93-01 (3-16-1993)

Rescinded, AGO 95-07 (5-30-1995)

Truck drivers who deliver materials are not entitled to the prevailing wage when they deliver materials to a public works project. Truck drivers who drive trucks to the site of a public work project located in Nevada to deliver materials for immediate use at the site do not have to be paid the prevailing wage in accordance with NRS 338.020. Such drivers are either sellers or suppliers not subject to the prevailing wage requirements. Further, the function of delivering and unloading materials would not constitute work on the job site (see NRS 338.040). AGO 95-07 (5-30-1995)

NRS 338.050 Contractual relationships: Applicability of NRS 338.010 to 338.090, inclusive. For the purpose of NRS 338.010 to 338.090, inclusive, except as otherwise provided by specific statute, every worker who performs work for a public work covered by a contract therefor is subject to all of the provisions of NRS 338.010 to 338.090, inclusive, regardless of any contractual relationship alleged to exist between such worker and his or her employer.

[4:139:1937; A 1941, 389; 1931 NCL § 6179.54]—(NRS A 2001, 1148; 2005, 2891)

NEVADA CASES.

Prohibition against providing public benefits to undocumented aliens does not apply to requirement to pay prevailing rate of wage on public work. The prohibition against payments to an undocumented alien of costs or expenses related to a state or local public benefit (see NRS 422.065) does not apply to the requirement that contractors on a public

work pay workers a prevailing rate of wage (see NRS 338.040 and 338.050) because: (1) a contractor on a public work is not providing the public benefit contract and is not included in the express terms excusing payment; and (2) the language of NRS 338.040 and 338.050 evidences the intent of the Legislature that any worker falling within the purview of the prevailing wage laws must be paid accordingly, regardless of immigration status. City Plan Dev. v. Office of Labor Comm'r, 121 Nev. 419, 117 P.3d 182 (2005)

NRS 338.060 Forfeitures when workers paid less than designated rates or willfully reported in inaccurate or incomplete manner or not reported to public body; forfeiture clause in contracts; regulation establishing sliding scale for penalties; recovery of investigative costs and attorney's fees; waiver or reduction of penalty.

1. Except as otherwise provided in subsection 8, a contractor engaged on a public work shall forfeit, as a penalty to the public body on behalf of which the contract has been made and awarded to the contractor, not less than \$20 nor more than \$50 for each calendar day or portion thereof that each worker employed on the public work is paid less than the designated rate for any work done under the contract, by the contractor or any subcontractor engaged on the public work.

2. Except as otherwise provided in subsection 8, a contractor engaged on a public work shall forfeit, as a penalty to the public body on behalf of which the contract has been made and awarded to the contractor, not less than \$20 nor more than \$50 for each calendar day or portion thereof for each worker employed on the public work for which the contractor or subcontractor willfully included inaccurate or incomplete information in the monthly record required to be submitted to the public body pursuant to subsection 5 of NRS 338.070.

3. Except as otherwise provided in subsection 8, a contractor engaged on a public work shall forfeit, as a penalty to the public body on behalf of which the contract has been made and awarded to the contractor, not less than \$20 nor more than \$50 for each calendar day or portion thereof that each worker employed on the public work is not reported to the public body awarding the contract by the contractor or any subcontractor engaged on the public work as required pursuant to subsection 5 of NRS 338.070, up to a maximum of:

(a) For the first failure to comply during the term of the contract for the public work, \$1,000; and

(b) For each subsequent failure to comply during the term of the contract for the public work, \$5,000.

4. Except as otherwise provided in subsection 8, if a violation of more than one provision of subsections 1, 2 and 3 involves the same worker, the contractor shall forfeit the penalty set forth in each subsection that was violated.

5. A public body awarding a contract for a public work shall cause a stipulation setting forth the penalties specified in subsections 1 to 4, inclusive, to be inserted in the contract.

6. The Labor Commissioner shall, by regulation, establish a sliding scale based on the size of the business of a contractor engaged on a public work to determine the amount of the penalty to be imposed pursuant to subsections 1 and 2.

7. If a penalty is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the Labor Commissioner and the public body.

8. The Labor Commissioner may, for good cause shown, waive or reduce any penalty imposed pursuant to this section.

[6:139:1937; A 1941, 389; 1931 NCL § 6179.56]—(NRS A 1993, 896; 1997, 3355; 2001, 1148; 2003, 1862, 2415)

ADMINISTRATIVE REGULATIONS.

Penalties, NAC 338.120

NRS 338.070 Investigations of violations by public bodies; withholding of certain sums by public bodies and contractors; maintenance and inspection of records regarding employees; penalty for noncompliance.

1. Any public body awarding a contract shall:

(a) Investigate possible violations of the provisions of NRS 338.010 to 338.090, inclusive, committed in the course of the execution of the contract, and determine whether a violation has been committed and inform the Labor Commissioner of any such violations; and

(b) When making payments to the contractor engaged on the public work of money becoming due under the contract, withhold and retain all sums forfeited pursuant to the provisions of NRS 338.010 to 338.090, inclusive.

2. No sum may be withheld, retained or forfeited, except from the final payment, without a full investigation being made by the awarding public body.

3. Except as otherwise provided in subsection 6, it is lawful for any contractor engaged on a public work to withhold from any subcontractor engaged on the public work sufficient sums to cover any penalties withheld from the contractor by the awarding public body on account of the failure of the subcontractor to comply with the terms of NRS 338.010 to 338.090, inclusive. If payment has already been made to the subcontractor, the contractor may recover from the subcontractor the amount of the penalty or forfeiture in a suit at law.

4. A contractor engaged on a public work and each subcontractor engaged on the public work shall keep or cause to be kept:

(a) An accurate record showing, for each worker employed by the contractor or subcontractor in connection with the public work:

(1) The name of the worker;

(2) The occupation of the worker;

(3) If the worker has a driver's license or identification card, an indication of the state or other jurisdiction that issued the license or card; and

(4) The actual per diem, wages and benefits paid to the worker; and

(b) An additional accurate record showing, for each worker employed by the contractor or subcontractor in connection with the public work who has a driver's license or identification card:

(1) The name of the worker;

(2) The driver's license number or identification card number of the worker;

and

(3) The state or other jurisdiction that issued the license or card.

5. The records maintained pursuant to subsection 4 must be open at all reasonable hours to the inspection of the public body awarding the contract. The contractor engaged on the public work or subcontractor engaged on the public work shall ensure that a copy of each record for each calendar month is received by the public body awarding the contract no later than 15 days after the end of the month. The copy of the record maintained pursuant to paragraph (a) of subsection 4 must be open to public inspection as provided in NRS 239.010. The copy of the record maintained pursuant to paragraph (b) of subsection 4 is confidential and not open to public inspection. The records in the possession of the public body awarding the contract may be discarded by the public body 2 years after final payment is made by the public body for the public work.

6. A contractor engaged on a public work shall not withhold from a subcontractor engaged on the public work the sums necessary to cover any penalties

provided pursuant to subsection 3 of NRS 338.060 that may be withheld from the contractor by the public body awarding the contract because the public body did not receive a copy of the record maintained by the subcontractor pursuant to subsection 4 for a calendar month by the time specified in subsection 5 if:

(a) The subcontractor provided to the contractor, for submission to the public body by the contractor, a copy of the record not later than the later of:

- (1) Ten days after the end of the month; or
- (2) A date agreed upon by the contractor and subcontractor; and

(b) The contractor failed to submit the copy of the record to the public body by the time specified in subsection 5.

↪ Nothing in this subsection prohibits a subcontractor from submitting a copy of a record for a calendar month directly to the public body by the time specified in subsection 5.

7. Any contractor or subcontractor, or agent or representative thereof, performing work for a public work who neglects to comply with the provisions of this section is guilty of a misdemeanor.

[7:139:1937; 1931 NCL § 6179.57]—(NRS A 1977, 789; 1985, 274; 1987, 1045; 1989, 464; 2001, 1148; 2003, 1863, 2416; 2011, 41)

REVISER'S NOTE.

Ch. 20, Stats. 2011, which amended this section to revise the contents of the records required to be maintained pursuant to subsection 4, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

(a) Which was not advertised in compliance with the amendatory provisions of this act;

(b) For which bids were not accepted in compliance with the amendatory provisions of this act; or

(c) For which the contract was not awarded in compliance with the amendatory provisions of this act,

↪ is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

ADMINISTRATIVE REGULATIONS.

Certified payroll reports and nonperformance payroll reports, NAC 338.094-338.100

NRS 338.075 Applicability to certain contracts for construction work of Nevada System of Higher Education. The provisions of NRS 338.020 to 338.090, inclusive, apply to any contract for construction work of the Nevada System of Higher Education for which the estimated cost exceeds \$100,000 even if the construction work does not qualify as a public work, as defined in subsection 16 of NRS 338.010.

(Added to NRS by 2005, 2890)

NRS 338.080 Exemptions. None of the provisions of NRS 338.020 to 338.090, inclusive, apply to:

1. Any work, construction, alteration, repair or other employment performed, undertaken or carried out, by or for any railroad company or any person operating the same, whether such work, construction, alteration or repair is incident to or in conjunction with a contract to which a public body is a party, or otherwise.

2. Apprentices recorded under the provisions of chapter 610 of NRS.

3. Any contract for a public work whose cost is less than \$100,000. A unit of the project must not be separated from the total project, even if that unit is to be completed at a later time, in order to lower the cost of the project below \$100,000.

[9:139:1937; 1931 NCL § 6179.59] + [8:169:1941; 1931 NCL § 6179.62]—(NRS A 1967, 34; 1985, 2041; 2003, 2416)

FEDERAL AND OTHER CASES.

Subsection 2 held to be unconstitutional. Subsection 2 of NRS 338.080, the effect of which is to require contractors performing public works to comply with the state prevailing wage law with respect to apprentices unless the apprenticeship training program is approved by the state apprenticeship council pursuant to NRS 610.095, is unconstitutional on its face and as applied to any apprenticeship program approved by the U.S. Department of Labor but not approved by the state apprenticeship council, because: (1) general field of apprenticeship training has been preempted by federal law; (2) the delegation of authority to state apprenticeship councils is controlled by federal law; (3) state laws affecting the wages paid to apprentices must apply equally to federally and state approved apprenticeship programs; and (4) the state law that grants significant benefit only to state approved programs is discriminatory and unconstitutional. *Associated Builders & Contractors, Inc. v. MacDonald*, 731 F. Supp. 966 (D. Nev. 1989)

Exemption for apprentices cannot be limited only to apprenticeship programs approved by the state apprenticeship council; federally approved programs must also be granted the exemption. A provision of NRS 338.080 provided an exemption for apprenticeship programs approved by the state apprenticeship council from the requirement that a contractor on a public works project pay employees the rate of wages then prevailing in the county in which the public work was located. The state labor commissioner was enjoined from enforcing that provision against a contractor who employed apprentices from an apprenticeship program approved by the federal Bureau of Apprenticeship and Training, because the federal law required that, if the exemption were to apply at all, it must apply to programs approved by either a federal or state organization. *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991)

ATTORNEY GENERAL'S OPINIONS.

Probationary period before an apprenticeship is subject to the prevailing wage requirement. A person hired for a short probationary period before entering into an apprenticeship agreement pursuant to NRS ch. 610 is not exempted from the prevailing wage requirements for workers on public works projects set forth in NRS 338.020 et seq. Under NRS 338.080, only apprentices are exempted. AGO 80-18 (5-29-1980)

NRS 338.090 Penalties.

1. Any person, including the officers, agents or employees of a public body, who violates any provision of NRS 338.010 to 338.090, inclusive, or any regulation adopted pursuant thereto, is guilty of a misdemeanor.

2. The Labor Commissioner, in addition to any other remedy or penalty provided in this chapter:

(a) Shall assess a person who, after an opportunity for a hearing, is found to have failed to pay the prevailing wage required pursuant to NRS 338.020 to 338.090, inclusive, an amount equal to the difference between the prevailing wages required to be paid and the wages that the contractor or subcontractor actually paid; and

(b) May, in addition to any other administrative penalty, impose an administrative penalty not to exceed the costs incurred by the Labor Commissioner to investigate and prosecute the matter.

3. If the Labor Commissioner finds that a person has failed to pay the prevailing wage required pursuant to NRS 338.020 to 338.090, inclusive, the public body may, in addition to any other remedy or penalty provided in this chapter, require the person to pay the actual costs incurred by the public body to investigate the matter.

[7 1/2:139:1937; A 1941, 389; 1931 NCL § 6179.57 1/2]—(NRS A 1967, 553; 1985, 2041; 1993, 2248; 2001, 1149; 2003, 799, 2417)

NEVADA CASES.

Provisions of this section authorize one assessment and one administrative fine. The provisions of NRS 338.090 authorize the State Labor Commissioner to assess a person who is found to have violated the prevailing rate of wage provisions an amount equal to the difference between the actual rate of wage that was paid and the prevailing rate of wage that should have been paid and an administrative fine equal to the costs to investigate and prosecute the matter. The provisions of NRS 338.090 do not authorize the State Labor Commissioner to assess an additional administrative fine equal to the rate of pay differential. *City Plan Dev. v. Office of Labor Comm'r*, 121 Nev. 419, 117 P.3d 182 (2005)

EMPLOYMENT PRACTICES**NRS 338.125 Fair employment practices: Contents of contracts concerning public works; breach of contract.**

1. It is unlawful for any contractor in connection with the performance of work under a contract with a public body, when payment of the contract price, or any part of such payment, is to be made from public money, to refuse to employ or to discharge from employment any person because of his or her race, color, creed, national origin, sex, sexual orientation, gender identity or expression, or age, or to discriminate against a person with respect to hire, tenure, advancement, compensation or other terms, conditions or privileges of employment because of his or her race, creed, color, national origin, sex, sexual orientation, gender identity or expression, or age.

2. Contracts between contractors and public bodies must contain the following contractual provisions:

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, sexual orientation, gender identity or expression, or age, including, without limitation, with regard to employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including, without limitation, apprenticeship.

The contractor further agrees to insert this provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

3. Any violation of such provision by a contractor constitutes a material breach of contract.

4. As used in this section:

(a) "Gender identity or expression" means a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth.

(b) "Sexual orientation" means having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality.

(Added to NRS by 1959, 137; A 1973, 981; 1999, 1942; 2003, 2417; 2011, 501)

ATTORNEY GENERAL'S OPINIONS.

Use of prisoners on public works projects. Inmates of the state prison may be used as laborers on public works projects, but their employment must not be favored over private employees or have significant impact on the private labor force. (See NRS 209.461 and 338.125.) AGO 92-8 (10-6-1992)

NRS 338.130 Preferential employment in construction of public works.

1. In all cases where persons are employed in the construction of public works, preference must be given, the qualifications of the applicants being equal:

(a) First: To persons who:

(1) Have been honorably discharged from the Army, Navy, Air Force, Marine Corps or Coast Guard of the United States, a reserve component thereof or the National Guard; and

(2) Are citizens of the State of Nevada.

(b) Second: To other citizens of the State of Nevada.

2. Nothing in this section shall be construed to prevent the working of prisoners by a public body on a public work.

3. In each contract for the construction of public works, a clause must be inserted to the effect that if the provisions of this section are not complied with by the contractor engaged on the public work, the contract is void, and any failure or refusal to comply with any of the provisions of this section renders any such contract void. All boards, commissions, officers, agents and employees having the power to enter into contracts for the expenditure of public money on public works shall file in the Office of the Labor Commissioner the names and addresses of all contractors holding contracts with the public body, and upon the letting of new contracts, the names and addresses of such new contractors must likewise be filed with the Labor Commissioner. Upon the demand of the Labor Commissioner, a contractor shall furnish a list of the names and addresses of all subcontractors employed by the contractor engaged on a public work.

4. Subject to the exceptions contained in this section, no money may be paid out of the State Treasury or out of the treasury of any political subdivision of the State to any person employed on any work mentioned in this section unless there has been compliance with the provisions of this section.

5. Any contractor engaged on a public work or any other person who violates any of the provisions of this section is guilty of a misdemeanor. The penalties provided for in this section do not apply where violations thereof are due to misrepresentations made by the employee or employees.

[Part 1:168:1919; A 1921, 205; 1929, 89; NCL § 6173] + [2:168:1919; A 1921, 205; NCL § 6174] + [3:168:1919; 1919 RL p. 2965; NCL § 6175] + [Part 4:168:1919; A 1921, 205; NCL § 6176]—(NRS A 1967, 554; 1971, 209; 2003, 2418; 2005, 22)

ATTORNEY GENERAL'S OPINIONS.

Giving preference to the employment of veterans in offices of state and political subdivisions is constitutional. NCL § 6173 (cf. NRS 281.060 and 338.130), giving preference to the employment of veterans in offices of state and political subdivisions is constitutional. AGO 167 (5-27-1935)

Appointment of employees to a specific state office must be construed with the statute giving veterans preferences in state offices generally. The statute providing for the appointment of employees in a specific state office must be construed with the statute which provides for veterans' preferences in state offices generally and both given application. AGO 263 (7-22-1938)

Veterans cannot be given point advantages in scoring required civil service examinations. Veterans cannot be given point advantages in scoring required civil service examinations. They are entitled to preferential employment only if they comply with all requirements of law and score as high as nonveterans on the examination without regard to any advantageous scoring system. AGO 132 (4-17-1944)

NRS 338.135 Rental or lease of trucks or truck and trailer combinations by contractors or subcontractors: Hourly rate for vehicle and services of driver. Where a truck or truck and trailer combination is rented or leased after April 22, 1969, by a contractor or subcontractor on a public work, the hourly rate for the rental or lease of such truck or truck and trailer combination must, when added to the prevailing rate of wages required by NRS 338.020 for the driver, not be less than the hourly rate for similar vehicles with a driver as such hourly rate appears in freight tariffs approved by the Nevada Transportation Authority for the area in which the public work is located.

(Added to NRS by 1969, 900; A 1997, 1987)

GENERAL PROCEDURES FOR AWARDING CONTRACTS

LIMITATIONS ON GENERAL APPLICABILITY OF PROVISIONS

NRS 338.1373 Option of local governments to comply with alternative procedures; inapplicability of certain provisions to contracts awarded by Department of Transportation. [Effective through June 30, 2013.]

1. A local government or its authorized representative shall award a contract for a public work pursuant to the provisions of NRS 338.1415 and:

- (a) NRS 338.1377 to 338.139, inclusive;
- (b) NRS 338.143 to 338.148, inclusive;
- (c) NRS 338.169 to 338.16995, inclusive; or
- (d) NRS 338.1711 to 338.173, inclusive.

2. The provisions of NRS 338.1375 to 338.1382, inclusive, 338.1386, 338.13862, 338.13864, 338.139, 338.142 and 338.1711 to 338.1727, inclusive, do not apply with respect to contracts for the construction, reconstruction, improvement and maintenance of highways that are awarded by the Department of Transportation pursuant to NRS 408.201 and 408.313 to 408.433, inclusive.

(Added to NRS by 1999, 2390; A 2001, 640, 1930, 2262; 2003, 157, 1988, 2128, 2418, 2491; 2007, 2896; 2011, 43, 1602, 3684, 3685)

REVISER'S NOTE.

The amendatory provisions of subsection 2 of section 3 of chapter 283, Statutes of Nevada 2011, at p. 1602, were moved in revision to NRS 338.0118.

NRS 338.1373 Option of local governments to comply with alternative procedures; inapplicability of certain provisions to contracts awarded by Department of Transportation. [Effective July 1, 2013.]

1. A local government or its authorized representative shall award a contract for a public work pursuant to the provisions of NRS 338.1415 and:

- (a) NRS 338.1377 to 338.139, inclusive;
- (b) NRS 338.143 to 338.148, inclusive;
- (c) NRS 338.169 to 338.16995, inclusive; or
- (d) NRS 338.1711 to 338.173, inclusive.

2. The provisions of NRS 338.1375 to 338.1382, inclusive, 338.1386, 338.13862, 338.13864, 338.139, 338.142, 338.169 to 338.16995, inclusive, and 338.1711 to 338.1727, inclusive, do not apply with respect to contracts for the

construction, reconstruction, improvement and maintenance of highways that are awarded by the Department of Transportation pursuant to NRS 408.201 and 408.313 to 408.433, inclusive.

(Added to NRS by 1999, 2390; A 2001, 640, 1930, 2262; 2003, 157, 1988, 2128, 2418, 2491; 2007, 2896; 2011, 43, 1602, 3684, 3685, effective July 1, 2013)

**QUALIFICATION OF BIDDERS; QUALIFICATION OF
SUBCONTRACTORS ON STATE PUBLIC WORKS**

ADMINISTRATIVE REGULATIONS.

Qualification for bidding, NAC 338.130-338.410

NRS 338.1375 State public works: Acceptance of bids from qualified bidders only; adoption and use of criteria for qualification of bidders.

1. The Division shall not accept a bid on a contract for a public work unless the contractor who submits the bid has qualified pursuant to NRS 338.1379 to bid on that contract.

2. The State Public Works Board shall by regulation adopt criteria for the qualification of bidders on contracts for public works of this State. The criteria adopted by the State Public Works Board pursuant to this section must be used by the Division to determine the qualification of bidders on contracts for public works of this State.

3. The criteria adopted by the State Public Works Board pursuant to this section:

(a) Must be adopted in such a form that the determination of whether an applicant is qualified to bid on a contract for a public work does not require or allow the exercise of discretion by any one person.

(b) May include only:

- (1) The financial ability of the applicant to perform a contract;
- (2) The principal personnel of the applicant;
- (3) Whether the applicant has breached any contracts with a public body or person in this State or any other state;
- (4) Whether the applicant has been disqualified from being awarded a contract pursuant to NRS 338.017, 338.13845 or 338.13895;
- (5) Whether the applicant 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 applicant to perform the public work;
- (6) The performance history of the applicant concerning other recent, similar contracts, if any, completed by the applicant; and
- (7) The truthfulness and completeness of the application.

(Added to NRS by 1999, 2390; A 2001, 1930; 2003, 2128, 2419; 2009, 2551, 2669; 2011, 2962)

REVISER'S NOTE.

Ch. 479, Stats. 2011, which amended this section to transfer the responsibility of determining the qualification of bidders on state public works from the State Public Works Board to the State Public Works Division of the Department of Administration, contains the following provision not included in NRS:

2. Any contracts or other agreements entered into by an officer or agency whose name has been changed or whose responsibilities have been transferred pursuant to the provisions of this act to another officer or agency are binding upon the officer or agency to which the

responsibility for the administration of the provisions of the contract or other agreement has been transferred. Such contracts and other agreements may be enforced by the officer or agency to which the responsibility for the enforcement of the provisions of the contract or other agreement has been transferred.

3. Any action taken by an officer or agency whose name has been changed or whose responsibilities have been transferred pursuant to the provisions of this act to another officer or agency remains in effect as if taken by the officer or agency to which the responsibility for the enforcement of such actions has been transferred."

ADMINISTRATIVE REGULATIONS.

Qualification of prime contractors, NAC 338.150-338.290

NRS 338.1376 State public works: Qualification of subcontractors; disqualification; appeal.

1. Each subcontractor whose name is required to be included in a bid pursuant to NRS 338.141 must, to be eligible to provide labor or a portion of the work or improvement to a contractor to whom the Division awards a contract pursuant to this chapter, be qualified in accordance with criteria established by regulation by the State Public Works Board. The criteria established by the State Public Works Board pursuant to this subsection must be made applicable to a subcontractor but must otherwise be substantively identical to the criteria set forth in paragraph (b) of subsection 3 of NRS 338.1375.

2. A subcontractor shall be presumed to be qualified pursuant to subsection 1 unless the Division has received information that:

(a) The Division determines to be sufficient and verifiable; and

(b) Indicates the subcontractor does not meet the criteria established by regulation pursuant to subsection 1.

3. Upon receipt of sufficient and verifiable information of a type described in subsection 2, the Division shall require a subcontractor regarding whom such information is received to submit to the Division, on a form prescribed by the Division, an application for qualification in accordance with the criteria established by regulation pursuant to subsection 1. After receiving such an application, the Division shall determine whether the subcontractor is qualified in accordance with the criteria established by regulation pursuant to subsection 1. Except as otherwise provided in subsection 4, if the Division determines that the subcontractor does not meet such criteria, the Division may disqualify the subcontractor, for a period set by the Division, from participating in public works projects which are sponsored by the Division. The Division shall provide written notice to the subcontractor of any such disqualification.

4. A subcontractor may appeal a disqualification pursuant to subsection 3 in the manner set forth in NRS 338.1381.

(Added to NRS by 2003, 2127)

REVISER'S NOTE.

Ch. 479, Stats. 2011, which amended this section to transfer the responsibility of determining the qualification of subcontractors on state public works from the State Public Works Board to the State Public Works Division of the Department of Administration, contains the following provision not included in NRS:

2. Any contracts or other agreements entered into by an officer or agency whose name has been changed or whose responsibilities have been transferred pursuant to the provisions of this act to another officer or agency are binding upon the officer or agency to which the responsibility for the administration of the provisions of the contract or other agreement has been transferred. Such contracts and other agreements may be enforced by the officer or agency to which the responsibility for the enforcement of the provisions of the contract or other agreement has been transferred.

3. Any action taken by an officer or agency whose name has been changed or whose responsibilities have been transferred pursuant to the provisions of this act to another officer or agency remains in effect as if taken by the officer or agency to which the responsibility for the enforcement of such actions has been transferred.”

ADMINISTRATIVE REGULATIONS.

Qualification of subcontractors, NAC 338.300-338.410

NRS 338.1377 Local government public works: Adoption of criteria for qualification of bidders. Except as otherwise provided in NRS 338.1382, if a governing body that sponsors or finances a public work elects to award contracts for public works pursuant to the provisions of NRS 338.1377 to 338.139, inclusive, the governing body shall adopt the following criteria for determining whether a person who has applied pursuant to NRS 338.1379 is qualified to bid on contracts for public works of the local government:

1. Whether the applicant possesses a valid contractor’s license of a class corresponding to the work to be required by the local government;
2. Whether the applicant has the ability to obtain the necessary bonding for the work to be required by the local government;
3. Whether the applicant has successfully completed an appropriate number of projects as determined by the local government, but not to exceed five projects, during the 5 years immediately preceding the date of application of similar size, scope or type as the work to be required by the local government;
4. Whether the principal personnel employed by the applicant have the necessary professional qualifications and experience for the work to be required by the local government;
5. Whether the applicant has breached any contracts with a public agency or person in this State or any other state during the 5 years immediately preceding the date of application;
6. Whether the applicant has been disqualified from being awarded a contract pursuant to NRS 338.017 or 338.13895;
7. Whether the applicant has been convicted of a violation for discrimination in employment during the 2 years immediately preceding the date of application;
8. Whether the applicant has the ability to obtain and maintain insurance coverage for public liability and property damage within limits sufficient to protect the applicant and all the subcontractors of the applicant from claims for personal injury, accidental death and damage to property that may arise in connection with the work to be required by the local government;
9. Whether the applicant has established a safety program that complies with the requirements of chapter 618 of NRS;
10. Whether the applicant 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 applicant to perform the work to be required by the local government;
11. Whether, during the 5 years immediately preceding the date of application, the applicant has filed as a debtor under the provisions of the United States Bankruptcy Code;
12. Whether the application of the applicant is truthful and complete; and
13. Whether, during the 5 years immediately preceding the date of application, the applicant has, as a result of causes within the control of the applicant or a subcontractor or supplier of the applicant, failed to perform any contract:
 - (a) In the manner specified by the contract and any change orders initiated or approved by the person or governmental entity that awarded the contract or its authorized representative;

(b) Within the time specified by the contract unless extended by the person or governmental entity that awarded the contract or its authorized representative; or

(c) For the amount of money specified in the contract or as modified by any change orders initiated or approved by the person or governmental entity that awarded the contract or its authorized representative.

➤ Evidence of the failures described in this subsection may include, without limitation, the assessment of liquidated damages against the applicant, the forfeiture of any bonds posted by the applicant, an arbitration award granted against the applicant or a decision by a court of law against the applicant.

(Added to NRS by 1999, 2390; A 2001, 170, 1931; 2003, 2419, 2491; 2005, 1795)

NRS 338.1378 Local government public works: Advertisement required before acceptance of applications for qualification of bidders.

1. Before a local government accepts applications pursuant to NRS 338.1379, the local government must, in accordance with subsection 2, advertise in a newspaper that is:

(a) Qualified pursuant to the provisions of chapter 238 of NRS; and

(b) Published in a county in which the contracts for the potential public works will be performed or, if no qualified newspaper is published in that county, published in a qualified newspaper that is published in the State of Nevada and which has a general circulation in the county in which the contracts for the potential public works will be performed.

2. An advertisement required pursuant to subsection 1:

(a) Must be published at least once not less than 21 days before applications are to be submitted to the local government; and

(b) Must include:

(1) A description of the potential public works for which applications to qualify as a bidder are being accepted;

(2) The time and place at which applications are to be submitted to the local government;

(3) The place at which applications may be obtained; and

(4) Any other information that the local government deems necessary.

(Added to NRS by 2003, 2488; A 2005, 1797)

NRS 338.1379 State and local government public works: Submission of application to qualify as bidder; investigation of applicant; determination; notice; period of qualification; use of criteria; confidentiality of certain financial information concerning applicant; denial or revocation of qualification in certain circumstances.

1. Except as otherwise provided in NRS 338.1382, a contractor who wishes to qualify as a bidder on a contract for a public work must submit an application to the Division or the local government.

2. Upon receipt of an application pursuant to subsection 1, the Division or the local government shall:

(a) Investigate the applicant to determine whether the applicant is qualified to bid on a contract; and

(b) After conducting the investigation, determine whether the applicant is qualified to bid on a contract. The determination must be made within 45 days after receipt of the application.

3. The Division or the local government shall notify each applicant in writing of its determination. If an application is denied, the notice must set forth the reasons for the denial and inform the applicant of the right to a hearing pursuant to NRS 338.1381.

4. The Division or the local government may determine an applicant is qualified to bid:

(a) On a specific project; or

(b) On more than one project over a period of time to be determined by the Division or the local government.

5. Except as otherwise provided in subsection 8, the Division shall not use any criteria other than criteria adopted by regulation pursuant to NRS 338.1375 in determining whether to approve or deny an application.

6. Except as otherwise provided in subsection 8, the local government shall not use any criteria other than the criteria described in NRS 338.1377 in determining whether to approve or deny an application.

7. Except as otherwise provided in NRS 239.0115, financial information and other data pertaining to the net worth of an applicant which is gathered by or provided to the Division or a local government to determine the financial ability of an applicant to perform a contract is confidential and not open to public inspection.

8. The Division or the local government shall deny an application and revoke any existing qualification to bid if it finds that the applicant has, within the preceding year, breached a contract for a public work for which the cost exceeds \$25,000,000 by failing to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 of NRS 338.0117.

(Added to NRS by 1999, 2391; A 2001, 1931; 2003, 2421, 2493; 2005, 1797; 2007, 2089; 2011, 43)

NRS CROSS REFERENCES.

Application to court for order allowing inspection or copying of certain records, NRS 239.0115

REVISER'S NOTES.

Ch. 20, Stats. 2011, which added subsection 8 to this section to provide for the denial or revocation of qualification of a person who failed to comply with certain provisions of NRS 338.0117, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

(a) Which was not advertised in compliance with the amendatory provisions of this act;

(b) For which bids were not accepted in compliance with the amendatory provisions of this act; or

(c) For which the contract was not awarded in compliance with the amendatory provisions of this act,

is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

Ch. 479, Stats. 2011, which amended this section to transfer the responsibility of determining the qualification of bidders on state public works from the State Public Works Board to the State Public Works Division of the Department of Administration, contains the following provision not included in NRS:

"* * *

2. Any contracts or other agreements entered into by an officer or agency whose name has been changed or whose responsibilities have been transferred pursuant to the provisions of this act to another officer or agency are binding upon the officer or agency to which the

responsibility for the administration of the provisions of the contract or other agreement has been transferred. Such contracts and other agreements may be enforced by the officer or agency to which the responsibility for the enforcement of the provisions of the contract or other agreement has been transferred.

3. Any action taken by an officer or agency whose name has been changed or whose responsibilities have been transferred pursuant to the provisions of this act to another officer or agency remains in effect as if taken by the officer or agency to which the responsibility for the enforcement of such actions has been transferred."

NRS 338.1381 State and local government public works: Procedure upon appeal of denial of application to qualify as bidder or disqualification of subcontractor.

1. If, within 10 days after receipt of the notice denying an application pursuant to NRS 338.1379 or 338.16991 or disqualifying a subcontractor pursuant to NRS 338.1376, the applicant or subcontractor, as applicable, files a written request for a hearing with the Division or the local government, the State Public Works Board or governing body shall set the matter for a hearing within 20 days after receipt of the request. The hearing must be held not later than 45 days after the receipt of the request for a hearing unless the parties, by written stipulation, agree to extend the time.

2. The hearing must be held at a time and place prescribed by the Board or local government. At least 10 days before the date set for the hearing, the Board or local government shall serve the applicant or subcontractor with written notice of the hearing. The notice may be served by personal delivery to the applicant or subcontractor or by certified mail to the last known business or residential address of the applicant or subcontractor.

3. The applicant or subcontractor has the burden at the hearing of proving by substantial evidence that the applicant is entitled to be qualified to bid on a contract for a public work, or that the subcontractor is qualified to be a subcontractor on a contract for a public work.

4. In conducting a hearing pursuant to this section, the Board or governing body may:

- (a) Administer oaths;
- (b) Take testimony;
- (c) Issue subpoenas to compel the attendance of witnesses to testify before the Board or governing body;
- (d) Require the production of related books, papers and documents; and
- (e) Issue commissions to take testimony.

5. If a witness refuses to attend or testify or produce books, papers or documents as required by the subpoena issued pursuant to subsection 4, the Board or governing body may petition the district court to order the witness to appear or testify or produce the requested books, papers or documents.

6. The Board or governing body shall issue a decision on the matter during the hearing. The decision of the Board or governing body is a final decision for purposes of judicial review.

(Added to NRS by 1999, 2392; A 2003, 2128, 2421, 3515; 2005, 1798; 2011, 2962, 3685)

NEVADA CASES.

There is no private cause of action for the denial of a public works application. The Nevada Supreme Court concluded that there is no private cause of action for the denial of an application to qualify as a bidder on a contract for a public work. NRS 338.1381 does not provide for such a cause of action. Instead, it expressly provides for an administrative hearing and, if necessary, judicial review. Moreover, recognizing a private cause of action would undermine the purpose of the public works bidding statutes, which is to save public

funds. Finally, the doctrine of primary jurisdiction occasionally compels courts to refrain from exercising jurisdiction so that technical issues may first be determined by a governmental body with specialized knowledge. *Richardson Construction, Inc. v. Clark County School Dist.*, 123 Nev. 61, 156 P.3d 21 (2007)

NRS 338.1382 Local government public works: Alternative procedure for qualification of bidders. In lieu of adopting criteria pursuant to NRS 338.1377 and determining the qualification of bidders pursuant to NRS 338.1379, a governing body may deem a person to be qualified to bid on:

1. Contracts for public works of the local government if the person has not, within the preceding year, breached a contract for a public work for which the cost exceeds \$25,000,000 by failing to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 of NRS 338.0117, and has been determined by:

(a) The Division pursuant to NRS 338.1379 to be qualified to bid on contracts for public works of the State pursuant to criteria adopted pursuant to NRS 338.1375; or

(b) Another governing body pursuant to NRS 338.1379 to be qualified to bid on contracts for public works of that local government pursuant to the criteria set forth in NRS 338.1377.

2. A contract for a public work of the local government if:

(a) The person has been determined by the Department of Transportation pursuant to NRS 408.333 to be qualified to bid on the contract for the public work;

(b) The public work will be owned, operated or maintained by the Department of Transportation after the public work is constructed by the local government; and

(c) 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.

(Added to NRS by 2003, 2488; A 2011, 44)

REVISER'S NOTE.

Ch. 20, Stats. 2011, which amended this section to disqualify a person who failed to comply with certain provisions of NRS 338.0117, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

(a) Which was not advertised in compliance with the amendatory provisions of this act;

(b) For which bids were not accepted in compliance with the amendatory provisions of this act; or

(c) For which the contract was not awarded in compliance with the amendatory provisions of this act,

is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

**PREFERENCE FOR BIDS ON SMALLER CONTRACTS
SUBMITTED BY LOCAL BUSINESSES OWNED BY
VETERANS WITH SERVICE-CONNECTED DISABILITIES**

NRS 338.1384 Definitions. As used in NRS 338.1384 to 338.13847, inclusive, unless the context otherwise requires, the words and terms defined in NRS 338.13841, 338.13842 and 338.13843 have the meanings ascribed to them in those sections.

(Added to NRS by 2009, 2668)

NRS 338.13841 “Business owned by a veteran with a service-connected disability” defined. “Business owned by a veteran with a service-connected disability” means a business:

1. Of which at least 51 percent of the ownership interest is held by one or more veterans with service-connected disabilities;
2. That is organized to engage in commercial transactions; and
3. That is managed and operated on a day-to-day basis by one or more veterans with service-connected disabilities.

↪ The term includes a business which meets the above requirements that is transferred to the spouse of a veteran with a service-connected disability upon the death of the veteran, as determined by the United States Department of Veterans Affairs.

(Added to NRS by 2009, 2668)

NRS 338.13842 “Local business” defined. “Local business” has the meaning ascribed to it in NRS 333.3363.

(Added to NRS by 2009, 2668)

NRS 338.13843 “Veteran with a service-connected disability” defined. “Veteran with a service-connected disability” means a veteran of the Armed Forces of the United States who has a service-connected disability of at least zero percent as determined by the United States Department of Veterans Affairs.

(Added to NRS by 2009, 2668)

NRS 338.13844 Amount of preference.

1. For the purpose of awarding a contract for a public work of this State for which the estimated cost is \$100,000 or less, as governed by NRS 338.13862, if a local business owned by a veteran with a service-connected disability submits a bid, the bid shall be deemed to be 5 percent lower than the bid actually submitted.

2. The preference described in subsection 1 may not be combined with any other preference.

(Added to NRS by 2009, 2668)

NRS 338.13845 Fraudulent acts.

1. If the Division determines that a business has made a material misrepresentation or otherwise committed a fraudulent act in applying for the preference described in NRS 338.13844, the business is thereafter permanently prohibited from:

- (a) Applying for or receiving the preference described in NRS 338.13844; and
- (b) Bidding on a contract for a public work of this State.

2. If the Division determines, as described in subsection 1, that a business has made a material misrepresentation or otherwise committed a fraudulent act in applying for the preference described in NRS 338.13844, the business may apply to the Administrator to review the decision pursuant to chapter 233B of NRS.

3. As used in this section, “Administrator” has the meaning ascribed to it in NRS 341.011.

(Added to NRS by 2009, 2668; A 2011, 2963)

NRS CROSS REFERENCES.

Nevada Administrative Procedure Act, NRS ch. 233B

REVISER'S NOTE.

Ch. 479, Stats. 2011, which amended this section to transfer the responsibilities of the State Public Works Board to the State Public Works Division of the Department of Administration, contains the following provision not included in NRS:

3. Any action taken by an officer or agency whose name has been changed or whose responsibilities have been transferred pursuant to the provisions of this act to another officer or agency remains in effect as if taken by the officer or agency to which the responsibility for the enforcement of such actions has been transferred."

NRS 338.13846 Duty of State Public Works Division to report to Legislature. The Division shall report every 6 months to the Legislature, if it is in session, or to the Interim Finance Committee, if the Legislature is not in session. The report must contain, for the period since the last report:

1. The number of contracts for public works of this State that were subject to the provisions of NRS 338.1384 to 338.13847, inclusive.
2. The total dollar amount of contracts for public works of this State that were subject to the provisions of NRS 338.1384 to 338.13847, inclusive.
3. The number of local businesses owned by veterans with service-connected disabilities that submitted a bid or proposal on a contract for a public work of this State.
4. The number of contracts for public works of this State that were awarded to local businesses owned by veterans with service-connected disabilities.
5. The total number of dollars worth of contracts for public works of this State that were awarded to local businesses owned by veterans with service-connected disabilities.
6. Any other information deemed relevant by the Director of the Legislative Counsel Bureau.

(Added to NRS by 2009, 2669)

NRS 338.13847 Regulations. The State Public Works Board may adopt such regulations as it determines to be necessary or advisable to carry out the provisions of NRS 338.1384 to 338.13847, inclusive. The regulations may include, without limitation, provisions setting forth:

1. The method by which a business may apply to receive the preference described in NRS 338.13844;
2. The documentation or other proof that a business must submit to demonstrate that it qualifies for the preference described in NRS 338.13844; and
3. Such other matters as the Division deems relevant.

↪ In carrying out the provisions of this section, the State Public Works Board and the Division shall, to the extent practicable, cooperate and coordinate with the Purchasing Division of the Department of Administration so that any regulations adopted pursuant to this section and NRS 333.3369 are reasonably consistent.

(Added to NRS by 2009, 2669; A 2011, 2963)

NRS CROSS REFERENCES.

Preference for bid on proposal submitted by local business owned by veteran with service-connected disability, NRS 333.3369

ADMINISTRATIVE REGULATIONS.

Application to receive preference, list of qualified businesses, NAC 338.450

**ADVERTISING; ACCEPTANCE OF BIDS;
AWARD OF CONTRACT**

NRS 338.1385 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before public body may commence public work itself; exemptions. [Effective through April 30, 2013.]

1. Except as otherwise provided in subsection 9 and NRS 338.1906 and 338.1907, this State, or a governing body or its authorized representative that awards a contract for a public work in accordance with paragraph (a) of subsection 1 of NRS 338.1373 shall not:

(a) Commence a public work for which the estimated cost exceeds \$100,000 unless it advertises in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed for bids for the public work. If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and has a general circulation in the county.

(b) Commence a public work for which the estimated cost is \$100,000 or less unless it complies with the provisions of NRS 338.1386, 338.13862 and 338.13864 and, with respect to the State, NRS 338.1384 to 338.13847, inclusive.

(c) Divide a public work into separate portions to avoid the requirements of paragraph (a) or (b).

2. At least once each quarter, the authorized representative of a public body shall report to the public body any contract that the authorized representative awarded pursuant to subsection 1 in the immediately preceding quarter.

3. Each advertisement for bids must include a provision that sets forth the requirement that a contractor must be qualified pursuant to NRS 338.1379 or 338.1382 to bid on the contract.

4. Approved plans and specifications for the bids must be on file at a place and time stated in the advertisement for the inspection of all persons desiring to bid thereon and for other interested persons. Contracts for the public work must be awarded on the basis of bids received.

5. Except as otherwise provided in subsection 6 and NRS 338.1389, a public body or its authorized representative shall award a contract to the lowest responsive and responsible bidder.

6. Any bids received in response to an advertisement for bids may be rejected if the public body or its authorized representative responsible for awarding the contract determines that:

(a) The bidder is not a qualified bidder pursuant to NRS 338.1379 or 338.1382;

(b) The bidder is not responsive or responsible;

(c) The quality of the services, materials, equipment or labor offered does not conform to the approved plans or specifications; or

(d) The public interest would be served by such a rejection.

7. A public body may let a contract without competitive bidding if no bids were received in response to an advertisement for bids and:

(a) The public body publishes a notice stating that no bids were received and that the contract may be let without further bidding;

(b) The public body considers any bid submitted in response to the notice published pursuant to paragraph (a);

(c) The public body lets the contract not less than 7 days after publishing a notice pursuant to paragraph (a); and

(d) The contract is awarded to the bidder who has submitted the lowest responsive and responsible bid.

8. Before a public body may commence the performance of a public work itself pursuant to the provisions of this section, based upon a determination that the public interest would be served by rejecting any bids received in response to an advertisement for bids, the public body shall prepare and make available for public inspection a written statement containing:

(a) A list of all persons, including supervisors, whom the public body intends to assign to the public work, together with their classifications and an estimate of the direct and indirect costs of their labor;

(b) A list of all equipment that the public body intends to use on the public work, together with an estimate of the number of hours each item of equipment will be used and the hourly cost to use each item of equipment;

(c) An estimate of the cost of administrative support for the persons assigned to the public work;

(d) An estimate of the total cost of the public work, including the fair market value of or, if known, the actual cost of all materials, supplies, labor and equipment to be used for the public work; and

(e) An estimate of the amount of money the public body expects to save by rejecting the bids and performing the public work itself.

9. This section does not apply to:

(a) Any utility subject to the provisions of chapter 318 or 710 of NRS;

(b) Any work of construction, reconstruction, improvement and maintenance of highways subject to NRS 408.323 or 408.327;

(c) Normal maintenance of the property of a school district;

(d) The Las Vegas Valley Water District created pursuant to chapter 167, Statutes of Nevada 1947, the Moapa Valley Water District created pursuant to chapter 477, Statutes of Nevada 1983 or the Virgin Valley Water District created pursuant to chapter 100, Statutes of Nevada 1993;

(e) The design and construction of a public work for which a public body contracts with a design-build team pursuant to NRS 338.1711 to 338.1727, inclusive;

(f) A constructability review of a public work, which review a local government or its authorized representative is required to perform pursuant to NRS 338.1435; or

(g) The preconstruction or construction of a public work for which a public body enters into a contract with a construction manager at risk pursuant to NRS 338.169 to 338.16995, inclusive.

(Added to NRS by 1999, 2392; A 1999, 3491, 3497; 2001, 252, 2022; 2003, 119, 1989, 2422, 2494; 2005, 1798; 2007, 2896; 2009, 434, 2670; 2011, 3686)

NRS CROSS REFERENCES.

General improvement districts, NRS ch. 318

Utilities owned by local governments, NRS ch. 710

NRS 338.1385 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before public body may commence public work itself; exemptions. [Effective May 1, 2013.]

1. Except as otherwise provided in subsection 9, this State, or a governing body or its authorized representative that awards a contract for a public work in accordance with paragraph (a) of subsection 1 of NRS 338.1373 shall not:

(a) Commence a public work for which the estimated cost exceeds \$100,000 unless it advertises in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed for bids for the public work. If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and having a general circulation within the county.

(b) Commence a public work for which the estimated cost is \$100,000 or less unless it complies with the provisions of NRS 338.1386, 338.13862 and 338.13864 and, with respect to the State, NRS 338.1384 to 338.13847, inclusive.

(c) Divide a public work into separate portions to avoid the requirements of paragraph (a) or (b).

2. At least once each quarter, the authorized representative of a public body shall report to the public body any contract that the authorized representative awarded pursuant to subsection 1 in the immediately preceding quarter.

3. Each advertisement for bids must include a provision that sets forth the requirement that a contractor must be qualified pursuant to NRS 338.1379 or 338.1382 to bid on the contract.

4. Approved plans and specifications for the bids must be on file at a place and time stated in the advertisement for the inspection of all persons desiring to bid thereon and for other interested persons. Contracts for the public work must be awarded on the basis of bids received.

5. Except as otherwise provided in subsection 6 and NRS 338.1389, a public body or its authorized representative shall award a contract to the lowest responsive and responsible bidder.

6. Any bids received in response to an advertisement for bids may be rejected if the public body or its authorized representative responsible for awarding the contract determines that:

(a) The bidder is not a qualified bidder pursuant to NRS 338.1379 or 338.1382;

(b) The bidder is not responsive or responsible;

(c) The quality of the services, materials, equipment or labor offered does not conform to the approved plans or specifications; or

(d) The public interest would be served by such a rejection.

7. A public body may let a contract without competitive bidding if no bids were received in response to an advertisement for bids and:

(a) The public body publishes a notice stating that no bids were received and that the contract may be let without further bidding;

(b) The public body considers any bid submitted in response to the notice published pursuant to paragraph (a);

(c) The public body lets the contract not less than 7 days after publishing a notice pursuant to paragraph (a); and

(d) The contract is awarded to the lowest responsive and responsible bidder.

8. Before a public body may commence the performance of a public work itself pursuant to the provisions of this section, based upon a determination that the public interest would be served by rejecting any bids received in response to an advertisement for bids, the public body shall prepare and make available for public inspection a written statement containing:

(a) A list of all persons, including supervisors, whom the public body intends to assign to the public work, together with their classifications and an estimate of the direct and indirect costs of their labor;

(b) A list of all equipment that the public body intends to use on the public work, together with an estimate of the number of hours each item of equipment will be used and the hourly cost to use each item of equipment;

(c) An estimate of the cost of administrative support for the persons assigned to the public work;

(d) An estimate of the total cost of the public work, including, the fair market value of or, if known, the actual cost of all materials, supplies, labor and equipment to be used for the public work; and

(e) An estimate of the amount of money the public body expects to save by rejecting the bids and performing the public work itself.

9. This section does not apply to:

(a) Any utility subject to the provisions of chapter 318 or 710 of NRS;

(b) Any work of construction, reconstruction, improvement and maintenance of highways subject to NRS 408.323 or 408.327;

(c) Normal maintenance of the property of a school district;

(d) The Las Vegas Valley Water District created pursuant to chapter 167, Statutes of Nevada 1947, the Moapa Valley Water District created pursuant to chapter 477, Statutes of Nevada 1983 or the Virgin Valley Water District created pursuant to chapter 100, Statutes of Nevada 1993;

(e) The design and construction of a public work for which a public body contracts with a design-build team pursuant to NRS 338.1711 to 338.1727, inclusive;

(f) A constructability review of a public work, which review a local government or its authorized representative is required to perform pursuant to NRS 338.1435; or

(g) The preconstruction or construction of a public work for which a public body enters into a contract with a construction manager at risk pursuant to NRS 338.169 to 338.16995, inclusive.

(Added to NRS by 1999, 2392; A 1999, 3491, 3497; 2001, 252, 2006, 2022; 2003, 119, 1989, 1990, 2422, 2423, 2494, 2495; 2005, 1798, 1799; 2007, 2896, 2898; 2009, 434, 2670, 2672; 2011, 3686, effective May 1, 2013)

NRS 338.1386 State or local government to award contract for smaller public work to contractor or perform public work itself. If the estimated cost of a public work is \$100,000 or less, this State or a local government shall:

1. Award a contract for the completion of the public work to a properly licensed contractor in accordance with NRS 338.13862; or

2. Perform the public work itself in accordance with NRS 338.13864.

(Added to NRS by 2003, 1984)

NRS 338.13862 Requirements for awarding contract for smaller public work to contractor.

1. Before this State or a local government awards a contract for the completion of a public work in accordance with subsection 1 of NRS 338.1386, the State or the local government must:

(a) If the estimated cost of the public work is more than \$25,000 but not more than \$100,000, solicit bids from at least three properly licensed contractors; and

(b) If the estimated cost of the public work is \$25,000 or less, solicit a bid from at least one properly licensed contractor.

2. Any bids received in response to a solicitation for bids made pursuant to this section may be rejected if the State or the local government determines that:

(a) The quality of the services, materials, equipment or labor offered does not conform to the approved plan or specifications;

(b) The bidder is not responsive or responsible; or

(c) The public interest would be served by such a rejection.

3. At least once each quarter, the State and each local government shall prepare a report detailing, for each public work over \$25,000 for which a contract for its completion is awarded pursuant to paragraph (a) of subsection 1, if any:

(a) The name of the contractor to whom the contract was awarded;

(b) The amount of the contract awarded;

(c) A brief description of the public work; and

(d) The names of all contractors from whom bids were solicited.

4. A report prepared pursuant to subsection 3 is a public record and must be maintained on file at the administrative offices of the applicable public body.

5. The provisions of this section do not relieve this State from the duty to award the contract for the public work to a bidder who is:

(a) Qualified pursuant to the applicable provisions of NRS 338.1375 to 338.1382, inclusive; and

(b) The lowest responsive and responsible bidder, if bids are required to be solicited from more than one properly licensed contractor pursuant to subsection 1. For the purposes of this paragraph, the lowest responsive and responsible bidder must be determined in consideration of any applicable bidder's preference granted pursuant to NRS 338.13844.

(Added to NRS by 2003, 1984; A 2009, 2673)

NRS 338.13864 Attestation required before State or local government may perform certain smaller public works itself.

1. If the State or a local government proposes to perform a public work itself in accordance with subsection 2 of NRS 338.1386, the public officer responsible for the management of the public works of the State or the local government, as applicable, must, if the estimated cost of the public work is more than \$25,000 but not more than \$100,000 and before work on the public work is commenced, prepare a signed attestation regarding the decision of the State or the local government to perform the public work itself.

2. An attestation prepared pursuant to subsection 1:

(a) Must set forth:

(1) The estimated cost of the public work;

(2) A general statement as to why the State or the local government has decided to perform the public work itself; and

(3) A general statement that the public work will adhere to the same quality and standards as would be required of a properly licensed contractor if the public work had been awarded to a properly licensed contractor; and

(b) Is a public record and must be maintained on file at the administrative offices of the applicable public body.

(Added to NRS by 2003, 1985)

NRS 338.1389 Contract for public work for which estimated cost exceeds \$250,000 must be awarded to contractor who submits best bid; certain bids deemed best bid; eligibility to receive preference in bidding; issuance of certificate of eligibility by State Contractors' Board; regulations; fees; sanctions; objections.

1. Except as otherwise provided in subsection 10 and NRS 338.1385, 338.1386 and 338.13864, a public body or its authorized representative shall award a contract for a public work for which the estimated cost exceeds \$250,000 to the contractor who submits the best bid.

2. Except as otherwise provided in subsection 10 or limited by subsection 11, the lowest bid that is:

(a) Submitted by a responsive and responsible contractor who:

(1) Has been determined by the public body to be a qualified bidder pursuant to NRS 338.1379 or 338.1382;

(2) At the time the contractor submits his or her bid, has a valid certificate of eligibility to receive a preference in bidding on public works issued to the contractor by the State Contractors' Board pursuant to subsection 3 or 4; and

(3) At the time the contractor submits his or her bid, submits a signed affidavit that meets the requirements of subsection 1 of NRS 338.0117; and

(b) Not more than 5 percent higher than the bid submitted by the lowest responsive and responsible bidder who:

(1) Does not have, at the time he or she submits the bid, a valid certificate of eligibility to receive a preference in bidding on public works issued to him or her by the State Contractors' Board pursuant to subsection 3 or 4; or

(2) Does not submit, at the time he or she submits the bid, a signed affidavit certifying that he or she will comply with the requirements of paragraphs (a) to (e), inclusive, of subsection 1 of NRS 338.0117 for the duration of the contract,

➤ shall be deemed to be the best bid for the purposes of this section.

3. The State Contractors' Board shall issue a certificate of eligibility to receive a preference in bidding on public works to a general contractor who is licensed pursuant to the provisions of chapter 624 of NRS and submits to the Board an affidavit from a certified public accountant setting forth that the general contractor has, while licensed as a general contractor in this State:

(a) Paid directly, on his or her own behalf:

(1) The sales and use taxes imposed pursuant to chapters 372, 374 and 377 of NRS on materials used for construction in this State, including, without limitation, construction that is undertaken or carried out on land within the boundaries of this State that is managed by the Federal Government or is on an Indian reservation or Indian colony, of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant;

(2) The governmental services tax imposed pursuant to chapter 371 of NRS on the vehicles used in the operation of his or her business in this State of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant; or

(3) Any combination of such sales and use taxes and governmental services tax; or

(b) Acquired, by purchase, inheritance, gift or transfer through a stock option plan, all the assets and liabilities of a viable, operating construction firm that possesses a:

(1) License as a general contractor pursuant to the provisions of chapter 624 of NRS; and

(2) Certificate of eligibility to receive a preference in bidding on public works.

4. The State Contractors' Board shall issue a certificate of eligibility to receive a preference in bidding on public works to a specialty contractor who is licensed pursuant to the provisions of chapter 624 of NRS and submits to the Board an affidavit from a certified public accountant setting forth that the specialty contractor has, while licensed as a specialty contractor in this State:

(a) Paid directly, on his or her own behalf:

(1) The sales and use taxes pursuant to chapters 372, 374 and 377 of NRS on materials used for construction in this State, including, without limitation, construction that is undertaken or carried out on land within the boundaries of this State that is managed by the Federal Government or is on an Indian reservation or Indian colony, of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant;

(2) The governmental services tax imposed pursuant to chapter 371 of NRS on the vehicles used in the operation of his or her business in this State of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant; or

(3) Any combination of such sales and use taxes and governmental services tax; or

(b) Acquired, by purchase, inheritance, gift or transfer through a stock option plan, all the assets and liabilities of a viable, operating construction firm that possesses a:

(1) License as a specialty contractor pursuant to the provisions of chapter 624 of NRS; and

(2) Certificate of eligibility to receive a preference in bidding on public works.

5. For the purposes of complying with the requirements set forth in paragraph (a) of subsection 3 and paragraph (a) of subsection 4, a contractor shall be deemed to have paid:

(a) Sales and use taxes and governmental services taxes that were paid in this State by an affiliate or parent company of the contractor, if the affiliate or parent company is also a general contractor or specialty contractor, as applicable; and

(b) Sales and use taxes that were paid in this State by a joint venture in which the contractor is a participant, in proportion to the amount of interest the contractor has in the joint venture.

6. A contractor who has received a certificate of eligibility to receive a preference in bidding on public works from the State Contractors' Board pursuant to subsection 3 or 4 shall, at the time for the renewal of his or her contractor's license pursuant to NRS 624.283, submit to the Board an affidavit from a certified public accountant setting forth that the contractor has, during the immediately preceding 12 months, paid the taxes required pursuant to paragraph (a) of subsection 3 or paragraph (a) of subsection 4, as applicable, to maintain eligibility to hold such a certificate.

7. A contractor who fails to submit an affidavit to the Board pursuant to subsection 6 ceases to be eligible to receive a preference in bidding on public works unless the contractor reapplies for and receives a certificate of eligibility pursuant to subsection 3 or 4, as applicable.

8. If a contractor holds more than one contractor's license, the contractor must submit a separate application for each license pursuant to which the contractor wishes to qualify for a preference in bidding. Upon issuance, the certificate of

eligibility to receive a preference in bidding on public works becomes part of the contractor's license for which the contractor submitted the application.

9. If a contractor who applies to the State Contractors' Board for a certificate of eligibility to receive a preference in bidding on public works:

(a) Submits false information to the Board regarding the required payment of taxes, the contractor is not eligible to receive a preference in bidding on public works for a period of 5 years after the date on which the Board becomes aware of the submission of the false information; or

(b) Is found by the Board to have, within the preceding 5 years, breached a contract for a public work for which the cost exceeds \$5,000,000 by failing to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 of NRS 338.0117, the contractor is not eligible to receive a preference in bidding on public works.

10. If any federal statute or regulation precludes the granting of federal assistance or reduces the amount of that assistance for a particular public work because of the provisions of subsection 2, those provisions do not apply insofar as their application would preclude or reduce federal assistance for that work.

11. If a bid is submitted by two or more contractors as a joint venture or by one of them as a joint venturer, the bid may be deemed the best bid only if both or all of the joint venturers separately meet the requirements of subsection 2.

12. The State Contractors' Board shall adopt regulations and may assess reasonable fees relating to the certification of contractors for a preference in bidding on public works.

13. A person or entity who believes that a contractor wrongfully holds a certificate of eligibility to receive a preference in bidding on public works may challenge the validity of the certificate by filing a written objection with the public body to which the contractor has submitted a bid on a contract for the construction of a public work. A written objection authorized pursuant to this subsection must:

(a) Set forth proof or substantiating evidence to support the belief of the person or entity that the contractor wrongfully holds a certificate of eligibility to receive a preference in bidding on public works; and

(b) Be filed with the public body not later than 3 business days after the opening of the bids by the public body or its authorized representative.

14. If a public body receives a written objection pursuant to subsection 13, the public body shall determine whether the objection is accompanied by the proof or substantiating evidence required pursuant to paragraph (a) of that subsection. If the public body determines that the objection is not accompanied by the required proof or substantiating evidence, the public body shall dismiss the objection and the public body or its authorized representative may proceed immediately to award the contract. If the public body determines that the objection is accompanied by the required proof or substantiating evidence, the public body shall determine whether the contractor qualifies for the certificate pursuant to the provisions of this section and the public body or its authorized representative may proceed to award the contract accordingly.

(Added to NRS by 1999, 2395; A 1999, 3491, 3497; 2001, 252, 296, 2008, 2022, 2262; 2003, 119, 124, 1992, 2426, 2497; 2007, 864; 2011, 44)

REVISER'S NOTE.

Ch. 20, Stats. 2011, which amended this section to address certain requirements in NRS 338.0117, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

- (a) Which was not advertised in compliance with the amendatory provisions of this act;
 - (b) For which bids were not accepted in compliance with the amendatory provisions of this act; or
 - (c) For which the contract was not awarded in compliance with the amendatory provisions of this act,
- ☞ is void.
3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

ADMINISTRATIVE REGULATIONS.

Certificates of eligibility, NAC 624.685-624.6899

NRS 338.13895 Award of contract to unlicensed or improperly licensed contractor prohibited; replacement of unacceptable subcontractor before contract is awarded; rescission of award of contract to unlicensed or improperly licensed contractor before commencement of work.

1. The Division shall not award a contract to a person who, at the time of the bid, is not properly licensed under the provisions of chapter 624 of NRS or if the contract would exceed the limit of the person's license. A subcontractor who is:

(a) Named in the bid for the contract as a subcontractor who will provide a portion of the work on the public work pursuant to NRS 338.141; and

(b) Not properly licensed for that portion of the work, or who, at the time of the bid, is on disqualified status with the Division pursuant to NRS 338.1376, ☞ shall be deemed unacceptable. If the subcontractor is deemed unacceptable pursuant to this subsection, the contractor shall provide an acceptable subcontractor with no increase in the amount of the contract or bid.

2. A local government awarding a contract for a public work shall not award the contract to a person who, at the time of the bid, is not properly licensed under the provisions of chapter 624 of NRS or if the contract would exceed the limit of the person's license. A subcontractor who is:

(a) Named in the bid for the contract as a subcontractor who will provide a portion of the work on the public work pursuant to NRS 338.141; and

(b) Not properly licensed for that portion of work, ☞ shall be deemed unacceptable. If the subcontractor is deemed unacceptable pursuant to this subsection, the contractor shall provide an acceptable subcontractor with no increase in the amount of the contract or bid.

3. If, after awarding the contract, but before commencement of the work, the public body or its authorized representative discovers that the person to whom the contract was awarded is not licensed, or that the contract would exceed the person's license, the public body or its authorized representative shall rescind the award of the contract and may accept the next lowest bid for that public work from a responsive bidder who was determined by the public body or its authorized representative to be a qualified bidder pursuant to NRS 338.1379 or 338.1382 without requiring that new bids be submitted.

(Added to NRS by 1999, 2395; A 2003, 2129, 2425, 2497; 2005, 1802; 2011, 3688)

NRS 338.139 Awarding of contract to specialty contractor: Conditions.

1. A public body or its authorized representative may award a contract for a public work pursuant to NRS 338.1375 to 338.13895, inclusive, to a specialty contractor if:

(a) The majority of the work to be performed on the public work to which the contract pertains consists of specialty contracting for which the specialty contractor is licensed; and

(b) The public work to which the contract pertains is not part of a larger public work.

2. If a public body or its authorized representative awards a contract to a specialty contractor pursuant to NRS 338.1375 to 338.13895, inclusive, all work to be performed on the public work to which the contract pertains that is outside the scope of the license of the specialty contractor must be performed by a subcontractor who:

- (a) Is licensed to perform such work; and
- (b) At the time of the performance of the work, is not on disqualified status with the Division pursuant to NRS 338.1376.

(Added to NRS by 2001, 2258; A 2003, 2129, 2429)

ADDITIONAL PROCEDURES, CONDITIONS AND LIMITATIONS RELATING TO CONTRACTS

NEVADA CASES.

Project labor agreement was in conformity with competitive bidding laws. Where a bidder for a state construction project offered by the Southern Nevada Water Authority (Water Authority) argued that the project labor agreement (PLA) adopted by the Water Authority violated Nevada's competitive bidding statutes (see NRS 338.140 et seq.), the supreme court noted that a PLA will be upheld if it was adopted in conformity with the objectives of Nevada's competitive bidding laws. Therefore, the court addressed whether the PLA at issue was adopted in conformity with the interests underlying competitive bidding practices as previously set forth by the court: to secure competition, save public funds and guard against favoritism, improvidence and corruption. The court noted that: (1) the PLA maintained competition among bidders and guarded against favoritism as evidenced by the manner in which it treated both union and nonunion contractors fairly; (2) the Water Authority adopted the PLA as a result of concerns about potential labor disputes and a halt to the project which could affect public funds; and (3) another concern of the Water Authority in adopting the PLA was the cost of a delay if water supplies to southern Nevadans became limited and thus the PLA was further focused on saving public funds, and held that the PLA at issue was adopted in conformity with Nevada's competitive bidding laws. *Associated Builders & Contractors, Inc. v. Southern Nevada Water Auth.*, 115 Nev. 151, 979 P.2d 224 (1999)

GENERAL PROVISIONS

NRS 338.140 Requirements and limitations relating to drafting of specifications for bids; documents generated by bidder in preparation or determination of prices included in bid.

1. A public body shall not draft or cause to be drafted specifications for bids, in connection with a public work:

(a) In such a manner as to limit the bidding, directly or indirectly, to any one specific concern.

(b) Except in those instances where the product is designated to match others in use on a particular public improvement either completed or in the course of completion, calling for a designated material, product, thing or service by specific brand or trade name unless the specification lists at least two brands or trade names of comparable quality or utility and is followed by the words "or equal" so that bidders may furnish any equal material, product, thing or service.

(c) In such a manner as to hold the bidder to whom such contract is awarded responsible for extra costs incurred as a result of errors or omissions by the public body in the contract documents.

(d) Except as otherwise provided in subsection 2, in such a manner as to require a bidder to furnish to the public body, whether before or after the bid is submitted,

documents generated in the preparation or determination of prices included in the bid, except when requested by the public body for:

- (1) A determination of the price of additional work performed pursuant to a change order;
- (2) An evaluation of claims for costs incurred for the performance of additional work;
- (3) Preparation for arbitration or litigation;
- (4) A determination of the validity of the protest of a bid;
- (5) A determination of the validity of an increase or decrease in the price of a contract in accordance with a provision in the contract which authorizes such an increase or decrease to correspond to changing market conditions; or
- (6) Any combination thereof.

2. A public body may, at the time a bid is submitted, require documents generated in the preparation or determination of prices included in the bid to be transmitted to and stored electronically by the public body or a third party. Any document furnished by a bidder pursuant to this subsection may be transmitted and stored electronically if the manner of transmission ensures that the documents are exclusively accessible to the bidder. Electronic transmission and storage of such documents does not waive or otherwise affect the proprietary interests of the bidder in the documents, except that the third party or the bidder must release any document furnished pursuant to this subsection if requested by the public body pursuant to paragraph (d) of subsection 1.

3. In those cases involving a unique or novel product application required to be used in the public interest, or where only one brand or trade name is known to the public body, it may list only one.

4. Specifications must provide a period of time of at least 7 days after award of the contract for submission of data substantiating a request for a substitution of "an equal" item.

(Added to NRS by 1967, 929; A 1975, 540; 1997, 3164; 2003, 2429; 2005, 1802, 2891; 2007, 3266)

REVISER'S NOTE.

Ch. 514, Stats. 1993, contains the following provision not included in NRS:

"The legislature finds and declares that it is the policy of this State to ensure that the public receives the full benefits of fair competition among contractors and subcontractors in public works and has therefore enacted NRS 338.140 to limit the practice of shopping for bids for the construction, alteration and repair of public improvements."

NRS 338.141 Bids to include certain information concerning subcontractors and prime contractors; when bids deemed not responsive with respect to subcontractors; requirements and penalties for substitution of named subcontractors.

1. Except as otherwise provided in NRS 338.1727, each bid submitted to a public body for any public work to which paragraph (a) of subsection 1 of NRS 338.1385 or paragraph (a) of subsection 1 of NRS 338.143 applies, must include:

(a) If the public body provides a list of the labor or portions of the public work which are estimated by the public body to exceed 3 percent of the estimated cost of the public work, the name of each first tier subcontractor who will provide such labor or portion of the work on the public work which is estimated to exceed 3 percent of the estimated cost of the public work; or

(b) If the public body does not provide a list of the labor or portions of the public work which are estimated by the public body to exceed 3 percent of the estimated cost of the public work, the name of each first tier subcontractor who will provide

labor or a portion of the work on the public work to the prime contractor for which the first tier subcontractor will be paid an amount exceeding 5 percent of the prime contractor's total bid. If the bid is submitted pursuant to this paragraph, within 2 hours after the completion of the opening of the bids, the contractors who submitted the three lowest bids must submit a list containing the name of each first tier subcontractor who will provide labor or a portion of the work on the public work to the prime contractor for which the first tier subcontractor will be paid an amount exceeding 1 percent of the prime contractor's total bid or \$50,000, whichever is greater, and the number of the license issued to the first tier subcontractor pursuant to chapter 624 of NRS.

2. The lists required by subsection 1 must include a description of the labor or portion of the work which each first tier subcontractor named in the list will provide to the prime contractor.

3. A prime contractor shall include his or her name on a list required by paragraph (a) or (b) of subsection 1 if, as the prime contractor, the prime contractor will perform any of the work required to be listed pursuant to paragraph (a) or (b) of subsection 1.

4. Except as otherwise provided in this subsection, if a contractor:

(a) Fails to submit the list within the required time; or

(b) Submits a list that includes the name of a subcontractor who, at the time of the submission of the list, is on disqualified status with the Division pursuant to NRS 338.1376,

the contractor's bid shall be deemed not responsive. A contractor's bid shall not be deemed not responsive on the grounds that the contractor submitted a list that includes the name of a subcontractor who, at the time of the submission of the list, is on disqualified status with the Division pursuant to NRS 338.1376 if the contractor, before the award of the contract, provides an acceptable replacement subcontractor in the manner set forth in subsection 1 or 2 of NRS 338.13895.

5. A prime contractor shall not substitute a subcontractor for any subcontractor who is named in the bid, unless:

(a) The public body or its authorized representative objects to the subcontractor, requests in writing a change in the subcontractor and pays any increase in costs resulting from the change.

(b) The substitution is approved by the public body or its authorized representative. The substitution must be approved if the public body or its authorized representative determines that:

(1) The named subcontractor, after having a reasonable opportunity, fails or refuses to execute a written contract with the contractor which was offered to the named subcontractor with the same general terms that all other subcontractors on the project were offered;

(2) The named subcontractor files for bankruptcy or becomes insolvent;

(3) The named subcontractor fails or refuses to perform his or her subcontract within a reasonable time or is unable to furnish a performance bond and payment bond pursuant to NRS 339.025; or

(4) The named subcontractor is not properly licensed to provide that labor or portion of the work.

(c) If the public body awarding the contract is a governing body, the public body or its authorized representative, in awarding the contract pursuant to NRS 338.1375 to 338.139, inclusive:

(1) Applies such criteria set forth in NRS 338.1377 as are appropriate for subcontractors and determines that the subcontractor does not meet that criteria; and

(2) Requests in writing a substitution of the subcontractor.

6. If a prime contractor substitutes a subcontractor for any subcontractor who is named in the bid without complying with the provisions of subsection 5, the prime contractor shall forfeit, as a penalty to the public body that awarded the contract, an amount equal to 1 percent of the total amount of the contract.

7. If a prime contractor indicated pursuant to subsection 3 that he or she would perform a portion of work on the public work and, after the submission of the bid, substitutes a subcontractor to perform such work, the prime contractor shall forfeit as a penalty to the public body that awarded the contract, the lesser of, and excluding any amount of the contract that is attributable to change orders:

(a) An amount equal to 2.5 percent of the total amount of the contract; or

(b) An amount equal to 35 percent of the estimate by the engineer of the cost of the work the prime contractor indicated pursuant to subsection 3 that he or she would perform on the public work.

8. As used in this section:

(a) "First tier subcontractor" means a subcontractor who contracts directly with a prime contractor to provide labor, materials or services for a construction project.

(b) "General terms" means the terms and conditions of a contract that set the basic requirements for a public work and apply without regard to the particular trade or specialty of a subcontractor, but does not include any provision that controls or relates to the specific portion of the public work that will be completed by a subcontractor, including, without limitation, the materials to be used by the subcontractor or other details of the work to be performed by the subcontractor.

(Added to NRS by 1993, 2130; A 2001, 573, 2268; 2003, 2130, 2430, 2500; 2005, 1803; 2011, 3688)

FEDERAL AND OTHER CASES.

Purpose of section is to prevent bid-shopping on public works contracts. Purpose behind legislative enactment of the provisions of former NRS 338.144 (cf. NRS 338.141) is to prevent bid-shopping on public works contracts, and courts must read provisions of section to give effect to that purpose. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

General contractor may substitute listed subcontractor if subcontractor fails or refuses to execute subcontract setting forth terms that are in reasonable conformity with terms of subcontractor's original bid. Provisions of former NRS 338.144 (cf. NRS 338.141) concerning substitution of a subcontractor must be read to allow a general contractor on a public works project to substitute a listed subcontractor who, after receiving reasonable opportunity, fails or refuses to execute the written subcontract offered to him by the general contractor, if the terms of the proposed subcontract are in reasonable conformity with the terms of the listed subcontractor's original bid. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

Provisions of section impose pseudo-contractual obligations on general contractor and subcontractor. General contractor does not enter into a contract with a subcontractor merely by listing a subcontractor in the general contractor's bid. However, if a subcontractor is listed in the bid, the provisions of former NRS 338.144 (cf. NRS 338.141) impose pseudo-contractual obligations on the parties and, absent circumstances justifying substitution of a subcontractor on grounds set forth in that section, the general contractor and the listed subcontractor must eventually enter into a binding contract. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

Subcontractor who is listed in bid of general contractor has right to perform contract unless valid statutory grounds for substitution of subcontractor exist. Provisions of former NRS 338.144 (cf. NRS 338.141) confer the right upon a subcontractor who is listed in a bid of a general contractor to perform the contract unless statutory grounds exist for the valid substitution of the subcontractor. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

Availability of money damages and injunctive relief to subcontractor who is wrongfully substituted. In addition to relief in the form of money damages, a subcontractor who is wrongfully substituted (see NRS 338.141) may be entitled to injunctive relief against the general contractor and awarding authority. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

Subcontractor made sufficient showing of irreparable harm under circumstances. General contractor who submitted a bid on a public works project to construct a state prison listed a subcontractor in his bid. After the general contractor was awarded the contract to construct the prison, the general contractor substituted another subcontractor for the listed subcontractor and the Manager of the State Public Works Board (now the Administrator of the State Public Works Division of the Department of Administration) approved the substitution. The listed subcontractor then filed a civil action against the manager and the general contractor alleging that the defendants had deprived him of property without due process of law in violation of the U.S. 14th Amendment and deprived him of his right not to be substituted as a subcontractor on a public works project absent the existence of the specific circumstances set forth in the provisions of former NRS 338.144 (cf. NRS 338.141). In ruling on the plaintiff's motion for a preliminary injunction to enjoin the defendants from substituting the plaintiff for another subcontractor, the court determined that sufficient showing of irreparable harm had been made, thereby warranting grant of the plaintiff's motion, where the order granting a preliminary injunction would: (1) protect the plaintiff's interest in gaining invaluable experience and goodwill in the construction industry; (2) avoid rendering at least partly ineffective possible judgment on the merits in favor of the plaintiff; (3) protect the interest of the plaintiff and the public in the lawful bidding process and execution of a lawful public works contract; and (4) prevent the construction of the state prison whose quality may be substantially impaired if subcontractors on the project resorted to excessive corner-cutting to avoid ruin at the hands of an unscrupulous and extortionate general contractor. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

Subcontractor submitted evidence sufficient to establish substantial likelihood of success on merits of his claims under circumstances. General contractor who submitted a bid on the public works project to construct a state prison listed a subcontractor in his bid. After the general contractor was awarded the contract to construct the prison, the general contractor substituted another subcontractor for the listed subcontractor and the Manager of the State Public Works Board (now the Administrator of the State Public Works Division of the Department of Administration) approved the substitution. Listed subcontractor then filed a civil action against the manager and the general contractor alleging that the defendants had deprived him of property without due process of law in violation of the U.S. 14th Amendment and deprived him of his right not to be substituted as a subcontractor on a public works project absent the existence of the specific circumstances set forth in the provisions of former NRS 338.144 (cf. NRS 338.141). In granting the plaintiff's motion for a preliminary injunction to enjoin the defendants from making a substitution, the court concluded that the plaintiff established a substantial likelihood of success on the merits of his claims where the evidence submitted by the plaintiff indicated that: (1) delays by the general contractor in negotiating with the plaintiff effectively denied the plaintiff reasonable opportunity to execute the subcontract with the general contractor; (2) the subcontract offered to the plaintiff by the general contractor was not in reasonable conformity with the terms of the plaintiff's original bid of \$4,500,000 because the terms of the offered subcontract required the plaintiff to increase his work obligation under the subcontract by approximately \$500,000; and (3) the general contractor may never have had any intention to negotiate in good faith with the plaintiff. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

Balance of hardships weighed in favor of granting preliminary injunction under circumstances. General contractor who submitted a bid on the public works project to construct the state prison listed the subcontractor in his bid. After the general contractor was awarded the contract to construct the prison, the general contractor substituted another subcontractor for the listed subcontractor and the Manager of the State Public Works Board (now the Administrator of the State Public Works Division of the Department of Administration) approved the substitution. Listed subcontractor then filed a civil action against the manager and the general contractor alleging that the defendants had deprived him of property without due process of law in violation of the U.S. 14th Amendment and deprived him of his right not to be substituted as a subcontractor on a public works project absent the existence of the specific circumstances set forth in the provisions of former NRS 338.144 (cf. NRS 338.141). In ruling on the plaintiff's motion for a preliminary injunction to enjoin the defendants from making the substitution, the court determined that the balance of the hardships weighed in favor of granting of the plaintiff's motion where: (1) the hardship

befalling the general contractor was the result of his unethical behavior in attempting to obtain a more favorable subcontract from the substituted subcontractor without following the provisions for substitution set forth in section; (2) the hardship incurred by the State was primarily the result of inattention by the manager of the state public works board to statutory requirements for properly awarding public construction contracts; and (3) the interest of the public in the quick construction of the state prison weighed equally with the interest of the public in curtailing exploitative practices by general contractors on public works projects. *Clark Pac. v. Krump Constr., Inc.*, 942 F. Supp. 1324 (D. Nev. 1996)

COMMISSION ON ETHICS OPINIONS.

Member of board of trustees for public hospital who owns electrical contracting company prohibited from bidding on hospital projects as subcontractor. Where a member of the board of hospital trustees for a public hospital is also a partner in a company that performs electrical contracting work, the Commission on Ethics found that former NRS 281.481(2) and 281.505 (cf. NRS 281A.400 and 281A.430) would prohibit the member from bidding as an electrical subcontractor on hospital improvement projects that must be approved by the board. (See NRS 338.141.) In re Arrien, II, CEO 99-21 (2-1-2000)

NRS 338.1415 Local government prohibited from accepting bid on contract for public work submitted by contractor who breached certain contracts for public works. A local government or its authorized representative shall not accept a bid on a contract for a public work if the contractor who submits the bid has, within the preceding year, breached a contract for a public work for which the cost exceeds \$25,000,000 by failing to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 of NRS 338.0117.

(Added to NRS by 2011, 41)

REVISER'S NOTE.

Ch. 20, Stats. 2011, the source of this section, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

- (a) Which was not advertised in compliance with the amendatory provisions of this act;
 - (b) For which bids were not accepted in compliance with the amendatory provisions of this act; or
 - (c) For which the contract was not awarded in compliance with the amendatory provisions of this act,
- is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

NRS 338.142 Notice of protest of award of contract: Period for filing; contents; posting and disposition of bond or security; stay of action; immunity of public body from liability to bidder.

1. A person who bids on a contract may file a notice of protest regarding the awarding of the contract with the authorized representative designated by the public body within 5 business days after the date the recommendation to award a contract is issued by the public body or its authorized representative.

2. The notice of protest must include a written statement setting forth with specificity the reasons the person filing the notice believes the applicable provisions of law were violated.

3. A person filing a notice of protest may be required by the public body or its authorized representative, at the time the notice of protest is filed, to post a bond with

a good and solvent surety authorized to do business in this state or submit other security, in a form approved by the public body, to the public body who shall hold the bond or other security until a determination is made on the protest. A bond posted or other security submitted with a notice of protest must be in an amount equal to the lesser of:

(a) Twenty-five percent of the total value of the bid submitted by the person filing the notice of protest; or

(b) Two hundred fifty thousand dollars.

4. A notice of protest filed in accordance with the provisions of this section operates as a stay of action in relation to the awarding of any contract until a determination is made by the public body on the protest.

5. A person who makes an unsuccessful bid may not seek any type of judicial intervention until the public body has made a determination on the protest and awarded the contract.

6. Neither a public body nor any authorized representative of the public body is liable for any costs, expenses, attorney's fees, loss of income or other damages sustained by a person who makes a bid, whether or not the person files a notice of protest pursuant to this section.

7. If the protest is upheld, the bond posted or other security submitted with the notice of protest must be returned to the person who posted the bond or submitted the security. If the protest is rejected, a claim may be made against the bond or other security by the public body in an amount equal to the expenses incurred by the public body because of the unsuccessful protest. Any money remaining after the claim has been satisfied must be returned to the person who posted the bond or submitted the security.

(Added to NRS by 2003, 2410; A 2011, 3690)

NRS 338.1425 Prohibition against public body entering into contract with design professional who is not member of design-build team for services on public work until certain period after public body transmits certain information to licensing board of design professional; posting of such information by licensing board. A public body shall not enter into a contract with a design professional who is not a member of a design-build team for the provision of services in connection with a public work until 3 days after the public body has transmitted the information relating to the selection of the design professional to the licensing board that regulates the design professional, including, without limitation, the name of the public body, the name of the design professional, whether the design professional possesses a certificate of eligibility to receive a preference when competing for public works and a brief description of the project and services the design professional was selected for, and the licensing board has posted such information on its Internet website. A licensing board shall post any information received pursuant to this subsection within 1 business day after receiving such information.

(Added to NRS by 2011, 3693)

REVISER'S NOTE.

The provisions of this section were moved in revision from NRS 338.155 as amended by section 16 of chapter 529, Statutes of Nevada 2011.

ALTERNATIVE PROCEDURES FOR
LOCAL GOVERNMENTS

NRS 338.143 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before local government may commence public work itself; exemptions. [Effective through April 30, 2013.]

1. Except as otherwise provided in subsection 8 and NRS 338.1907, a local government or its authorized representative that awards a contract for a public work in accordance with paragraph (b) of subsection 1 of NRS 338.1373 shall not:

(a) Commence a public work for which the estimated cost exceeds \$100,000 unless it advertises in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed for bids for the public work. If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and has a general circulation in the county.

(b) Commence a public work for which the estimated cost is \$100,000 or less unless it complies with the provisions of NRS 338.1442, 338.1444 and 338.1446.

(c) Divide a project work into separate portions to avoid the requirements of paragraph (a) or (b).

2. At least once each quarter, the authorized representative of a local government shall report to the governing body any contract that the authorized representative awarded pursuant to subsection 1 in the immediately preceding quarter.

3. Approved plans and specifications for the bids must be on file at a place and time stated in the advertisement for the inspection of all persons desiring to bid thereon and for other interested persons. Contracts for the public work must be awarded on the basis of bids received.

4. Except as otherwise provided in subsection 5 and NRS 338.147, the local government or its authorized representative shall award a contract to the lowest responsive and responsible bidder.

5. Any bids received in response to an advertisement for bids may be rejected if the local government or its authorized representative responsible for awarding the contract determines that:

(a) The bidder is not responsive or responsible;

(b) The quality of the services, materials, equipment or labor offered does not conform to the approved plans or specifications; or

(c) The public interest would be served by such a rejection.

6. A local government may let a contract without competitive bidding if no bids were received in response to an advertisement for bids and:

(a) The local government publishes a notice stating that no bids were received and that the contract may be let without further bidding;

(b) The local government considers any bid submitted in response to the notice published pursuant to paragraph (a);

(c) The local government lets the contract not less than 7 days after publishing a notice pursuant to paragraph (a); and

(d) The contract is awarded to the lowest responsive and responsible bidder.

7. Before a local government may commence the performance of a public work itself pursuant to the provisions of this section, based upon a determination that the public interest would be served by rejecting any bids received in response to an advertisement for bids, the local government shall prepare and make available for public inspection a written statement containing:

(a) A list of all persons, including supervisors, whom the local government intends to assign to the public work, together with their classifications and an estimate of the direct and indirect costs of their labor;

(b) A list of all equipment that the local government intends to use on the public work, together with an estimate of the number of hours each item of equipment will be used and the hourly cost to use each item of equipment;

(c) An estimate of the cost of administrative support for the persons assigned to the public work;

(d) An estimate of the total cost of the public work, including the fair market value of or, if known, the actual cost of all materials, supplies, labor and equipment to be used for the public work; and

(e) An estimate of the amount of money the local government expects to save by rejecting the bids and performing the public work itself.

8. This section does not apply to:

(a) Any utility subject to the provisions of chapter 318 or 710 of NRS;

(b) Any work of construction, reconstruction, improvement and maintenance of highways subject to NRS 408.323 or 408.327;

(c) Normal maintenance of the property of a school district;

(d) The Las Vegas Valley Water District created pursuant to chapter 167, Statutes of Nevada 1947, the Moapa Valley Water District created pursuant to chapter 477, Statutes of Nevada 1983 or the Virgin Valley Water District created pursuant to chapter 100, Statutes of Nevada 1993;

(e) The design and construction of a public work for which a public body contracts with a design-build team pursuant to NRS 338.1711 to 338.1727, inclusive;

(f) A constructability review of a public work, which review a local government or its authorized representative is required to perform pursuant to NRS 338.1435; or

(g) The preconstruction or construction of a public work for which a public body enters into a contract with a construction manager at risk pursuant to NRS 338.169 to 338.16995, inclusive.

(Added to NRS by 1987, 2322; A 1993, 913, 1439, 2131, 2134, 2135; 1995, 575, 576; 1999, 1360, 2398, 3474; 2001, 252, 269; 2003, 119, 1995, 2431; 2005, 1805; 2007, 2899; 2009, 436; 2011, 3691)

NRS CROSS REFERENCES.

General improvement districts, NRS ch. 318

Legal notices and advertisements, NRS ch. 238

Utilities owned by local governments, NRS ch. 710

NRS 338.143 Advertising for bids and compliance with certain provisions required for commencement of certain public works; quarterly reports of awarded contracts by authorized representatives; availability of plans and specifications for public inspection; award of contract to lowest responsive and responsible bidder; rejection of bids; authority to award contract without competitive bidding if no bids received in response to advertisement for bids in certain circumstances; requirements before local government may commence public work itself; exemptions. [Effective May 1, 2013.]

1. Except as otherwise provided in subsection 8, a local government or its authorized representative that awards a contract for a public work in accordance with paragraph (b) of subsection 1 of NRS 338.1373 shall not:

(a) Commence a public work for which the estimated cost exceeds \$100,000 unless it advertises in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed for bids for the public work. If no qualified newspaper is published within the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and has a general circulation within the county.

(b) Commence a public work for which the estimated cost is \$100,000 or less unless it complies with the provisions of NRS 338.1442, 338.1444 or 338.1446.

(c) Divide a public work into separate portions to avoid the requirements of paragraph (a) or (b).

2. At least once each quarter, the authorized representative of a local government shall report to the governing body any contract that the authorized representative awarded pursuant to subsection 1 in the immediately preceding quarter.

3. Approved plans and specifications for the bids must be on file at a place and time stated in the advertisement for the inspection of all persons desiring to bid thereon and for other interested persons. Contracts for the public work must be awarded on the basis of bids received.

4. Except as otherwise provided in subsection 5 and NRS 338.147, the local government or its authorized representative shall award a contract to the lowest responsive and responsible bidder.

5. Any bids received in response to an advertisement for bids may be rejected if the local government or its authorized representative responsible for awarding the contract determines that:

(a) The bidder is not responsive or responsible;

(b) The quality of the services, materials, equipment or labor offered does not conform to the approved plans or specifications; or

(c) The public interest would be served by such a rejection.

6. A local government may let a contract without competitive bidding if no bids were received in response to an advertisement for bids and:

(a) The local government publishes a notice stating that no bids were received and that the contract may be let without further bidding;

(b) The local government considers any bid submitted in response to the notice published pursuant to paragraph (a);

(c) The local government lets the contract not less than 7 days after publishing a notice pursuant to paragraph (a); and

(d) The contract is awarded to the lowest responsive and responsible bidder.

7. Before a local government may commence the performance of a public work itself pursuant to the provisions of this section, based upon a determination that the public interest would be served by rejecting any bids received in response to an

advertisement for bids, the local government shall prepare and make available for public inspection a written statement containing:

(a) A list of all persons, including supervisors, whom the local government intends to assign to the public work, together with their classifications and an estimate of the direct and indirect costs of their labor;

(b) A list of all equipment that the local government intends to use on the public work, together with an estimate of the number of hours each item of equipment will be used and the hourly cost to use each item of equipment;

(c) An estimate of the cost of administrative support for the persons assigned to the public work;

(d) An estimate of the total cost of the public work, including the fair market value of or, if known, the actual cost of all materials, supplies, labor and equipment to be used for the public work; and

(e) An estimate of the amount of money the local government expects to save by rejecting the bids and performing the public work itself.

8. This section does not apply to:

(a) Any utility subject to the provisions of chapter 318 or 710 of NRS;

(b) Any work of construction, reconstruction, improvement and maintenance of highways subject to NRS 408.323 or 408.327;

(c) Normal maintenance of the property of a school district;

(d) The Las Vegas Valley Water District created pursuant to chapter 167, Statutes of Nevada 1947, the Moapa Valley Water District created pursuant to chapter 477, Statutes of Nevada 1983 or the Virgin Valley Water District created pursuant to chapter 100, Statutes of Nevada 1993;

(e) The design and construction of a public work for which a public body contracts with a design-build team pursuant to NRS 338.1711 to 338.1727, inclusive;

(f) A constructability review of a public work, which review a local government or its authorized representative is required to perform pursuant to NRS 338.1435; or

(g) The preconstruction or construction of a public work for which a public body enters into a contract with a construction manager at risk pursuant to NRS 338.169 to 338.16995, inclusive.

(Added to NRS by 1987, 2322; A 1993, 913, 1439, 2131, 2134, 2135; 1995, 575, 576; 1999, 1360, 1362, 2398, 2399, 3474, 3476, 3490; 2001, 252, 269, 2010, 2022; 2003, 119, 1995, 1996, 2431, 2433; 2005, 1805, 1806; 2007, 2899, 2901; 2009, 436; 2011, 3691, effective May 1, 2013)

NRS 338.1435 Constructability review required before advertising for bids.

1. Before a local government or its authorized representative advertises for bids for a contract for a public work, the local government or its authorized representative shall perform a review of the approved plans and specifications to determine if the plans and specifications are complete and contain all necessary information and specifications to construct the public work, if:

(a) The plans and specifications are to be used for the first time on a public work; and

(b) The plans and specifications are for a public work that has an estimated cost which exceeds \$10,000,000.

2. A constructability review required pursuant to subsection 1 must be performed by an architect registered pursuant to chapter 623 of NRS, a contractor licensed pursuant to chapter 624 of NRS or a professional engineer licensed pursuant to chapter 625 of NRS and must include, without limitation:

(a) A determination of whether a competent contractor would be able to construct the public work based on the approved plans and specifications; and

(b) A review of the approved plans and specifications for the public work for completeness, clarity and economic feasibility.

3. If the local government or its authorized representative does not employ a person who has the expertise to perform a constructability review as described in subsection 2, the local government or its authorized representative must contract with an independent third party who is an architect registered pursuant to chapter 623 of NRS, a contractor licensed pursuant to chapter 624 of NRS or a professional engineer licensed pursuant to chapter 625 of NRS to perform the constructability review. A contract entered into pursuant to this section between a local government or its authorized representative and an independent third party is not required to be awarded by competitive bidding.

(Added to NRS by 2007, 2895)

NRS 338.1442 Local government to award contract for smaller public work to contractor or perform public work itself. If the estimated cost of a public work is \$100,000 or less, a local government shall:

1. Award a contract for the completion of the public work to a properly licensed contractor in accordance with NRS 338.1444; or

2. Perform the public work itself in accordance with NRS 338.1446.

(Added to NRS by 2003, 1985)

NRS 338.1444 Requirements for awarding contract for smaller public work to contractor.

1. Before a local government awards a contract for the completion of a public work in accordance with subsection 1 of NRS 338.1442, the local government must:

(a) If the estimated cost of the public work is more than \$25,000 but not more than \$100,000, solicit bids from at least three properly licensed contractors; and

(b) If the estimated cost of the public work is \$25,000 or less, solicit a bid from at least one properly licensed contractor.

2. Any bids received in response to a solicitation for bids made pursuant to this section may be rejected if the local government determines that:

(a) The quality of the services, materials, equipment or labor offered does not conform to the approved plan or specifications;

(b) The bidder is not responsive or responsible; or

(c) The public interest would be served by such a rejection.

3. At least once each quarter, a local government shall prepare a report detailing, for each public work over \$25,000 for which a contract for its completion is awarded pursuant to paragraph (a) of subsection 1, if any:

(a) The name of the contractor to whom the contract was awarded;

(b) The amount of the contract awarded;

(c) A brief description of the public work; and

(d) The names of all contractors from whom bids were solicited.

4. A report prepared pursuant to subsection 3 is a public record and must be maintained on file at the administrative offices of the applicable public body.

5. The provisions of this section do not relieve a local government from the duty to award the contract for the public work to a bidder who is the lowest responsive and responsible bidder if bids are required to be solicited from more than one properly licensed contractor pursuant to subsection 1.

(Added to NRS by 2003, 1985)

NRS 338.1446 Attestation required before local government may perform certain smaller public works itself.

1. If a local government proposes to perform a public work itself in accordance with subsection 2 of NRS 338.1442, the public officer responsible for the management of the public works of the local government must, if the estimated cost of the public work is more than \$25,000 but not more than \$100,000 and before work on the public work is commenced, prepare a signed attestation regarding the decision of the local government to perform the public work itself.

2. An attestation prepared pursuant to subsection 1:

(a) Must set forth:

(1) The estimated cost of the public work;

(2) A general statement as to why the local government has decided to perform the public work itself; and

(3) A general statement that the public work will adhere to the same quality and standards as would be required of a properly licensed contractor if the public work had been awarded to a properly licensed contractor; and

(b) Is a public record and must be maintained on file at the administrative offices of the local government.

(Added to NRS by 2003, 1986)

NRS 338.147 Contract for public work for which estimated cost exceeds \$250,000 must be awarded to contractor who submits best bid; certain bids deemed best bid; eligibility to receive preference in bidding; issuance of certificate of eligibility by State Contractors' Board; regulations; fees; sanctions; objections.

1. Except as otherwise provided in subsection 10 and NRS 338.143, 338.1442 and 338.1446, a local government or its authorized representative shall award a contract for a public work for which the estimated cost exceeds \$250,000 to the contractor who submits the best bid.

2. Except as otherwise provided in subsection 10 or limited by subsection 11, the lowest bid that is:

(a) Submitted by a contractor who:

(1) Has been found to be a responsible and responsive contractor by the local government or its authorized representative;

(2) At the time the contractor submits his or her bid, has a valid certificate of eligibility to receive a preference in bidding on public works issued to the contractor by the State Contractors' Board pursuant to subsection 3 or 4; and

(3) At the time the contractor submits his or her bid, submits a signed affidavit that meets the requirements of subsection 1 of NRS 338.0117; and

(b) Not more than 5 percent higher than the bid submitted by the lowest responsive and responsible bidder who:

(1) Does not have, at the time he or she submits the bid, a valid certificate of eligibility to receive a preference in bidding on public works issued to him or her by the State Contractors' Board pursuant to subsection 3 or 4; or

(2) Does not submit, at the time he or she submits the bid, a signed affidavit certifying that he or she will comply with the requirements of paragraphs (a) to (e), inclusive, of subsection 1 of NRS 338.0117 for the duration of the contract, ➤ shall be deemed to be the best bid for the purposes of this section.

3. The State Contractors' Board shall issue a certificate of eligibility to receive a preference in bidding on public works to a general contractor who is licensed pursuant to the provisions of chapter 624 of NRS and submits to the Board an

affidavit from a certified public accountant setting forth that the general contractor has, while licensed as a general contractor in this State:

(a) Paid directly, on his or her own behalf:

(1) The sales and use taxes imposed pursuant to chapters 372, 374 and 377 of NRS on materials used for construction in this State, including, without limitation, construction that is undertaken or carried out on land within the boundaries of this State that is managed by the Federal Government or is on an Indian reservation or Indian colony, of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant;

(2) The governmental services tax imposed pursuant to chapter 371 of NRS on the vehicles used in the operation of his or her business in this State of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant; or

(3) Any combination of such sales and use taxes and governmental services tax; or

(b) Acquired, by purchase, inheritance, gift or transfer through a stock option plan, all the assets and liabilities of a viable, operating construction firm that possesses a:

(1) License as a general contractor pursuant to the provisions of chapter 624 of NRS; and

(2) Certificate of eligibility to receive a preference in bidding on public works.

4. The State Contractors' Board shall issue a certificate of eligibility to receive a preference in bidding on public works to a specialty contractor who is licensed pursuant to the provisions of chapter 624 of NRS and submits to the Board an affidavit from a certified public accountant setting forth that the specialty contractor has, while licensed as a specialty contractor in this State:

(a) Paid directly, on his or her own behalf:

(1) The sales and use taxes pursuant to chapters 372, 374 and 377 of NRS on materials used for construction in this State, including, without limitation, construction that is undertaken or carried out on land within the boundaries of this State that is managed by the Federal Government or is on an Indian reservation or Indian colony, of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant;

(2) The governmental services tax imposed pursuant to chapter 371 of NRS on the vehicles used in the operation of his or her business in this State of not less than \$5,000 for each consecutive 12-month period for 60 months immediately preceding the submission of the affidavit from the certified public accountant; or

(3) Any combination of such sales and use taxes and governmental services tax; or

(b) Acquired, by purchase, inheritance, gift or transfer through a stock option plan, all the assets and liabilities of a viable, operating construction firm that possesses a:

(1) License as a specialty contractor pursuant to the provisions of chapter 624 of NRS; and

(2) Certificate of eligibility to receive a preference in bidding on public works.

5. For the purposes of complying with the requirements set forth in paragraph (a) of subsection 3 and paragraph (a) of subsection 4, a contractor shall be deemed to have paid:

(a) Sales and use taxes and governmental services taxes paid in this State by an affiliate or parent company of the contractor, if the affiliate or parent company is also a general contractor or specialty contractor, as applicable; and

(b) Sales and use taxes paid in this State by a joint venture in which the contractor is a participant, in proportion to the amount of interest the contractor has in the joint venture.

6. A contractor who has received a certificate of eligibility to receive a preference in bidding on public works from the State Contractors' Board pursuant to subsection 3 or 4 shall, at the time for the renewal of his or her contractor's license pursuant to NRS 624.283, submit to the Board an affidavit from a certified public accountant setting forth that the contractor has, during the immediately preceding 12 months, paid the taxes required pursuant to paragraph (a) of subsection 3 or paragraph (a) of subsection 4, as applicable, to maintain eligibility to hold such a certificate.

7. A contractor who fails to submit an affidavit to the Board pursuant to subsection 6 ceases to be eligible to receive a preference in bidding on public works unless the contractor reapplies for and receives a certificate of eligibility pursuant to subsection 3 or 4, as applicable.

8. If a contractor holds more than one contractor's license, the contractor must submit a separate application for each license pursuant to which the contractor wishes to qualify for a preference in bidding. Upon issuance, the certificate of eligibility to receive a preference in bidding on public works becomes part of the contractor's license for which the contractor submitted the application.

9. If a contractor who applies to the State Contractors' Board for a certificate of eligibility to receive a preference in bidding on public works:

(a) Submits false information to the Board regarding the required payment of taxes, the contractor is not eligible to receive a preference in bidding on public works for a period of 5 years after the date on which the Board becomes aware of the submission of the false information; or

(b) Is found by the Board to have, within the preceding 5 years, breached a contract for a public work for which the cost exceeds \$5,000,000 by failing to comply with a requirement of paragraphs (a) to (e), inclusive, of subsection 1 of NRS 338.0117, the contractor is not eligible to receive a preference in bidding on public works.

10. If any federal statute or regulation precludes the granting of federal assistance or reduces the amount of that assistance for a particular public work because of the provisions of subsection 2, those provisions do not apply insofar as their application would preclude or reduce federal assistance for that work.

11. If a bid is submitted by two or more contractors as a joint venture or by one of them as a joint venturer, the bid may be deemed a best bid only if both or all of the joint venturers separately meet the requirements of subsection 2.

12. The State Contractors' Board shall adopt regulations and may assess reasonable fees relating to the certification of contractors for a preference in bidding on public works.

13. A person or entity who believes that a contractor wrongfully holds a certificate of eligibility to receive a preference in bidding on public works may challenge the validity of the certificate by filing a written objection with the local government to which the contractor has submitted a bid on a contract for the construction of a public work. A written objection authorized pursuant to this subsection must:

(a) Set forth proof or substantiating evidence to support the belief of the person or entity that the contractor wrongfully holds a certificate of eligibility to receive a preference in bidding on public works; and

(b) Be filed with the local government not later than 3 business days after the opening of the bids by the local government or its authorized representative.

14. If a local government receives a written objection pursuant to subsection 13, the local government shall determine whether the objection is accompanied by the proof or substantiating evidence required pursuant to paragraph (a) of that subsection. If the local government determines that the objection is not accompanied by the required proof or substantiating evidence, the local government shall dismiss the objection and the local government or its authorized representative may proceed immediately to award the contract. If the local government determines that the objection is accompanied by the required proof or substantiating evidence, the local government shall determine whether the contractor qualifies for the certificate pursuant to the provisions of this section and the local government or its authorized representative may proceed to award the contract accordingly.

(Added to NRS by 1985, 670; A 1987, 1476; 1989, 932; 1991, 2374; 1993, 1382, 1383, 2133, 2135; 1995, 678, 2062; 1999, 1850, 2401, 3477; 2001, 252, 300, 2011, 2022, 2269; 2003, 119, 124, 1997, 2435; 2007, 866; 2011, 47)

REVISER'S NOTES.

Ch. 713, Stats. 1991, the source of the amendatory provisions of subsection 2 of this section, contains the following provision not included in NRS:

"The legislature finds and declares that it is the public policy of the state to confer a preferential bidder status on a contractor licensed pursuant to chapter 624 of NRS who has paid taxes which make public works projects possible, unless the conferral of that status would preclude or reduce federal assistance for a public project."

Ch. 20, Stats. 2011, which amended this section to address certain requirements relating to NRS 338.0117, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

(a) Which was not advertised in compliance with the amendatory provisions of this act;

(b) For which bids were not accepted in compliance with the amendatory provisions of this act; or

(c) For which the contract was not awarded in compliance with the amendatory provisions of this act,

is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

ADMINISTRATIVE REGULATIONS.

Certificates of eligibility, NAC 624.685-624.6899

ATTORNEY GENERAL'S OPINIONS.

Joint venture may qualify for preference under section. Where two contractors enter into a joint venture and submit a bid on a contract for a public work, the joint venture may be entitled to the benefits of NRS 338.147, which provides preference for certain bidders, when at least one contractor involved in the joint venture: (1) has an unlimited Nevada contractor license; (2) independently meets the requirements of NRS 338.147; (3) shares equally in the profits and losses of the joint venture; and (4) has at least equal control in the joint venture. AGO 92-4 (3-18-1992)

NRS 338.1475 Award of contract to unlicensed or improperly licensed contractor prohibited; replacement of unacceptable subcontractor before contract is awarded; rescission of award of contract to unlicensed or improperly licensed contractor before commencement of work.

1. A local government or its authorized representative awarding a contract for a public work shall not award the contract to a person who, at the time of the bid, is not properly licensed under the provisions of chapter 624 of NRS or if the contract would exceed the limit of the person's license. A subcontractor who is:

(a) Named in the bid for the contract as a subcontractor who will provide a portion of the work on the public work pursuant to NRS 338.141; and

(b) Not properly licensed for that portion of the work,
➤ shall be deemed unacceptable. If the subcontractor is deemed unacceptable pursuant to this subsection, the contractor shall provide an acceptable subcontractor.

2. If, after awarding the contract, but before commencement of the work, the local government or its authorized representative discovers that the person to whom the contract was awarded is not licensed, or that the contract would exceed the person's license, the local government or its authorized representative shall rescind the award of the contract and may accept the next lowest bid for that public work from a responsive and responsible bidder without requiring that new bids be submitted.

(Added to NRS by 1983, 913; A 1993, 2133; 1999, 2400; 2003, 2434)

NRS 338.148 Awarding of contract to specialty contractor: Conditions.

1. A local government or its authorized representative may award a contract for a public work to a specialty contractor pursuant to NRS 338.143 to 338.1475, inclusive, if:

(a) The majority of the work to be performed on the public work to which the contract pertains consists of specialty contracting for which the specialty contractor is licensed; and

(b) The public work to which the contract pertains is not part of a larger public work.

2. If a local government or its authorized representative awards a contract to a specialty contractor pursuant to NRS 338.143 to 338.1475, inclusive, all work to be performed on the public work to which the contract pertains that is outside the scope of the license of the specialty contractor must be performed by a subcontractor who is licensed to perform such work.

(Added to NRS by 2001, 2258; A 2003, 2438)

PROVISIONS REQUIRED IN CONTRACTS

NRS 338.150 Provisions requiring use of method of alternate dispute resolution before initiation of judicial action; exception.

1. Except as otherwise provided in subsection 2, a public body charged with the drafting of specifications for a public work shall include in the specifications a clause requiring the use of a method of alternate dispute resolution before initiation of a judicial action if a dispute arising between the public body and the contractor engaged on a public work cannot otherwise be settled.

2. The provisions of subsection 1 do not require the Department of Transportation to include such a clause in any contract entered into by the Department.

(Added to NRS by 1969, 618; A 1971, 621; 1979, 1796; 1985, 1462; 2003, 2438; 2005, 1808; 2009, 424)

NEVADA CASES.

Legislature intended section to contemplate mandatory binding arbitration. Although NRS 338.150(1) refers to the inclusion in specifications for a public work of a clause “permitting” arbitration, several factors indicate that the Nevada Legislature intended arbitration to be mandatory under that provision. As explained by the Supreme Court, the four factors militating toward a conclusion that arbitration was intended to be mandatory are: (1) the Legislature amended the section in 1971 to require a clause permitting arbitration, whereas the section had previously only stated that such a clause may be included; (2) the Legislature further amended the section in 1971 to provide an exemption to the arbitration clause requirement for the State Department of Transportation, which exemption would have been unnecessary if the inclusion of such a clause still allowed public entities to choose freely as to whether to arbitrate or not; (3) NRS 338.150(2) refers to the situation of a dispute “requiring” arbitration, which situation would not arise if public entities had discretion to arbitrate; and (4) persons who appeared before the Legislature to testify concerning the 1971 amendments indicated that arbitration would be mandatory. *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 81 P.3d 532 (2003)

Fact that section requires mandatory arbitration does not violate public entity’s right to jury trial. The Clark County School District asserted that if the provisions of NRS 338.150 were to be read as making arbitration mandatory, such a reading would improperly deny the affected parties their right to a trial by jury as described in Nev. Art. 1, § 3 and N.R.C.P. 38(a). The Supreme Court disagreed with the school district, finding that: (1) NRS 338.150 does not require two private parties to arbitrate their claims; (2) the construction company with whom the school district sought to avoid arbitration was willing to waive its right to a jury trial, and it was instead the school district which was seeking to enforce the right to a jury trial; and (3) by enacting NRS 338.150(1), the Nevada Legislature waived the school district’s right to a jury trial, thus eliminating the possibility that the district’s rights under either Nev. Art. 1, § 3 or N.R.C.P. 38(a) were violated. (N.B., the Supreme Court explained that it specifically did not determine whether the construction company had a right to a jury trial or whether that right was waived by entering into a public works contract with the school district.) *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 81 P.3d 532 (2003)

NRS 338.153 Provision requiring persons who provide labor, equipment, materials, supplies or services for public work to comply with all applicable state and local laws. A public body shall include in each contract for a public work a clause requiring each contractor, subcontractor and other person who provides labor, equipment, materials, supplies or services for the public work to comply with the requirements of all applicable state and local laws, including, without limitation, any applicable licensing requirements and requirements for the payment of sales and use taxes on equipment, materials and supplies provided for the public work.

(Added to NRS by 2003, 20th Special Session, 21)

REVISER’S NOTE.

Ch. 3, Stats. 2003, 20th Special Session, the source of this section, contains the following provision not included in NRS:

“The provisions of section 15 of this act [NRS 338.153] do not apply to any contracts made before the effective date of that section [July 22, 2003].”

NRS 338.155 Provisions relating to design professional who is not member of design-build team.

1. If a public body enters into a contract with a design professional who is not a member of a design-build team, for the provision of services in connection with a public work, the contract:

(a) Must set forth:

(1) The specific period within which the public body must pay the design professional.

(2) The specific period and manner in which the public body may dispute a payment or portion thereof that the design professional alleges is due.

(3) The terms of any penalty that will be imposed upon the public body if the public body fails to pay the design professional within the specific period set forth in the contract pursuant to subparagraph (1).

(4) That the prevailing party in an action to enforce the contract is entitled to reasonable attorney's fees and costs.

(b) May set forth the terms of any discount that the public body will receive if the public body pays the design professional within the specific period set forth in the contract pursuant to subparagraph (1) of paragraph (a).

(c) May set forth the terms by which the design professional agrees to name the public body, at the cost of the public body, as an additional insured in an insurance policy held by the design professional, if the policy allows such an addition.

(d) Must not require the design professional to defend, indemnify or hold harmless the public body or the employees, officers or agents of that public body from any liability, damage, loss, claim, action or proceeding caused by the negligence, errors, omissions, recklessness or intentional misconduct of the employees, officers or agents of the public body.

(e) Except as otherwise provided in this paragraph, may require the design professional to defend, indemnify and hold harmless the public body, and the employees, officers and agents of the public body from any liabilities, damages, losses, claims, actions or proceedings, including, without limitation, reasonable attorneys' fees and costs, to the extent that such liabilities, damages, losses, claims, actions or proceedings are caused by the negligence, errors, omissions, recklessness or intentional misconduct of the design professional or the employees or agents of the design professional in the performance of the contract. If the insurer by which the design professional is insured against professional liability does not so defend the public body and the employees, officers and agents of the public body and the design professional is adjudicated to be liable by a trier of fact, the trier of fact shall award reasonable attorney's fees and costs to be paid to the public body by the design professional in an amount which is proportionate to the liability of the design professional.

2. Any provision of a contract entered into by a public body and a design professional who is not a member of a design-build team that conflicts with the provisions of paragraph (d) or (e) of subsection 1 is void.

3. As used in this section, "agents" means those persons who are directly involved in and acting on behalf of the public body or the design professional, as applicable, in furtherance of the contract or the public work to which the contract pertains.

(Added to NRS by 1997, 2975; A 1999, 3481; 2001, 1270, 2022; 2003, 119, 124, 2438; 2005, 823; 2009, 2226; 2011, 3693)

REVISER'S NOTE.

The amendatory provisions of section 16 of chapter 529, Statutes of Nevada 2011, at p. 3693, were moved in revision to NRS 338.1425.

CONTRACTS FOR TRANSPORTATION FACILITIES

NRS 338.161 "Transportation facility" defined. As used in NRS 338.161 to 338.168, inclusive, unless the context otherwise requires, "transportation facility" means a road, railroad, bridge, tunnel, overpass, airport, mass transit facility, parking

facility for vehicles or similar commercial facility used for the support of or the transportation of persons or goods, including, without limitation, any other property that is needed to operate the facility. The term does not include a toll bridge or toll road.

(Added to NRS by 2003, 2022)

NRS 338.162 Alternative methods of authorization. A public body may authorize a person to develop, construct, improve, maintain or operate, or any combination thereof, a transportation facility pursuant to NRS 338.163 or 338.164.

(Added to NRS by 2003, 2022)

NRS 338.163 Submission of request to public body; contents of request.

1. A person may submit a request to a public body to develop, construct, improve, maintain or operate, or any combination thereof, a transportation facility.

2. The request must be accompanied by the following information:

(a) A topographic map indicating the location of the transportation facility.

(b) A description of the transportation facility, including, without limitation, the conceptual design of the transportation facility and all proposed interconnections with other transportation facilities.

(c) The projected total cost of the transportation facility over its life and the proposed date for the development of or the commencement of the construction of, or improvements to, the transportation facility.

(d) A statement setting forth the method by which the person submitting the request proposes to secure all property interests required for the transportation facility. The statement must include, without limitation:

(1) The names and addresses, if known, of the current owners of any property needed for the transportation facility;

(2) The nature of the property interests to be acquired; and

(3) Any property that the person submitting the request proposes that the public body condemn.

(e) Information relating to the current transportation plans, if any, of any governmental entity in the jurisdiction of which any portion of the transportation facility is located.

(f) A list of all permits and approvals required for the development or construction of or improvement to the transportation facility from local, state or federal agencies and a projected schedule for obtaining those permits and approvals.

(g) A list of the facilities of any utility or existing transportation facility that will be crossed by the transportation facility and a statement of the plans of the person submitting the request to accommodate such crossings.

(h) A statement setting forth the general plans of the person submitting the request for financing and operating the transportation facility, which must include, without limitation:

(1) A plan for the development, financing and operation of the transportation facility, including, without limitation, an indication of the proposed sources of money for the development and operation of the transportation facility, the anticipated use of such money and the anticipated schedule for the receipt of such money;

(2) A list of any assumptions made by the person about the anticipated use of the transportation facility, including, without limitation, the fees that will be charged for the use of the transportation facility, and a discussion of those assumptions;

(3) The identification of any risk factors identified by the person that are associated with developing, constructing or improving the transportation facility and the plan for addressing those risk factors;

(4) The identification of any local, state or federal resources that the person anticipates requesting for development and operation of the transportation facility, including, without limitation, an anticipated schedule for the receipt of those resources and the effect of those resources on any statewide or regional program for the improvement of transportation; and

(5) The identification and analysis of any costs or benefits associated with the proposed facility, performed by a professional engineer who is licensed pursuant to chapter 625 of NRS.

(i) The names and addresses of the persons who may be contacted for further information concerning the request.

(j) Any additional material and information that the public body may request.

(Added to NRS by 2003, 2022)

NRS 338.164 Request for submission of proposals by public body. If a public body receives a request regarding a transportation facility pursuant to NRS 338.163 and the public body determines that the transportation facility serves a public purpose, the public body may request other persons to submit proposals to develop, construct, improve, maintain or operate, or any combination thereof, the transportation facility.

(Added to NRS by 2003, 2023)

NRS 338.166 Approval of request or proposal: Determination of public purpose; staff reports; copy of request or proposal to be furnished to affected governmental entities; fee; approval contingent on entering agreement with public body; establishment of date for development of or commencement of construction of transportation facility.

1. A public body may approve a request or proposal submitted pursuant to NRS 338.163 or 338.164 if the public body determines that the transportation facility serves a public purpose. In determining whether the transportation facility serves a public purpose, the public body shall consider whether:

(a) There is a public need for the type of transportation facility that is proposed;

(b) The proposed interconnections between the transportation facility and existing transportation facilities and the plans of the person submitting the request for the operation of the transportation facility are reasonable and compatible with any statewide or regional program for the improvement of transportation and with the transportation plans of any other governmental entity in the jurisdiction of which any portion of the transportation facility will be located;

(c) The estimated cost of the transportation facility is reasonable in relation to similar transportation facilities, as determined by an analysis of the cost performed by a professional engineer who is licensed pursuant to chapter 625 of NRS;

(d) The plans of the person submitting the request will result in the timely development or construction of, or improvement to, the transportation facility or its more efficient operation;

(e) The plans of the person submitting the request contain any penalties for the failure of the person submitting the request to meet any deadline which results in the untimely development or construction of, or improvement to, the transportation facility or failure to meet any deadline for its more efficient operation; and

(f) The long-term quality of the transportation facility will meet a level of performance established by the public body over a sufficient duration of time to provide value to the public.

2. In evaluating a request or proposal submitted pursuant to NRS 338.163 or 338.164, the public body may consider internal staff reports prepared by personnel of the public body who are familiar with the operation of similar transportation facilities or the advice of outside advisors or consultants with relevant experience.

3. The public body shall request that a person who submitted a request or proposal pursuant to NRS 338.163 or 338.164 furnish a copy of the request or proposal to each governmental entity that has jurisdiction over an area in which any part of the transportation facility is located. Within 30 days after receipt of such a request or proposal, the governmental entity shall submit in writing to the public body, for consideration by the public body, any comments that the governmental entity has concerning the transportation facility and shall indicate whether the transportation facility is compatible with any local, regional or statewide transportation plan or program that is applicable to the governmental entity.

4. A public body shall charge a reasonable fee to cover the costs of processing, reviewing and evaluating a request or proposal submitted pursuant to NRS 338.163 or 338.164, including, without limitation, reasonable fees for the services of an attorney or a financial or other consultant or advisor, to be collected before the public body accepts the request or proposal for processing, review and evaluation.

5. The approval of a request or proposal by the public body is contingent on the person who submitted the request or proposal entering into an agreement with the public body. In such an agreement, the public body shall include, without limitation:

(a) Criteria that address the long-term quality of the transportation facility.

(b) The date of termination of the authority and duties pursuant to NRS 338.161 to 338.168, inclusive, of the person whose request or proposal was approved by the public body with respect to the transportation facility and for the dedication of the transportation facility to the public body on that date.

(c) Provision for the imposition by the person whose request or proposal was approved by the public body of such rates, fees or other charges as may be established from time to time by agreement of the parties for use of all or a portion of a transportation facility, other than a bridge or road.

6. In connection with the approval of a transportation facility, the public body shall establish a date for the development of or the commencement of the construction of, or improvements to, the transportation facility. The public body may extend the date from time to time.

(Added to NRS by 2003, 2023)

NRS 338.167 Contract for transportation services. A public body may contract with a person whose request or proposal is approved pursuant to NRS 338.166 for transportation services to be provided by the transportation facility in exchange for such payments for service and other consideration as the public body may deem appropriate.

(Added to NRS by 2003, 2025)

NRS 338.168 Federal, state or local assistance. The public body may take any action necessary to obtain federal, state or local assistance for a transportation facility that it approves and may enter into any contracts required to receive such assistance. The public body shall, by resolution, determine if it serves the public

purpose for all or a portion of the costs of the transportation facility to be paid, directly or indirectly, from the proceeds of a grant or loan made by the local, state or Federal Government or any agency or instrumentality thereof.

(Added to NRS by 2003, 2025)

CONTRACTS INVOLVING CONSTRUCTION MANAGERS AT RISK

NRS 338.169 Public body authorized to construct public work by selecting and entering into contracts with construction manager at risk. A public body may construct a public work by:

1. Selecting a construction manager at risk pursuant to the provisions of NRS 338.1691 to 338.1696, inclusive; and
2. Entering into separate contracts with a construction manager at risk:
 - (a) For preconstruction services, including, without limitation:
 - (1) Assisting the public body in determining whether scheduling or constructability problems exist that would delay the construction of the public work;
 - (2) Estimating the cost of the labor and material for the public work; and
 - (3) Assisting the public body in determining whether the public work can be constructed within the public body's budget; and
 - (b) To construct the public work.

(Added to NRS by 2007, 2891; A 2009, 437; 2011, 3694)

NRS 338.1691 Qualifications for construction manager at risk. To qualify to enter into contracts with a public body for preconstruction services and to construct a public work, a construction manager at risk must:

1. Not have been found liable for breach of contract with respect to a previous project, other than a breach for legitimate cause, during the 5 years immediately preceding the date of the advertisement for proposals pursuant to NRS 338.1692;
2. Not have been disqualified from being awarded a contract pursuant to NRS 338.017, 338.13895, 338.1475 or 408.333;
3. Be licensed as a contractor pursuant to chapter 624 of NRS; and
4. If the project is for the construction of a public work of the State, be qualified to bid on a public work of the State pursuant to NRS 338.1379.

(Added to NRS by 2007, 2891; A 2009, 438; 2011, 3694)

NRS 338.1692 Advertising for proposals for construction manager at risk; contents of request for proposals; requirements for proposals.

1. A public body or its authorized representative shall advertise for proposals for a construction manager at risk in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed. If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and has a general circulation in the county.

2. A request for proposals published pursuant to subsection 1 must include, without limitation:

- (a) A description of the public work;
- (b) An estimate of the cost of construction;

(c) A description of the work that the public body expects a construction manager at risk to perform;

(d) The dates on which it is anticipated that the separate phases of the preconstruction and construction of the public work will begin and end;

(e) The date by which proposals must be submitted to the public body;

(f) If the project is a public work of the State, a statement setting forth that the construction manager at risk must be qualified to bid on a public work of the State pursuant to NRS 338.1379 before submitting a proposal;

(g) The name, title, address and telephone number of a person employed by the public body that an applicant may contact for further information regarding the public work;

(h) A list of the selection criteria and relative weight of the selection criteria that will be used to evaluate proposals; and

(i) A notice that the proposed form of the contract to assist in the preconstruction of the public work or to construct the public work, including, without limitation, the terms and general conditions of the contract, is available from the public body.

3. A proposal must include, without limitation:

(a) An explanation of the experience that the applicant has with projects of similar size and scope in both the public and private sectors, including, without limitation, an explanation of the experience that the applicant has in assisting in the design of such projects and an explanation of the experience that the applicant has in such projects in Nevada;

(b) The contact information for references who have knowledge of the background, character and technical competence of the applicant;

(c) Evidence of the ability of the applicant to obtain the necessary bonding for the work to be required by the public body;

(d) Evidence that the applicant has obtained or has the ability to obtain such insurance as may be required by law;

(e) A statement of whether the applicant has been:

(1) Found liable for breach of contract with respect to a previous project, other than a breach for legitimate cause, during the 5 years immediately preceding the date of the advertisement for proposals; and

(2) Disqualified from being awarded a contract pursuant to NRS 338.017, 338.13895, 338.1475 or 408.333;

(f) The professional qualifications and experience of the applicant, including, without limitation, the resume of any employee of the applicant who will be managing the preconstruction and construction of the public work;

(g) The safety programs established and the safety records accumulated by the applicant;

(h) Evidence that the applicant is licensed as a contractor pursuant to chapter 624 of NRS;

(i) The proposed plan of the applicant to manage the preconstruction and construction of the public work which sets forth in detail the ability of the applicant to provide preconstruction services and to construct the public work; and

(j) If the project is for the design of a public work of the State, evidence that the applicant is qualified to bid on a public work of the State pursuant to NRS 338.1379.

(Added to NRS by 2007, 2891; A 2009, 438; 2011, 3694)

NRS CROSS REFERENCES.

Legal notices and advertisements, NRS ch. 238

NRS 338.1693 Procedure for selection of most qualified applicants; minimum number of proposals required; negotiation of contract for preconstruction services; availability of certain information to applicants and public.

1. The public body or its authorized representative shall appoint a panel consisting of at least three members, at least two of whom must have experience in the construction industry, to rank the proposals submitted to the public body by evaluating the proposals as required pursuant to subsections 2 and 3.

2. The panel shall rank the proposals by:

(a) Verifying that each applicant satisfies the requirements of NRS 338.1691; and

(b) Evaluating and assigning a score to each of the proposals received by the public body based on the factors and relative weight assigned to each factor that the public body specified in the request for proposals.

3. When ranking the proposals, the panel shall assign a relative weight of 5 percent to the applicant's possession of a certificate of eligibility to receive a preference in bidding on public works if the applicant submits a signed affidavit that meets the requirements of subsection 1 of NRS 338.0117. If any federal statute or regulation precludes the granting of federal assistance or reduces the amount of that assistance for a particular public work because of the provisions of this subsection, those provisions of this subsection do not apply insofar as their application would preclude or reduce federal assistance for that work.

4. After the panel ranks the proposals, the public body or its authorized representative shall, except as otherwise provided in subsection 5, select at least the two but not more than the five applicants whose proposals received the highest scores for interviews. During the interview process, the public body or its authorized representative may require the applicants to submit a preliminary proposed amount of compensation for managing the preconstruction and construction of the public work, but in no event shall the proposed amount of compensation exceed 20 percent of the scoring for the selection of the most qualified applicant. After conducting such interviews, the panel shall rank the applicants by using a ranking process that is separate from the process used to rank proposals pursuant to subsection 2 and is based only on information submitted during the interview process. The score to be given for the proposed amount of compensation, if any, must be calculated by dividing the lowest of all the proposed amounts of compensation by the applicant's proposed amount of compensation multiplied by the total possible points available to each applicant.

5. If the public body did not receive at least two proposals, the public body may not contract with a construction manager at risk.

6. Upon receipt of the final rankings of the applicants from the panel, the public body or its authorized representative shall enter into negotiations with the most qualified applicant determined pursuant to subsections 2, 3 and 4 for a contract for preconstruction services, unless the public body required the submission of a proposed amount of compensation, in which case the proposed amount of compensation submitted by the applicant must be the amount offered for the contract. If the public body or its authorized representative is unable to negotiate a contract with the most qualified applicant for an amount of compensation that the public body or its authorized representative and the most qualified applicant determine to be fair and reasonable, the public body or its authorized representative shall terminate negotiations with that applicant. The public body or its authorized representative may then undertake negotiations with the next most qualified applicant in sequence until an agreement is reached and, if the negotiation is

undertaken by an authorized representative of the public body, approved by the public body or until a determination is made by the public body to reject all applicants.

7. The public body or its authorized representative shall make available to all applicants and the public the final rankings of the applicants and shall provide, upon request, an explanation to any unsuccessful applicant of the reasons why the applicant was unsuccessful.

(Added to NRS by 2007, 2892; A 2009, 439; 2011, 50, 3696)

REVISER'S NOTE.

Ch. 20, Stats. 2011, which amended this section to address certain requirements of NRS 338.0117, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

(a) Which was not advertised in compliance with the amendatory provisions of this act;

(b) For which bids were not accepted in compliance with the amendatory provisions of this act; or

(c) For which the contract was not awarded in compliance with the amendatory provisions of this act,

is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

NRS 338.16935 Contract between construction manager at risk and subcontractor for certain preconstruction services.

1. Notwithstanding the provisions of NRS 338.16991 and 338.16995, and subject to the provisions of subsection 2, if a public body enters into a contract with a construction manager at risk for preconstruction services pursuant to NRS 338.1693, the construction manager at risk may enter into a contract with a subcontractor licensed pursuant to chapter 624 of NRS to provide any of the following preconstruction services, the basis of payment for which is a negotiated price:

(a) Assisting the construction manager at risk in identifying and selecting materials and equipment to be provided by each subcontractor;

(b) Assisting the construction manager at risk in creating a schedule for the provision of labor, materials or equipment by each subcontractor;

(c) For the purpose of enabling the construction manager at risk to establish a budget for the construction of the public work, estimating the cost of labor, materials or equipment to be provided by each subcontractor; and

(d) Providing recommendations to the construction manager at risk regarding the design for the public work, as the design pertains to the labor, materials or equipment to be provided by each subcontractor.

2. A subcontractor may not provide preconstruction services pursuant to this section in an area of work outside the field or scope of the license of the subcontractor.

(Added to NRS by 2011, 3680)

NRS 338.1694 Final proposals: Requests; requirements. Repealed. (See chapter 529, Statutes of Nevada 2011, at page 3708.)

NRS 338.1695 Ranking of applicants based on final proposals and interviews; negotiations with certain applicants for contract for preconstruction services; availability to applicants and public of certain information. Repealed. (See chapter 529, Statutes of Nevada 2011, at page 3708.)

NRS 338.1696 Negotiation of contract for construction of public work or portion thereof with construction manager at risk; awarding of contract if public body unable to negotiate satisfactory contract with construction manager at risk.

1. If a public body enters into a contract with a construction manager at risk for preconstruction services pursuant to NRS 338.1693, after the public body has finalized the design for the public work, or any portion thereof sufficient to determine the provable cost of that portion, the public body shall enter into negotiations with the construction manager at risk for a contract to construct the public work or the portion thereof for the public body for:

- (a) The cost of the work, plus a fee, with a guaranteed maximum price;
- (b) A fixed price; or
- (c) A fixed price plus reimbursement for overhead and other costs and expenses related to the construction of the public work or portion thereof.

2. If the public body is unable to negotiate a satisfactory contract with the construction manager at risk to construct the public work or portion thereof, the public body shall terminate negotiations with that applicant and:

- (a) May award the contract for the public work:
 - (1) If the public body is not a local government, pursuant to the provisions of NRS 338.1377 to 338.139, inclusive.

- (2) If the public body is a local government, pursuant to the provisions of NRS 338.1377 to 338.139, inclusive, or 338.143 to 338.148, inclusive; and

- (b) Shall accept a bid to construct the public work from the construction manager at risk with whom the public body entered into a contract for preconstruction services.

(Added to NRS by 2007, 2893; A 2009, 440; 2011, 3697)

NRS 338.1697 Authorized provision in contract with construction manager at risk for construction of public work or portion thereof for guaranteed maximum price. A contract entered into pursuant to NRS 338.1696 that is for a guaranteed maximum price may include a provision that authorizes the construction manager at risk to receive all or part of any difference between the guaranteed maximum price set forth in the contract and the actual price of construction of the public work, if the actual price is less than the guaranteed maximum price.

(Added to NRS by 2007, 2894)

NRS 338.1698 Required and authorized provisions in contract for construction of public work or portion thereof awarded to construction manager at risk. A contract awarded to a construction manager at risk pursuant to NRS 338.1696:

- 1. Must comply with the provisions of NRS 338.020 to 338.090, inclusive.
- 2. Must specify a date by which performance of the work required by the contract must be completed.
- 3. May set forth the terms by which the construction manager at risk agrees to name the public body, at the cost of the public body, as an additional insured in an insurance policy held by the construction manager at risk.
- 4. Must require that the construction manager at risk to whom a contract is awarded assume overall responsibility for ensuring that the preconstruction or construction of the public work, as applicable, is completed in a satisfactory manner.

5. May include such additional provisions as may be agreed upon by the public body and the construction manager at risk.

(Added to NRS by 2007, 2894; A 2009, 441; 2011, 3698)

NRS 338.16985 Duties and powers of construction manager at risk who enters into contract for construction of public work or portion thereof. A construction manager at risk who enters into a contract for the construction of a public work pursuant to NRS 338.1696:

1. Is responsible for contracting for the services of any necessary subcontractor, supplier or independent contractor necessary for the construction of the public work and for the performance of and payment to any such subcontractors, suppliers or independent contractors.

2. If the public work involves the construction of a fixed work that is described in subsection 2 of NRS 624.215, shall perform not less than 25 percent of the construction of the fixed work himself or herself or using his or her own employees.

3. If the public work involves the construction of a building or structure that is described in subsection 3 of NRS 624.215, may perform himself or herself or using his or her own employees as much of the construction of the building or structure that the construction manager at risk is able to demonstrate that the construction manager at risk or his or her own employees have performed on similar projects.

(Added to NRS by 2007, 2894)

NRS 338.1699 Subcontractors on public works for which construction manager at risk was awarded contract: Eligibility; submission of list to local government. Repealed. (See chapter 529, Statutes of Nevada 2011, at page 3708.)

NRS 338.16991 Contract between construction manager at risk and subcontractor to provide labor, materials or equipment on project: Eligibility; procedure for determination of qualification of subcontractor to submit proposal.

1. To be eligible to provide labor, materials or equipment on a public work, the contract for which a public body has entered into with a construction manager at risk pursuant to NRS 338.1696, a subcontractor must be:

(a) Licensed pursuant to chapter 624 of NRS; and

(b) Qualified pursuant to the provisions of this section to submit a proposal for the provision of labor, materials or equipment on a public work.

2. Subject to the provisions of subsections 3, 4 and 5, the construction manager at risk shall determine whether an applicant is qualified to submit a proposal for the provision of labor, materials or equipment on the public work for the purposes of paragraph (b) of subsection 1.

3. After the design and schedule for the construction of the public work is sufficiently detailed and complete to allow a subcontractor to apply to qualify to submit a meaningful and responsive proposal for the provision of labor, materials or equipment on the public work, and not later than 21 days before the date by which such an application must be submitted, the construction manager at risk shall advertise for such applications in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed. If no qualified newspaper is published in the county where the public work will be performed, the advertisement must be published in some qualified newspaper that is printed in the State of Nevada and has a general circulation in the county.

4. The criteria to be used by the construction manager at risk when determining whether an applicant is qualified to submit a proposal for the provision of labor, materials or equipment must include, and must be limited to:

(a) The monetary limit placed on the license of the applicant by the State Contractors' Board pursuant to NRS 624.220;

(b) The financial ability of the applicant to provide the labor, materials or equipment required on the public work;

(c) Whether the applicant has the ability to obtain the necessary bonding for the work required by the public body;

(d) The safety programs established and the safety records accumulated by the applicant;

(e) Whether the applicant has breached any contracts with a public body or person in this State or any other state during the 5 years immediately preceding the application;

(f) Whether the applicant 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 applicant to perform the public work;

(g) The performance history of the applicant concerning other recent, similar public or private contracts, if any, completed by the applicant in Nevada;

(h) The principal personnel of the applicant;

(i) Whether the applicant has been disqualified from the award of any contract pursuant to NRS 338.017 or 338.13895; and

(j) The truthfulness and completeness of the application.

5. The public body or its authorized representative shall ensure that each determination made pursuant to subsection 2 is made subject to the provisions of subsection 4.

6. The construction manager at risk shall notify each applicant and the public body in writing of a determination made pursuant to subsection 2.

7. A determination made pursuant to subsection 2 that an applicant is not qualified may be appealed pursuant to NRS 338.1381 to the public body with whom the construction manager at risk has entered into a contract for the construction of the public work.

(Added to NRS by 2011, 3681)

NRS CROSS REFERENCES.

Legal notices and advertisements, NRS ch. 238

REVISER'S NOTE.

Ch. 529, Stats. 2011, the source of this section, contains the following provision not included in NRS:

"The provisions of sections 4 and 5 of this act [NRS 338.16991 and 338.16995] apply only to contracts entered into on or after July 1, 2011."

NRS 338.16995 Contract between construction manager at risk and subcontractor to provide labor, materials or equipment on project; Authority to enter into; procedure for awarding subcontracts of certain estimated value; substitution of subcontractor on such subcontracts; availability of certain information to applicants and public.

1. If a public body enters into a contract with a construction manager at risk for the construction of a public work pursuant to NRS 338.1696, the construction manager at risk may enter into a subcontract for the provision of labor, materials and equipment necessary for the construction of the public work only as provided in this section.

2. The provisions of this section apply only to a subcontract for which the estimated value is at least 1 percent of the total cost of the public work.

3. After the design and schedule for the construction of the public work is sufficiently detailed and complete to allow a subcontractor to submit a meaningful and responsive proposal, and not later than 21 days before the date by which a proposal for the provision of labor, materials or equipment by a subcontractor must be submitted, the construction manager at risk shall notify in writing each subcontractor who was determined pursuant to NRS 338.16991 to be qualified to submit such a proposal of a request for such proposals. A copy of the notice required pursuant to this subsection must be provided to the public body.

4. The notice required pursuant to subsection 3 must include, without limitation:

(a) A description of the design for the public work and a statement indicating where a copy of the documents relating to that design may be obtained;

(b) A description of the type and scope of labor, equipment and materials for which subcontractor proposals are being sought;

(c) The dates on which it is anticipated that construction of the public work will begin and end;

(d) The date, time and place at which a preproposal meeting will be held;

(e) The date and time by which proposals must be received, and to whom they must be submitted;

(f) The date, time and place at which proposals will be opened for evaluation;

(g) A description of the bonding and insurance requirements for subcontractors;

(h) Any other information reasonably necessary for a subcontractor to submit a responsive proposal; and

(i) A statement in substantially the following form:

Notice: For a proposal for a subcontract on the public work to be considered:

1. The subcontractor must be licensed pursuant to chapter 624 of NRS;

2. The proposal must be timely received;

3. The subcontractor must attend the preproposal meeting; and

4. The subcontractor may not modify the proposal after the date and time the proposal is received.

5. A subcontractor may not modify a proposal after the date and time the proposal is received.

6. To be considered responsive, a proposal must:

(a) Be timely received by the construction manager at risk; and

(b) Substantially and materially conform to the details and requirements included in the proposal instructions and for the finalized bid package for the public work, including, without limitation, details and requirements affecting price and performance.

7. The opening of the proposals must be attended by an authorized representative of the public body and the architect or engineer responsible for the design of the public work but is not otherwise open to the public.

8. At the time the proposals are opened, the construction manager at risk shall compile and provide to the public body or its authorized representative a list that includes, without limitation, the name and contact information of each subcontractor who submits a timely proposal and the price of the proposal submitted by the subcontractor. The list must be made available to the public upon request.

9. Not less than 10 working days after opening the proposals, the construction manager at risk shall:

(a) Evaluate the proposals and determine which proposals are responsive.
(b) Select the subcontractor who submits the proposal that the construction manager at risk determines is the best proposal. The subcontractor must be selected from among those:

- (1) Who attended the preproposal meeting;
- (2) Who submitted a responsive proposal; and
- (3) Whose names are included on the list compiled and provided to the public body or its authorized representative pursuant to subsection 8.

(c) Inform the public body or its authorized representative which subcontractor has been selected.

10. The public body or its authorized representative shall ensure that the evaluation of proposals and selection of subcontractors are done pursuant to the provisions of this section and regulations adopted by the State Public Works Board.

11. A subcontractor selected pursuant to subsection 9 need not be selected by the construction manager at risk solely on the basis of lowest price.

12. Except as otherwise provided in subsection 13, the construction manager at risk shall enter into a subcontract with a subcontractor selected pursuant to subsection 9 to provide the labor, materials or equipment described in the request for proposals.

13. A construction manager at risk shall not substitute a subcontractor for any subcontractor selected pursuant to subsection 9 unless:

(a) The public body or its authorized representative objects to the subcontractor, requests in writing a change in the subcontractor and pays any increase in costs resulting from the change; or

(b) The substitution is approved by the public body after the selected subcontractor:

- (1) Files for bankruptcy or becomes insolvent;
- (2) After having a reasonable opportunity, fails or refuses to execute a written contract with the construction manager at risk which was offered to the selected subcontractor with the same general terms that all other subcontractors on the project were offered;
- (3) Fails or refuses to perform the subcontract within a reasonable time;
- (4) Is unable to furnish a performance bond and payment bond pursuant to NRS 339.025, if required for the public work; or
- (5) Is not properly licensed to provide that labor or portion of the work.

14. The construction manager at risk shall make available to the public, including, without limitation, each subcontractor who submits a proposal, the final rankings of the subcontractors and shall provide, upon request, an explanation to any subcontractor who is not selected of the reasons why the subcontractor was not selected.

15. If a public work is being constructed in phases, and a construction manager at risk selects a subcontractor pursuant to subsection 9 for the provision of labor, materials or equipment for any phase of that construction, the construction manager at risk may select that subcontractor for the provision of labor, materials or equipment for any other phase of the construction without following the requirements of subsections 3 to 11, inclusive.

(Added to NRS by 2011, 3682)

REVISER'S NOTE.

Ch. 529, Stats. 2011, the source of this section, contains the following provision not included in NRS:

"The provisions of sections 4 and 5 of this act [NRS 338.16991 and 338.16995] apply only to contracts entered into on or after July 1, 2011."

**CONTRACTS INVOLVING DESIGN-BUILD
TEAMS, PRIME CONTRACTORS OR
NONPROFIT ORGANIZATIONS**

GENERAL PROVISIONS

NRS 338.1711 Contracts for which public body is required or authorized to enter into with prime contractor or design-build team.

1. Except as otherwise provided in this section and NRS 338.161 to 338.16995, inclusive, a public body shall contract with a prime contractor for the construction of a public work for which the estimated cost exceeds \$100,000.

2. A public body may contract with a design-build team for the design and construction of a public work that is a discrete project if the public body has approved the use of a design-build team for the design and construction of the public work and the public work has an estimated cost which exceeds \$5,000,000.

(Added to NRS by 1999, 3467; A 2001, 2013, 2022, 2275; 2003, 119, 157, 2025, 2439; 2005, 1808; 2007, 2903; 2011, 3698)

NRS 338.1715 Procedure for selecting design-build team. A public body that contracts with a design-build team pursuant to NRS 338.1711 shall select the design-build team in accordance with the provisions of NRS 338.1721 to 338.1727, inclusive.

(Added to NRS by 1999, 3469; A 2001, 2022, 2276; 2003, 119, 157, 2441; 2005, 1810)

NRS 338.1717 Employment of architect, general contractor, construction manager as agent, landscape architect or engineer as consultant. A public body may employ a registered architect, general contractor, construction manager as agent, landscape architect or licensed professional engineer as a consultant to assist the public body in overseeing the construction of a public work. An architect, general contractor, construction manager as agent, landscape architect or engineer so employed shall not:

1. Construct the public work; or
2. Assume overall responsibility for ensuring that the construction of the public work is completed in a satisfactory manner.

(Added to NRS by 1999, 3472; A 2001, 2022; 2003, 119, 2441; 2007, 2903)

NRS 338.1718 Contract with construction manager as agent.

1. A construction manager as agent:

(a) Must:

- (1) Be a contractor licensed pursuant to chapter 624 of NRS;
- (2) Hold a certificate of registration to practice architecture, interior design or residential design pursuant to chapter 623 of NRS; or
- (3) Be licensed as a professional engineer pursuant to chapter 625 of NRS.

(b) May enter into a contract with a public body to assist in the planning, scheduling and management of the construction of a public work without assuming any responsibility for the cost, quality or timely completion of the construction of the public work. A construction manager as agent who enters into a contract with a public body pursuant to this section may not:

- (1) Take part in the design or construction of the public work; or
- (2) Act as an agent of the public body to select a subcontractor if the work to be performed by the subcontractor is part of a larger public work.

2. A contract between a public body and a construction manager as agent is not required to be awarded by competitive bidding.
(Added to NRS by 2007, 2895; A 2011, 3698)

**PROCEDURES FOR AWARDING CONTRACTS TO
DESIGN-BUILD TEAMS**

NRS 338.1721 Qualifications of design-build team. To qualify to participate in a project for the design and construction of a public work, a design-build team must:

1. Have the ability to obtain a performance bond and payment bond as required pursuant to NRS 339.025;
2. Have the ability to obtain insurance covering general liability and liability for errors and omissions;
3. Not have been found liable for breach of contract with respect to a previous project, other than a breach for legitimate cause, during the 5 years immediately preceding the date of the advertisement for preliminary proposals;
4. Not have been disqualified from being awarded a contract pursuant to NRS 338.017, 338.13895, 338.1475 or 408.333;
5. Ensure that the members of the design-build team possess the licenses and certificates required to carry out the functions of their respective professions within this State; and
6. If the project is for the design and construction of a public work of the State, ensure that the prime contractor is qualified to bid on a public work of the State pursuant to NRS 338.1379.
(Added to NRS by 1999, 3470; A 2001, 252, 2022; 2003, 119, 2131; 2005, 1810)

NRS 338.1723 Advertisement for preliminary proposals.

1. A public body shall advertise for preliminary proposals for the design and construction of a public work by a design-build team. The advertisement must be published:
 - (a) In a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed at least once and not less than 7 days before the opening of bids; and
 - (b) On the Internet website of the public body, if the public body maintains an Internet website, every day for not less than 7 days before the opening of bids.
➔ If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and has a general circulation in the county.
2. A request for preliminary proposals published pursuant to subsection 1 must include, without limitation:
 - (a) A description of the public work to be designed and constructed;
 - (b) An estimate of the cost to design and construct the public work;
 - (c) The dates on which it is anticipated that the separate phases of the design and construction of the public work will begin and end;
 - (d) The date by which preliminary proposals must be submitted to the public body;
 - (e) If the proposal is for a public work of the State, a statement setting forth that the prime contractor must be qualified to bid on a public work of the State pursuant to NRS 338.1379 before submitting a preliminary proposal;

(f) A description of the extent to which designs must be completed for both preliminary and final proposals and any other requirements for the design and construction of the public work that the public body determines to be necessary;

(g) A list of the requirements set forth in NRS 338.1721;

(h) A list of the factors and relative weight assigned to each factor that the public body will use to evaluate design-build teams who submit a proposal for the public work;

(i) Notice that a design-build team desiring to submit a proposal for the public work must include with its proposal the information used by the public body to determine finalists among the design-build teams submitting proposals pursuant to subsection 2 of NRS 338.1725 and a description of that information; and

(j) A statement as to whether a design-build team that is selected as a finalist pursuant to NRS 338.1725 but is not awarded the design-build contract pursuant to NRS 338.1727 will be partially reimbursed for the cost of preparing a final proposal and, if so, an estimate of the amount of the partial reimbursement.

(Added to NRS by 1999, 3469; A 2001, 252, 2015, 2022; 2003, 119, 2131, 2441; 2005, 1810; 2011, 1864)

NRS CROSS REFERENCES.

Legal notices and advertisements, NRS ch. 238

NRS 338.1725 Selection of finalists based on preliminary proposals; minimum number of proposals required; availability to public of certain information.

1. The public body shall select at least two but not more than four finalists from among the design-build teams that submitted preliminary proposals. If the public body does not receive at least two preliminary proposals from design-build teams that the public body determines to be qualified pursuant to this section and NRS 338.1721, the public body may not contract with a design-build team for the design and construction of the public work.

2. The public body shall select finalists pursuant to subsection 1 by:

(a) Verifying that each design-build team which submitted a preliminary proposal satisfies the requirements of NRS 338.1721;

(b) Conducting an evaluation of the qualifications of each design-build team that submitted a preliminary proposal, including, without limitation, an evaluation of:

(1) The professional qualifications and experience of the members of the design-build team;

(2) The performance history of the members of the design-build team concerning other recent, similar projects completed by those members, if any;

(3) The safety programs established and the safety records accumulated by the members of the design-build team; and

(4) The proposed plan of the design-build team to manage the design and construction of the public work that sets forth in detail the ability of the design-build team to design and construct the public work; and

(c) Except as otherwise provided in this paragraph, assigning, without limitation, a relative weight of 5 percent to the possession of both a certificate of eligibility to receive a preference in bidding on public works by all contractors on the design-build team and a certificate of eligibility to receive a preference when competing for public works by all design professionals on the design-build team. If any federal statute or regulation precludes the granting of federal assistance or reduces the amount of that assistance for a particular public work because of the provisions of this paragraph relating to a preference in bidding on public works or a preference

when competing for public works, those provisions of this paragraph do not apply insofar as their application would preclude or reduce federal assistance for that public work.

3. After the selection of finalists pursuant to this section, the public body shall make available to the public the results of the evaluations of preliminary proposals conducted pursuant to paragraph (b) of subsection 2 and identify which of the finalists, if any, received an assignment of 5 percent pursuant to paragraph (c) of subsection 2.

(Added to NRS by 1999, 3470; A 2001, 2016, 2022; 2003, 119; 2005, 1811; 2011, 3699)

NRS 338.1727 Request for and submission of final proposals; selection or rejection of final proposals; awarding of contract; partial reimbursement of unsuccessful finalists in certain circumstances; contents of contract; availability to public of certain information.

1. After selecting the finalists pursuant to NRS 338.1725, the public body shall provide to each finalist a request for final proposals for the public work. The request for final proposals must:

(a) Set forth the factors that the public body will use to select a design-build team to design and construct the public work, including the relative weight to be assigned to each factor; and

(b) Set forth the date by which final proposals must be submitted to the public body.

2. If one or more of the finalists selected pursuant to NRS 338.1725 is disqualified or withdraws, the public body may select a design-build team from the remaining finalist or finalists.

3. Except as otherwise provided in this subsection, in assigning the relative weight to each factor for selecting a design-build team pursuant to subsection 1, the public body shall assign, without limitation, a relative weight of 5 percent to the possession of both a certificate of eligibility to receive a preference in bidding on public works by all contractors on the design-build team if the contractors submit signed affidavits that meet the requirements of subsection 1 of NRS 338.0117, and a certificate of eligibility to receive a preference when competing for public works by all design professionals on the design-build team, and a relative weight of at least 30 percent to the proposed cost of design and construction of the public work. If any federal statute or regulation precludes the granting of federal assistance or reduces the amount of that assistance for a particular public work because of the provisions of this subsection relating to a preference in bidding on public works, or a preference when competing for public works, those provisions of this subsection do not apply insofar as their application would preclude or reduce federal assistance for that public work.

4. A final proposal submitted by a design-build team pursuant to this section must be prepared thoroughly and be responsive to the criteria that the public body will use to select a design-build team to design and construct the public work described in subsection 1. A design-build team that submits a final proposal which is not responsive shall not be awarded the contract and shall not be eligible for the partial reimbursement of costs provided for in subsection 7.

5. A final proposal is exempt from the requirements of NRS 338.141.

6. After receiving and evaluating the final proposals for the public work, the public body or its authorized representative shall enter into negotiations with the most qualified applicant, as determined pursuant to the criteria set forth pursuant to subsections 1 and 3, and award the design-build contract to the design-build team

whose proposal is selected. If the public body or its authorized representative is unable to negotiate with the most qualified applicant a contract that is determined by the parties to be fair and reasonable, the public body may terminate negotiations with that applicant. The public body or its authorized representative may then undertake negotiations with the next most qualified applicant in sequence until an agreement is reached and, if the negotiation is undertaken by an authorized representative of the public body, approved by the public body or until a determination is made by the public body to reject all applicants.

7. If a public body selects a final proposal and awards a design-build contract pursuant to subsection 6, the public body shall:

(a) Partially reimburse the unsuccessful finalists if partial reimbursement was provided for in the request for preliminary proposals pursuant to paragraph (j) of subsection 2 of NRS 338.1723. The amount of reimbursement must not exceed, for each unsuccessful finalist, 3 percent of the total amount to be paid to the design-build team as set forth in the design-build contract.

(b) Make available to the public the results of the evaluation of final proposals that was conducted and the ranking of the design-build teams who submitted final proposals. The public body shall not release to a third party, or otherwise make public, financial or proprietary information submitted by a design-build team.

8. A contract awarded pursuant to this section:

(a) Must comply with the provisions of NRS 338.020 to 338.090, inclusive.

(b) Must specify:

(1) An amount that is the maximum amount that the public body will pay for the performance of all the work required by the contract, excluding any amount related to costs that may be incurred as a result of unexpected conditions or occurrences as authorized by the contract;

(2) An amount that is the maximum amount that the public body will pay for the performance of the professional services required by the contract; and

(3) A date by which performance of the work required by the contract must be completed.

(c) May set forth the terms by which the design-build team agrees to name the public body, at the cost of the public body, as an additional insured in an insurance policy held by the design-build team.

(d) Except as otherwise provided in paragraph (e), must not require the design professional to defend, indemnify or hold harmless the public body or the employees, officers or agents of that public body from any liability, damage, loss, claim, action or proceeding caused by the negligence, errors, omissions, recklessness or intentional misconduct of the employees, officers and agents of the public body.

(e) May require the design-build team to defend, indemnify and hold harmless the public body, and the employees, officers and agents of the public body from any liabilities, damages, losses, claims, actions or proceedings, including, without limitation, reasonable attorneys' fees, that are caused by the negligence, errors, omissions, recklessness or intentional misconduct of the design-build team or the employees or agents of the design-build team in the performance of the contract.

(f) Must require that the design-build team to whom a contract is awarded assume overall responsibility for ensuring that the design and construction of the public work is completed in a satisfactory manner.

9. Upon award of the design-build contract, the public body shall make available to the public copies of all preliminary and final proposals received.

(Added to NRS by 1999, 3471; A 2001, 1272, 2017, 2022; 2003, 33, 119, 2027, 2132, 2442; 2005, 1812; 2011, 51, 3699, 3701)

REVISER'S NOTES.

Ch. 20, Stats. 2011, which amends subsection 3 of this section to address certain requirements of NRS 338.0117, contains the following provision not included in NRS:

"1. The amendatory provisions of this act apply to all public works for which bids are first advertised after the effective date of this act [April 27, 2011].

2. Any contract awarded for a public work to which the amendatory provisions of this act apply pursuant to subsection 1 and:

- (a) Which was not advertised in compliance with the amendatory provisions of this act;
 - (b) For which bids were not accepted in compliance with the amendatory provisions of this act; or
 - (c) For which the contract was not awarded in compliance with the amendatory provisions of this act,
- is void.

3. As used in this section, "contract" and "public work" have the meanings ascribed to them in NRS 338.010."

Ch. 529, Stats. 2011, which amended subsection 3 of this section concerning preferences, contains the following provision not included in NRS:

"1. The State Public Works Board [now the State Public Works Division of the Department of Administration] and each local government that awards a contract pursuant to NRS 338.1727, as amended by section 28 of this act, or NRS 408.3886, as amended by section 32 of this act, or selects a professional engineer, professional land surveyor or registered architect pursuant to NRS 625.530, as amended by section 33 of this act, shall, on or before October 1 of the year in which it awards such a contract or makes such a selection, submit to the Director of the Legislative Counsel Bureau a report detailing those contracts and selections on the form prescribed by the Committee on Local Government Finance.

2. Before August 1, 2011, the Committee on Local Government Finance created pursuant to NRS 354.105 shall prescribe a form for the report described in subsection 1, which must include, without limitation:

(a) The total number of contracts and selections described in subsection 1 awarded and made by the State Public Works Board [now the Division] or local government during the year to which the report pertains; and

(b) A description of each such contract or selection, including, without limitation:

- (1) The name of the person or entity who was selected or to whom the contract was awarded.
- (2) The particular type of goods or services involved in the contract or selection.
- (3) The dollar amount of the contract or selection.
- (4) Whether the person or entity who was selected or to whom the contract was awarded was awarded the contract or selected as a result of the person or entity possessing a certificate of eligibility to receive a preference when competing for public works pursuant to subsection 1, 2 or 3 of section 2 of this act [NRS 338.0117].

(5) If the person or entity who was selected or to whom the contract was awarded did not possess a certificate for eligibility to receive a preference when competing for public works pursuant to subsection 1, 2 or 3 of section 2 of this act [NRS 338.0117], the number of persons or entities that did possess such a certificate that bid on the contract or were considered for selection."

PREFERENCE WHEN COMPETING FOR PUBLIC WORKS

NRS 338.173 Certificate of eligibility to receive preference when competing for public works to certain design professionals: Issuance; duration; ineligibility for submission of false information; regulations; fees; written objections.

1. The State Board of Architecture, Interior Design and Residential Design shall issue a certificate of eligibility to receive a preference when competing for public works to a person who holds a certificate of registration to engage in the practice of architecture pursuant to the provisions of chapter 623 of NRS and submits

to the Board an affidavit from a certified public accountant setting forth that the person has, while holding a certificate of registration to engage in the practice of architecture in this State:

(a) Paid directly, on his or her own behalf the excise tax imposed upon an employer by NRS 363B.110 of not less than \$1,500 for each consecutive 12-month period for 36 months immediately preceding the submission of the affidavit from the certified public accountant; or

(b) Acquired, by purchase, inheritance, gift or transfer through a stock option plan, all the assets and liabilities of a viable, operating business that engages in the practice of architecture that:

(1) Satisfies the requirements of NRS 623.350; and

(2) Possesses a certificate of eligibility to receive a preference when competing for public works.

2. The State Board of Landscape Architecture shall issue a certificate of eligibility to receive a preference when competing for public works to a person who holds a certificate of registration to engage in the practice of landscape architecture pursuant to the provisions of chapter 623A of NRS and submits to the Board an affidavit from a certified public accountant setting forth that the person has, while holding a certificate of registration to engage in the practice of landscape architecture in this State:

(a) Paid directly, on his or her own behalf the excise tax imposed upon an employer by NRS 363B.110 of not less than \$1,500 for each consecutive 12-month period for 36 months immediately preceding the submission of the affidavit from the certified public accountant; or

(b) Acquired, by purchase, inheritance, gift or transfer through a stock option plan, all the assets and liabilities of a viable, operating business that engages in the practice of landscape architecture that:

(1) Satisfies the requirements of NRS 623A.250; and

(2) Possesses a certificate of eligibility to receive a preference when competing for public works.

3. The State Board of Professional Engineers and Land Surveyors shall issue a certificate of eligibility to receive a preference when competing for public works to a professional engineer or professional land surveyor who is licensed pursuant to the provisions of chapter 625 of NRS and submits to the Board an affidavit from a certified public accountant setting forth that the professional engineer or professional land surveyor has, while licensed as a professional engineer or professional land surveyor in this State:

(a) Paid directly, on his or her own behalf the excise tax imposed upon an employer by NRS 363B.110 of not less than \$1,500 for each consecutive 12-month period for 36 months immediately preceding the submission of the affidavit from the certified public accountant; or

(b) Acquired, by purchase, inheritance, gift or transfer through a stock option plan, all the assets and liabilities of a viable, operating business that engages in engineering or land surveying that:

(1) Satisfies the requirements of NRS 625.407; and

(2) Possesses a certificate of eligibility to receive a preference when competing for public works.

4. For the purposes of complying with the requirements set forth in paragraph (a) of subsection 1, paragraph (a) of subsection 2 and paragraph (a) of subsection 3, a person shall be deemed to have paid:

(a) The excise tax imposed upon an employer by NRS 363B.110 by an affiliate or parent company of the person, if the affiliate or parent company also satisfies the requirements of NRS 623.350, 623A.250 or 625.407, as applicable; and

(b) The excise tax imposed upon an employer by NRS 363B.110 by a joint venture in which the person is a participant, in proportion to the amount of interest the person has in the joint venture.

5. A design professional who has received a certificate of eligibility to receive a preference when competing for public works pursuant to subsection 1, 2 or 3 must, at the time for the renewal of his or her professional license or certificate of registration, as applicable, pursuant to chapter 623, 623A or 625 of NRS, submit to the applicable licensing board an affidavit from a certified public accountant setting forth that the design professional has, during the immediately preceding 12 months, paid the taxes required pursuant to paragraph (a) of subsection 1, paragraph (a) of subsection 2 or paragraph (a) of subsection 3, as applicable, to maintain eligibility to hold such a certificate.

6. A design professional who fails to submit an affidavit to the applicable licensing board pursuant to subsection 5 ceases to be eligible to receive a preference when competing for public works unless the design professional reapplies for and receives a certificate of eligibility pursuant to subsection 1, 2 or 3, as applicable.

7. If a design professional holds more than one license or certificate of registration, the design professional must submit a separate application for each license or certificate of registration pursuant to which the design professional wishes to qualify for a preference when competing for public works. Upon issuance, the certificate of eligibility to receive a preference when competing for public works becomes part of the design professional's license or certificate of registration for which the design professional submitted the application.

8. If a design professional who applies to a licensing board for a certificate of eligibility to receive a preference when competing for public works pursuant to subsection 1, 2 or 3 submits false information to the licensing board regarding the required payment of taxes, the design professional is not eligible to receive a preference when competing for public works for a period of 5 years after the date on which the licensing board becomes aware of the submission of the false information.

9. The State Board of Architecture, Interior Design and Residential Design, the State Board of Landscape Architecture and the State Board of Professional Engineers and Land Surveyors shall adopt regulations and may assess reasonable fees relating to their respective certification of design professionals for a preference when competing for public works.

10. A person or entity who believes that a design professional wrongfully holds a certificate of eligibility to receive a preference when competing for public works may challenge the validity of the certificate by filing a written objection with the public body which selected, for the purpose of providing services for a public work, the design professional who holds the certificate. A written objection authorized pursuant to this subsection must:

(a) Set forth proof or substantiating evidence to support the belief of the person or entity that the design professional wrongfully holds a certificate of eligibility to receive a preference when competing for public works; and

(b) Be filed with the public body not later than 3 business days after:

(1) The date on which the public body makes available to the public pursuant to subsection 3 of NRS 338.1725 the information required by that subsection, if the design-build team of which the design professional who holds the certificate is a part was selected as a finalist pursuant to NRS 338.1725;

(2) The date on which the Department of Transportation makes available to the public pursuant to subsection 3 of NRS 408.3885 the information required by that subsection, if the design-build team of which the design professional who holds the certificate is a part was selected as a finalist pursuant to NRS 408.3885; or

(3) The date on which the licensing board which issued the certificate to the design professional posted on its Internet website the information required by NRS 338.1425, if the design professional is identified in that information as being selected for a contract governed by NRS 338.155.

11. If a public body receives a written objection pursuant to subsection 10, the public body shall determine whether the objection is accompanied by the proof or substantiating evidence required pursuant to paragraph (a) of that subsection. If the public body determines that the objection is not accompanied by the required proof or substantiating evidence, the public body shall dismiss the objection and the public body or its authorized representative may proceed immediately to award the contract. If the public body determines that the objection is accompanied by the required proof or substantiating evidence, the public body shall determine whether the design professional qualifies for the certificate pursuant to the provisions of this section and the public body or its authorized representative may proceed to award the contract accordingly.

(Added to NRS by 2011, 3678)

NRS CROSS REFERENCES.

Business associations engaged in practice of—

Architecture, residential design or interior design, NRS 623.350

Land surveying, NRS 625.407

Landscape architecture, NRS 623A.250

Business tax, NRS ch. 363B

NOTIFICATION OF LICENSING BOARDS

NRS 338.175 Substantially incomplete or rejected plans submitted by registered architect, interior designer, residential designer or landscape architect. A public body shall notify the State Board of Architecture, Interior Design and Residential Design or the State Board of Landscape Architecture, as applicable, in writing if a registered architect, interior designer, residential designer or landscape architect:

1. Submits plans for a project which are substantially incomplete; or
2. Submits plans for the same project which are rejected by the public body at least three times.

(Added to NRS by 1997, 1409; A 2003, 2444)

NRS 338.176 Substantially incomplete or rejected plans submitted by licensed professional engineer or land surveyor. A public body shall notify the State Board of Professional Engineers and Land Surveyors in writing if a licensed professional engineer or land surveyor:

1. Submits plans that are substantially incomplete; or
2. Submits plans for the same public work that are rejected by the public body at least three times.

(Added to NRS by 1997, 156)

**DESIGN, CONSTRUCTION, RENOVATION AND
DEMOLITION OF PUBLIC WORKS****GENERAL PROVISIONS****NRS 338.177 Lease of property acquired by local government for public work pending completion of public work.**

1. Real property acquired by a governing body for a public work may be leased, pending the completion of the public work but for not more than 5 years, upon such terms and conditions as the governing body prescribes.

2. The governing body shall:

(a) Adopt the procedures for entering into such a lease at a public hearing held thereon; and

(b) Offer to lease the property to the person from whom it was acquired before offering to lease the property to any other person.

3. Except as otherwise provided in this subsection, revenue from the lease must be used to maintain the property in order to mitigate any adverse effect upon the adjacent area. Any revenue from the lease that is not needed to maintain the property must be used to offset the cost of the public work for which the property was acquired.

(Added to NRS by 1995, 156; A 2003, 2444)

NRS 338.180 Accommodation of persons with physical handicap or disability; verification of conformity with requirements; enforcement.

1. The Legislature of the State of Nevada declares that:

(a) The primary purpose of this section is to provide, subject to the limitations set forth in this section, for the removal and elimination of architectural barriers to persons with a physical handicap in public buildings and facilities designed after July 1, 1973, in order to encourage and facilitate the employment of persons with a physical handicap and to make public buildings accessible to and usable by persons with a physical handicap; and

(b) It is the intent of the Legislature that insofar as possible all buildings and facilities used by the public be accessible to, and functional for, persons with a physical handicap, without loss of function, space or facility where the general public is concerned.

2. All plans and specifications for the construction of public buildings and facilities owned by a public body must, after July 1, 1973, provide facilities and features for persons with a physical handicap so that buildings which are normally used by the public are constructed with entrance ramps, toilet facilities, drinking fountains, doors and public telephones accessible to and usable by persons with a physical handicap. In addition, all plans and specifications for the construction or alteration of public buildings and facilities owned by a public body must comply with the applicable requirements of the:

(a) Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., and the regulations adopted pursuant thereto, including, without limitation, the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities set forth in Appendix A of Part 36 of Title 28 of the Code of Federal Regulations;

(b) Minimum Guidelines and Requirements for Accessible Design, 36 C.F.R. §§ 1190.1 et seq.; and

(c) Fair Housing Act, 42 U.S.C. § 3604, and the regulations adopted pursuant thereto.

↪ The requirements of paragraph (a) of this subsection are not satisfied if the plans and specifications comply solely with the Uniform Federal Accessibility Standards set forth in Appendix A of Part 101-19.6 of Title 41 of the Code of Federal Regulations.

3. All public bodies shall, in the design, construction and alteration of public buildings and facilities comply with the applicable requirements of the:

(a) Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., and the regulations adopted pursuant thereto, including, without limitation, the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities set forth in Appendix A of Part 36 of Title 28 of the Code of Federal Regulations;

(b) Minimum Guidelines and Requirements for Accessible Design, 36 C.F.R. §§ 1190.1 et seq.; and

(c) Fair Housing Act, 42 U.S.C. § 3604, and the regulations adopted pursuant thereto.

↪ The requirements of paragraph (a) of this subsection are not satisfied if the public body complies solely with the Uniform Federal Accessibility Standards set forth in Appendix A of Part 101-19.6 of Title 41 of the Code of Federal Regulations.

4. In each public building and facility owned by a public body, each entrance to a corridor which leads to a toilet facility must be marked with a sign which:

(a) Conforms to the requirements related to signage contained in §§ 4.30 et seq. of the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities set forth in Appendix A of Part 36 of Title 28 of the Code of Federal Regulations; and

(b) Uses symbols, raised letters and Braille to:

(1) Identify the toilet facility and the gender of persons who may use the toilet facility; and

(2) If the toilet facility is for the exclusive use of persons of one gender:

(I) Indicate that the toilet facility is for the exclusive use of persons of that gender; and

(II) Provide direction to a toilet facility that may be used by persons of the other gender.

5. The Division shall verify that all public buildings and facilities owned by the State of Nevada conform with the requirements of this section. Each political subdivision shall verify that all public buildings and facilities owned by the political subdivision conform with the requirements of this section.

6. A person may report a violation of this section to the Attorney General.

7. Upon receiving a report pursuant to subsection 6, the Attorney General shall notify the public body responsible for the alleged violation. Not later than 30 days after receiving such a notification, the public body shall:

(a) Present evidence to the Attorney General that it is in compliance with this section; or

(b) Begin any action necessary to comply with the requirements of this section and notify the Attorney General of the date on which it will be in compliance with those requirements.

8. If the public body responsible for the alleged violation fails to comply with this section, the Attorney General shall take such action as is necessary to ensure compliance with this section, including, without limitation, commencing proceedings in a court of competent jurisdiction, if appropriate.

(Added to NRS by 1973, 394; A 1975, 155; 1985, 42, 274; 1999, 2852; 2001, 704; 2003, 2444)

NRS 338.185 Public body to reimburse contractor for certain costs of locating underground facility of public utility. If a public body directs a contractor to locate the facility of a public utility placed underground on the site of a public work, the public body shall reimburse the contractor for the difference between the costs incurred in finding the actual location of the facility and the costs of finding the reputed location of the facility.

(Added to NRS by 1987, 1042)

**ENERGY AND ENVIRONMENTAL
DESIGN REQUIREMENTS**

NRS 338.1905 Retrofitting of state buildings for energy efficiency: Appointment of energy retrofit coordinators and person to assist coordinators. [Effective through April 30, 2013.]

1. The Governor shall designate one or more energy retrofit coordinators for the buildings occupied by the Executive Branch of Government, including, without limitation, the Nevada System of Higher Education and the Public Employees' Retirement System.

2. The Supreme Court shall designate an energy retrofit coordinator for the buildings occupied by the Judicial Branch of State Government.

3. The Legislature, by concurrent resolution, shall designate an energy retrofit coordinator for the buildings occupied by the Legislative Branch of Government. If the position becomes vacant at a time when the Legislature is not in session, the Legislative Commission may designate a replacement.

4. The Governor shall appoint a person who is trained in the management of facilities to assist the energy retrofit coordinator of the:

(a) Judicial Branch of Government, upon request of the Supreme Court.

(b) Legislative Branch of Government, upon request of the Legislative Commission.

↪ A person appointed to assist an energy retrofit coordinator pursuant to this subsection shall provide all assistance requested including making recommendations for proposals for retrofitting buildings and any other assistance necessary to enable the coordinator to carry out the provisions of NRS 338.1906.

(Added to NRS by 1993, 910; A 1993, 1439, 2135; 1995, 550, 575, 576; 1999, 1818)

NRS 338.1906 Retrofitting of state buildings for energy efficiency: Duties of energy retrofit coordinators and State Board of Examiners; procedures for requesting and approving proposals; limitation on money committed beyond biennium; restrictions on approval of change orders to executed contracts; projects exempt from certain procedural requirements. [Effective through April 30, 2013.]

1. Upon request by or consultation with an officer or employee of the State who is responsible for the budget of a department, board, commission, agency or other entity of the State, the appropriate energy retrofit coordinator may request the approval of the State Board of Examiners to advertise a request for proposals to retrofit a building, or any portion thereof, that is occupied by the department, board, commission, agency or other entity, to make the use of energy in the building, or portion thereof, more efficient.

2. Upon approval of the State Board of Examiners, the coordinator shall prepare a request for proposals for the retrofitting of one or more buildings, or any portion thereof, which includes:

- (a) The name and location of the coordinator;
 - (b) A brief description of the requirements for the initial audit of the use of energy and the retrofitting;
 - (c) Where and how specifications of the requirements for the initial audit of the use of energy and the retrofitting may be obtained;
 - (d) The date and time not later than which proposals must be received by the coordinator; and
 - (e) The date and time when responses will be opened.
3. The request for proposals must be published in at least one newspaper of general circulation in the State.
4. After receiving the proposals but before making a decision on the proposals, the coordinator shall consider:
- (a) The best interests of the State;
 - (b) The experience and financial stability of the persons submitting the proposals;
 - (c) Whether the proposals conform with the terms of the request for proposals;
 - (d) The prices of the proposals; and
 - (e) Any other factor disclosed in the request for proposals.
5. The coordinator shall determine the relative weight of each factor before a request for proposals is advertised. The weight of each factor must not be disclosed before the date proposals are required to be submitted to the coordinator.
6. After reviewing the proposals, if the coordinator determines that the dollar value of the annual energy savings resulting from the retrofit will meet or exceed the total annual contract payments to be made by the State, including any financing charges to be incurred by the State over the life of the contract, the coordinator shall select the best proposal and request the approval of the State Board of Examiners to award the contract. The request for approval must include the proposed method of financing the audit and retrofit, which may include an installment contract, a shared savings contract or any other contract for a reasonable financing arrangement. Such a contract may commit the State to make payments beyond the biennium in which the contract is executed, but the interest due on any debt created pursuant to this section must be paid at least semiannually, payments must be made on the principal at least annually and the debt must be fully repaid on or before May 1, 2013.
7. Before approving a retrofit pursuant to this section, the State Board of Examiners shall evaluate any projects that would utilize shared savings as a method of payment or any method of financing that would commit the State to make payments beyond the biennium in which the contract is executed to ensure that:
- (a) The dollar value of the annual energy savings resulting from the retrofit will meet or exceed the total annual contract payments to be made by the State, including any financing charges to be incurred by the State over the life of the contract;
 - (b) The State is likely to continue to occupy the building for the entire period required to recoup the cost of the retrofit in energy savings; and
 - (c) The limitation set forth in subsection 9 will not be exceeded.
8. Upon approval of the State Board of Examiners, the coordinator shall execute the contract and notify:
- (a) The State Board of Examiners of the total amount of money committed by the contract per year; and
 - (b) Each officer or employee who is responsible for the budget of a department, board, commission, agency or other entity which occupies a portion of a building that will be retrofitted of the amount of money it will be required to pay annually for its portion of the retrofit.

9. The total amount of money committed beyond the biennium for all contracts executed pursuant to this section must not exceed \$15,000,000 at any one time.

10. The Legislature hereby pledges that a tax will be levied to pay the principal and interest on any indebtedness resulting from a contract executed pursuant to this section as they become due if the required payments will not be made by the entity that executed the contract from its budgeted accounts and the proceeds from any such taxes are hereby specially appropriated for this purpose.

11. A change order to a contract executed pursuant to this section may not be approved by the State if the cost of the change order would cause the dollar value of the annual energy savings resulting from the retrofit to be less than the total annual contract payments to be made by the State, including any financing charges to be incurred by the State over the life of the contract, unless approval of the change order is more economically feasible than termination of the retrofit.

12. NRS 338.1385 does not apply to a project for which a request for proposals is advertised and the contract is awarded pursuant to the provisions of this section.

(Added to NRS by 1993, 910; A 1993, 1437, 1439, 2135; 1995, 575, 576; 1999, 2402; 2001, 2991; 2005, 2891)

NRS 338.1907 Retrofitting of local governmental buildings for energy efficiency: Duties of energy retrofit coordinators and local governments; procedures for requesting and approving proposals; restrictions on approval of change orders to executed contracts; projects exempt from certain procedural requirements. [Effective through April 30, 2013.]

1. A governing body may designate one or more energy retrofit coordinators for the buildings occupied by the local government.

2. If such a coordinator is designated, upon request by or consultation with an officer or employee of the local government who is responsible for the budget of a department, board, commission or other entity of the local government, the coordinator may request the approval of the governing body to advertise a request for proposals to retrofit a building, or any portion thereof, that is occupied by the department, board, commission or other entity, to make the use of energy in the building, or portion thereof, more efficient.

3. Upon approval of the governing body, the coordinator shall prepare a request for proposals for the retrofitting of one or more buildings, or any portion thereof, which includes:

- (a) The name and location of the coordinator;
- (b) A brief description of the requirements for the initial audit of the use of energy and the retrofitting;
- (c) Where and how specifications of the requirements for the initial audit of the use of energy and the retrofitting may be obtained;
- (d) The date and time not later than which proposals must be received by the coordinator; and
- (e) The date and time when responses will be opened.

4. The request for proposals must be published:

(a) On the Internet website of the governing body, if the governing body maintains an Internet website, every day for not less than 7 days before the opening of bids; and

(b) In a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed at least once and not less than 7 days before the opening of bids.

➤ If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified

newspaper that is printed in the State of Nevada and has a general circulation in the county where the public work will be performed.

5. After receiving the proposals but before making a decision on the proposals, the coordinator shall consider:

- (a) The best interests of the local government;
- (b) The experience and financial stability of the persons submitting the proposals;
- (c) Whether the proposals conform with the terms of the request for proposals;
- (d) The prices of the proposals; and
- (e) Any other factor disclosed in the request for proposals.

6. The coordinator shall determine the relative weight of each factor before a request for proposals is advertised. The weight of each factor must not be disclosed before the date proposals are required to be submitted to the coordinator.

7. After reviewing the proposals, if the coordinator determines that the dollar value of the annual energy savings resulting from the retrofit will meet or exceed the total annual contract payments to be made by the local government, including any financing charges to be incurred by the local government over the life of the contract, the coordinator shall select the best proposal and request the approval of the governing body to award the contract. The request for approval must include the proposed method of financing the audit and retrofit, which may include an installment contract, a shared savings contract or any other contract for a reasonable financing arrangement. Such a contract may commit the local government to make payments beyond the fiscal year in which the contract is executed or beyond the terms of office of the governing body, or both.

8. Before approving a retrofit pursuant to this section, the governing body shall evaluate any projects that would utilize shared savings as a method of payment or any method of financing that would commit the local government to make payments beyond the fiscal year in which the contract is executed or beyond the terms of office of the governing body to ensure that:

- (a) The dollar value of the annual energy savings resulting from the retrofit will meet or exceed the total annual contract payments to be made by the local government related to the retrofit, including any financing charges to be incurred by the local government over the life of the contract; and
- (b) The local government is likely to continue to occupy the building for the entire period required to recoup the cost of the retrofit in energy savings.

9. Upon approval of the governing body, the coordinator shall execute the contract and notify each officer or employee who is responsible for the budget of a department, board, commission or other entity which occupies a portion of a building that will be retrofitted of the amount of money it will be required to pay annually for its portion of the retrofit.

10. A change order to a contract executed pursuant to this section may not be approved by the local government if the cost of the change order would cause the dollar value of the annual energy savings resulting from the retrofit to be less than the total annual contract payments to be made by the local government, including financing charges to be incurred by the local government over the life of the contract, unless approval of the change order is more economically feasible than termination of the retrofit.

11. NRS 338.1385 and 338.143 do not apply to a project for which a request for proposals is advertised and the contract is awarded pursuant to the provisions of this section.

(Added to NRS by 1993, 912; A 1993, 1439, 2135; 1995, 575, 576; 1999, 2404; 2003, 2446; 2005, 2893; 2011, 1865)

NRS CROSS REFERENCES.

Legal notices and advertisements, NRS ch. 238

NRS 338.1908 Retrofitting of local governmental buildings, facilities and structures with consideration of use of sources of renewable energy. [Effective through April 30, 2013.]

1. The governing body of each local government shall, by July 28, 2009, develop a plan to retrofit public buildings, facilities and structures, including, without limitation, traffic-control systems, and to otherwise use sources of renewable energy to serve those buildings, facilities and structures. Such a plan must:

(a) Be developed with input from one or more energy retrofit coordinators designated pursuant to NRS 338.1907, if any.

(b) Include a list of specific projects. The projects must be prioritized and selected on the basis of the following criteria:

- (1) The length of time necessary to commence the project.
- (2) The number of workers estimated to be employed on the project.
- (3) The effectiveness of the project in reducing energy consumption.
- (4) The estimated cost of the project.

(5) Whether the project is able to be powered by or otherwise use sources of renewable energy.

(6) Whether the project has qualified for participation in one or more of the following programs:

(I) The Solar Energy Systems Incentive Program created by NRS 701B.240;

(II) The Renewable Energy School Pilot Program created by NRS 701B.350;

(III) The Wind Energy Systems Demonstration Program created by NRS 701B.580; or

(IV) The Waterpower Energy Systems Demonstration Program created by NRS 701B.820.

(c) Include a list of potential funding sources for use in implementing the projects, including, without limitation, money available through the Energy Efficiency and Conservation Block Grant Program as set forth in 42 U.S.C. § 17152 and grants, gifts, donations or other sources of money from public and private sources.

2. The governing body of each local government shall transmit the plan developed pursuant to subsection 1 to the Director of the Office of Energy and to any other entity designated for that purpose by the Legislature.

3. As used in this section:

(a) "Local government" means each city or county that meets the definition of "eligible unit of local government" as set forth in 42 U.S.C. § 17151 and each unit of local government, as defined in subsection 12 of NRS 338.010, that does not meet the definition of "eligible entity" as set forth in 42 U.S.C. § 17151.

(b) "Renewable energy" means a source of energy that occurs naturally or is regenerated naturally, including, without limitation:

- (1) Biomass;
- (2) Fuel cells;
- (3) Geothermal energy;
- (4) Solar energy;
- (5) Waterpower; and
- (6) Wind.

➡ The term does not include coal, natural gas, oil, propane or any other fossil fuel, or nuclear energy.

(c) “Retrofit” means to alter, improve, modify, remodel or renovate a building, facility or structure to make that building, facility or structure more energy-efficient.

(Added to NRS by 2009, 1406; A 2011, 93, 1944, 2079, 2561, 2563, 2964)

REVISER’S NOTE.

Ch. 321, Stats. 2009, the source of this section, contains the following provision not included in NRS:

“1. On or before February 1, 2010, the Public Utilities Commission of Nevada shall adopt the regulations to carry out:

(a) The provisions of NRS 701B.010 to 701B.290, inclusive, as amended by this act, and sections 1.89, 1.9 and 1.91 of this act [NRS 701B.055, 701B.265 and 701B.255, respectively];

(b) The provisions of NRS 701B.400 to 701B.650, inclusive, as amended by this act, and sections 1.92 and 1.93 of this act [NRS 701B.625 and 701B.615, respectively]; and

(c) The provisions of NRS 701B.700 to 701B.880, inclusive, as amended by this act, and section 1.95 of this act [NRS 701B.865].

2. The incentives offered to participants in the Solar Energy Systems Incentive Program on July 1, 2008, must remain in effect until the Commission establishes different incentives pursuant to the regulations adopted pursuant paragraph (a) of subsection 1.

3. Any capacity from previous program years which was authorized for the Solar Energy Systems Incentive Program pursuant to NRS 701B.260 and any regulations adopted pursuant thereto and which remains unallocated on July 1, 2009, must be allocated to qualified applicants who were placed on the prioritized waiting list established pursuant to NRS 701B.260 and any regulations adopted pursuant thereto before July 1, 2009, and those applicants must be offered the incentives which were offered to participants in the Solar Program on July 1, 2008.

4. The incentives offered to participants in the Wind Energy Systems Demonstration Program on July 1, 2008, must remain in effect until the Commission establishes different incentives pursuant to the regulations adopted pursuant to paragraph (b) of subsection 1.

5. The incentives offered to participants in the Waterpower Energy Systems Demonstration Program on July 1, 2008, must remain in effect until the Commission establishes different incentives pursuant to the regulations adopted pursuant to paragraph (c) of subsection 1.

6. Any kilowatts of capacity that have been unused from the inceptions of the Solar Energy Systems Incentive Program, Wind Energy Systems Demonstration Program and Waterpower Energy Systems Demonstration Program pursuant to NRS 701B.260, 701B.620 and 701B.850 until the effective date of this section [May 28, 2009] may be allocated pursuant to the amendatory provisions of this act.”

NRS 338.1908 Retrofitting of local governmental buildings, facilities and structures with consideration of use of sources of renewable energy. [Effective May 1, 2013, through December 31, 2021.]

1. The governing body of each local government shall, by July 28, 2009, develop a plan to retrofit public buildings, facilities and structures, including, without limitation, traffic-control systems, and to otherwise use sources of renewable energy to serve those buildings, facilities and structures. Such a plan must:

(a) Include a list of specific projects. The projects must be prioritized and selected on the basis of the following criteria:

(1) The length of time necessary to commence the project.

(2) The number of workers estimated to be employed on the project.

(3) The effectiveness of the project in reducing energy consumption.

(4) The estimated cost of the project.

(5) Whether the project is able to be powered by or otherwise use sources of renewable energy.

(6) Whether the project has qualified for participation in one or more of the following programs:

(I) The Solar Energy Systems Incentive Program created by NRS 701B.240;

(II) The Renewable Energy School Pilot Program created by NRS 701B.350;

(III) The Wind Energy Systems Demonstration Program created by NRS 701B.580; or

(IV) The Waterpower Energy Systems Demonstration Program created by NRS 701B.820.

(b) Include a list of potential funding sources for use in implementing the projects, including, without limitation, money available through the Energy Efficiency and Conservation Block Grant Program as set forth in 42 U.S.C. § 17152 and grants, gifts, donations or other sources of money from public and private sources.

2. The governing body of each local government shall transmit the plan developed pursuant to subsection 1 to the Director of the Office of Energy and to any other entity designated for that purpose by the Legislature.

3. As used in this section:

(a) “Local government” means each city or county that meets the definition of “eligible unit of local government” as set forth in 42 U.S.C. § 17151 and each unit of local government, as defined in subsection 12 of NRS 338.010, that does not meet the definition of “eligible entity” as set forth in 42 U.S.C. § 17151.

(b) “Renewable energy” means a source of energy that occurs naturally or is regenerated naturally, including, without limitation:

- (1) Biomass;
- (2) Fuel cells;
- (3) Geothermal energy;
- (4) Solar energy;
- (5) Waterpower; and
- (6) Wind.

↪ The term does not include coal, natural gas, oil, propane or any other fossil fuel, or nuclear energy.

(c) “Retrofit” means to alter, improve, modify, remodel or renovate a building, facility or structure to make that building, facility or structure more energy-efficient.

(Added to NRS by 2009, 1406; A 2011, 93, 1944, 2079, 2561, 2563, 2964, effective May 1, 2013)

NRS 338.1908 Retrofitting of local governmental buildings, facilities and structures with consideration of use of sources of renewable energy. [Effective January 1, 2022.]

1. The governing body of each local government shall, by July 28, 2009, develop a plan to retrofit public buildings, facilities and structures, including, without limitation, traffic-control systems, and to otherwise use sources of renewable energy to serve those buildings, facilities and structures. Such a plan must:

(a) Include a list of specific projects. The projects must be prioritized and selected on the basis of the following criteria:

- (1) The length of time necessary to commence the project.
- (2) The number of workers estimated to be employed on the project.
- (3) The effectiveness of the project in reducing energy consumption.

- (4) The estimated cost of the project.
- (5) Whether the project is able to be powered by or otherwise use sources of renewable energy.
- (6) Whether the project has qualified for participation in the Renewable Energy School Pilot Program created by NRS 701B.350.
- (b) Include a list of potential funding sources for use in implementing the projects, including, without limitation, money available through the Energy Efficiency and Conservation Block Grant Program as set forth in 42 U.S.C. § 17152 and grants, gifts, donations or other sources of money from public and private sources.
- 2. The governing body of each local government shall transmit the plan developed pursuant to subsection 1 to the Director of the Office of Energy and to any other entity designated for that purpose by the Legislature.
- 3. As used in this section:
 - (a) "Local government" means each city or county that meets the definition of "eligible unit of local government" as set forth in 42 U.S.C. § 17151 and each unit of local government, as defined in subsection 12 of NRS 338.010, that does not meet the definition of "eligible entity" as set forth in 42 U.S.C. § 17151.
 - (b) "Renewable energy" means a source of energy that occurs naturally or is regenerated naturally, including, without limitation:
 - (1) Biomass;
 - (2) Fuel cells;
 - (3) Geothermal energy;
 - (4) Solar energy;
 - (5) Waterpower; and
 - (6) Wind.
- ↪ The term does not include coal, natural gas, oil, propane or any other fossil fuel, or nuclear energy.
- (c) "Retrofit" means to alter, improve, modify, remodel or renovate a building, facility or structure to make that building, facility or structure more energy-efficient.
- (Added to NRS by 2009, 1406; A 2011, 93, 1944, 2079, 2561, 2563, 2964, effective January 1, 2022)

ADDITIONAL CONDITIONS AND LIMITATIONS

NRS 338.193 Standards for plumbing fixtures.

- 1. Each public building sponsored or financed by a public body must meet the standards made applicable for the building pursuant to this section.
- 2. Except as otherwise provided in subsections 3 and 4, each public building, other than a prison or jail, on which construction begins on or after March 1, 1992, and each existing public building which is expanded or renovated on or after March 1, 1992, must incorporate the following minimal standards for plumbing fixtures:
 - (a) A toilet which uses water must not be installed unless its consumption of water does not exceed 3.5 gallons of water per flush.
 - (b) A shower apparatus which uses more than 3 gallons of water per minute must not be installed unless it is equipped with a device to reduce water consumption to 3 gallons of water or less per minute.

(c) Each faucet installed in a lavatory or kitchen must not allow water to flow at a rate greater than 3 gallons per minute.

(d) A toilet or urinal which employs a timing device or other mechanism to flush periodically irrespective of demand must not be installed.

3. Except as otherwise provided in subsection 4, each public building, other than a prison or jail, on which construction begins on or after March 1, 1993, and each existing public building which is expanded or renovated on or after March 1, 1993, must incorporate the following minimal standards for plumbing fixtures:

(a) A toilet which uses water must not be installed unless its consumption of water does not exceed 1.6 gallons of water per flush.

(b) A shower apparatus which uses more than 2.5 gallons of water per minute must not be installed unless it is equipped with a device to reduce water consumption to 2.5 gallons of water or less per minute.

(c) A urinal which uses water must not be installed unless its consumption of water does not exceed 1 gallon of water per flush.

(d) A toilet or urinal which employs a timing device or other mechanism to flush periodically, irrespective of demand, must not be installed.

(e) A urinal which continually flows or flushes water must not be installed.

(f) Each faucet installed in a lavatory or kitchen must not allow water to flow at a rate greater than 2.5 gallons per minute.

(g) Each faucet installed in a public restroom must contain a mechanism which closes the faucet automatically after a predetermined amount of water has flowed through the faucet. Multiple faucets that are activated from a single point must not be installed.

4. The requirements of this section for the installation of certain plumbing fixtures do not apply to any portion of an existing public building which is not being expanded or renovated.

(Added to NRS by 1991, 1168)

NRS 338.195 Survey for presence of asbestos required before renovation or demolition of public building.

1. No public building or other public structure may be renovated or demolished until a survey of the building or structure has been made for the presence of asbestos or material containing asbestos.

2. As used in this section, "material containing asbestos" has the meaning ascribed to it by the Division of Industrial Relations of the Department of Business and Industry pursuant to NRS 618.765.

(Added to NRS by 1989, 1280; A 1993, 1567)

NRS 338.200 Prohibition against naming public building or structure after member of governing body. No public building or other public structure, other than a street or road, may be named after a person who is at the time a member of the governing body which has jurisdiction or control over the building or structure or which is responsible for it.

(Added to NRS by 1981, 1337)

PROGRESS PAYMENTS**REVISER'S NOTE.**

Ch. 429, Stats. 1999, contains the following provision not included in NRS:

"The provisions of NRS 338.160, 338.165 and 338.170 [now NRS 338.515, 338.550 and 338.555, respectively] and sections 2 to 33, inclusive, of this act [NRS 338.400 to 338.645, inclusive] do not:

1. Create any right of action in a dispute between the public body and a subcontractor or supplier; and
2. Effect the right of the parties to agree to submit any controversy arising under the contract to arbitration."

GENERAL PROVISIONS

NRS 338.400 Definitions. As used in NRS 338.400 to 338.645, inclusive, unless the context otherwise requires, the words and terms defined in NRS 338.415 to 338.435, inclusive, have the meanings ascribed to them in those sections.

(Added to NRS by 1999, 1983; A 2005, 1814)

NRS 338.415 "Progress bill" defined. "Progress bill" means a bill for a portion of the supplies, work performed or services provided by a contractor, subcontractor or supplier for a public work.

(Added to NRS by 1999, 1983)

NRS 338.420 "Progress payment" defined. "Progress payment" means the payment for a portion of the supplies, work performed or services provided by a contractor, subcontractor or supplier for a public work.

(Added to NRS by 1999, 1983)

NRS 338.425 "Retainage" defined. "Retainage" means the amount authorized to be withheld from a progress payment pursuant to the provisions of NRS 338.515, 338.555 or 338.595.

(Added to NRS by 1999, 1983)

NRS 338.430 "Retainage bill" defined. "Retainage bill" means a bill for the amount authorized to be withheld from a progress payment pursuant to the provisions of NRS 338.515, 338.555 or 338.595.

(Added to NRS by 1999, 1983)

NRS 338.435 "Retainage payment" defined. "Retainage payment" means the payment of the amount authorized to be withheld from a progress payment pursuant to the provisions of NRS 338.515, 338.555 or 338.595.

(Added to NRS by 1999, 1983)

NRS 338.455 Methods to be used for providing notice. Each notice required pursuant to NRS 338.400 to 338.645, inclusive, must be:

1. Delivered personally; or
2. Sent by facsimile machine and delivered by regular or certified mail.

(Added to NRS by 1999, 1990)

NRS 338.460 Dates to be used for calculating accrual of interest on retainage. Interest that is required to be paid on the retainage accrues from the date the retainage is withheld until the date the retainage is paid to the person from whom the retainage was withheld.

(Added to NRS by 1999, 1984)

APPLICABILITY AND LIMITATIONS

NRS 338.480 Provisions inapplicable to certain contracts made by Department of Transportation. The provisions of NRS 338.400 to 338.645, inclusive, do not apply to a contract entered into by the Department of Transportation pursuant to chapter 408 of NRS.

(Added to NRS by 1999, 1984)

NRS 338.485 Waiver or modification of right, obligation or liability set forth in NRS 338.400 to 338.645, inclusive, prohibited; certain conditions, stipulations or provisions of contract void and unenforceable.

1. A person may not waive or modify a right, obligation or liability set forth in the provisions of NRS 338.400 to 338.645, inclusive.

2. A condition, stipulation or provision in a contract or other agreement that:

(a) Requires a person to waive a right set forth in the provisions of NRS 338.400 to 338.645, inclusive;

(b) Relieves a person of an obligation or liability imposed by the provisions of NRS 338.400 to 338.645, inclusive;

(c) Requires a contractor to waive, release or extinguish a claim or right for damages or an extension of time that the contractor may otherwise possess or acquire as a result of a delay that is:

(1) So unreasonable in length as to amount to an abandonment of the public work;

(2) Caused by fraud, misrepresentation, concealment or other bad faith by the public body;

(3) Caused by active interference by the public body; or

(4) Caused by a decision by the public body to significantly add to the scope or duration of the public work; or

(d) Requires a contractor or public body to be responsible for any consequential damages suffered or incurred by the other party that arise from or relate to a contract for a public work, including, without limitation, rental expenses or other damages resulting from a loss of use or availability of the public work, lost income, lost profit, lost financing or opportunity, business or reputation, and loss of management or employee availability, productivity, opportunity or services,

↪ is against public policy and is void and unenforceable.

3. The provisions of subsection 2 do not prohibit the use of a liquidated damages clause which otherwise satisfies the requirements of law.

(Added to NRS by 1999, 1990; A 2011, 3703)

NRS 338.490 Limitations on requiring release or waiver of right to receive progress payment or retainage payment. Any release or waiver required to be provided by a contractor, subcontractor or supplier to receive a progress payment or retainage payment must be:

1. Conditional for the purpose of receiving payment and shall be deemed to become unconditional upon the receipt of the money due to the contractor, subcontractor or supplier; and

2. Limited to claims related to the invoiced amount of the labor, materials, equipment or supplies that are the subject of the progress bill or retainage bill.

(Added to NRS by 1999, 1989)

PAYMENTS MADE BY PUBLIC BODY TO CONTRACTOR

NRS 338.510 Submittal of progress bills. A contractor shall submit a progress bill to the public body monthly or more frequently if the provisions of the contract so provide.

(Added to NRS by 1999, 1984)

NRS 338.515 Time for making payments; amounts paid; amounts withheld as retainage; rate of interest paid on amounts withheld; powers of Labor Commissioner when worker is owed wages. [Effective through June 30, 2015.]

1. Except as otherwise provided in NRS 338.525, a public body and its officers or agents awarding a contract for a public work shall pay or cause to be paid to a contractor the progress payments due under the contract within 30 days after the date the public body receives the progress bill or within a shorter period if the provisions of the contract so provide. Not more than 95 percent of the amount of any progress payment may be paid until 50 percent of the work required by the contract has been performed.

2. After 50 percent of the work required by the contract has been performed, the public body may pay to the contractor:

(a) Any of the remaining progress payments without withholding additional retainage; and

(b) Any amount of any retainage that was withheld from progress payments pursuant to subsection 1,

↪ if, in the opinion of the public body, satisfactory progress is being made in the work.

3. After determining in accordance with subsection 2 whether satisfactory progress is being made in the work, the public body may pay to the contractor an amount of any retainage that was withheld from progress payments pursuant to subsection 1 if:

(a) A subcontractor has performed a portion of the work;

(b) The public body determines that the portion of the work has been completed in compliance with all applicable plans and specifications;

(c) The subcontractor submits to the contractor:

(1) A release of the subcontractor's claim for a mechanic's lien for the portion of the work; and

(2) From each of the subcontractor's subcontractors and suppliers who performed work or provided material for the portion of the work, a release of his or her claim for a mechanic's lien for the portion of the work; and

(d) The amount of the retainage which the public body pays is in proportion to the portion of the work which the subcontractor has performed.

4. If, after determining in accordance with subsection 2 whether satisfactory progress is being made in the work, the public body continues to withhold retainage from remaining progress payments:

- (a) If the public body does not withhold any amount pursuant to NRS 338.525:
- (1) The public body may not withhold more than 2.5 percent of the amount of any progress payment; and
 - (2) Before withholding any amount pursuant to subparagraph (1), the public body must pay to the contractor 50 percent of the amount of any retainage that was withheld from progress payments pursuant to subsection 1; or
- (b) If the public body withholds any amount pursuant to NRS 338.525:
- (1) The public body may not withhold more than 5 percent of the amount of any progress payment; and
 - (2) The public body may continue to retain the amount of any retainage that was withheld from progress payments pursuant to subsection 1.
5. Except as otherwise provided in NRS 338.525, a public body shall identify in the contract and pay or cause to be paid to a contractor the actual cost of the supplies, materials and equipment that:
- (a) Are identified in the contract;
 - (b) Have been delivered and stored at a location, and in the time and manner, specified in a contract by the contractor or a subcontractor or supplier for use in a public work; and
 - (c) Are in short supply or were specially made for the public work,
- ↪ within 30 days after the public body receives a progress bill from the contractor for those supplies, materials or equipment.
6. A public body shall pay or cause to be paid to the contractor at the end of each quarter interest for the quarter on any amount withheld by the public body pursuant to NRS 338.400 to 338.645, inclusive, at a rate equal to the rate quoted by at least three insured banks, credit unions or savings and loan associations in this State as the highest rate paid on a certificate of deposit whose duration is approximately 90 days on the first day of the quarter. If the amount due to a contractor pursuant to this subsection for any quarter is less than \$500, the public body may hold the interest until:
- (a) The end of a subsequent quarter after which the amount of interest due is \$500 or more;
 - (b) The end of the fourth consecutive quarter for which no interest has been paid to the contractor; or
 - (c) The amount withheld under the contract is due pursuant to NRS 338.520,
- ↪ whichever occurs first.
7. If the Labor Commissioner has reason to believe that a worker is owed wages by a contractor or subcontractor, the Labor Commissioner may require the public body to withhold from any payment due the contractor under this section and pay the Labor Commissioner instead, an amount equal to the amount the Labor Commissioner believes the contractor owes to the worker. This amount must be paid by the Labor Commissioner to the worker if the matter is resolved in the worker's favor, otherwise it must be returned to the public body for payment to the contractor.
- (Added to NRS by 1973, 1159; A 1977, 1035; 1981, 552; 1983, 1591; 1985, 491; 1999, 1992; 2003, 799, 2448; 2007, 2512; 2011, 1619)

REVISER'S NOTE.

Subsection 4 of section 1 of chapter 289, Statutes of Nevada 2011, at p. 1619, was moved in revision to subsection 4 of NRS 338.555 and subsection 4 of NRS 338.595.

NEVADA CASES.

Alleged constitutional infirmity of section for failure to provide procedural due process was cured where the regulations of the Labor Commissioner provided for notice and hearing. In an action by a public works contractor wherein the contractor claimed the provision of former NRS 338.160 (cf. NRS 338.515) were unconstitutional for

failure to provide procedural due process and sought to enjoin retention of money by the Labor Commissioner pursuant to the provision of former NRS 338.160(5) (cf. NRS 338.515(7)), the alleged constitutional infirmity of the section for failure to provide procedural due process was cured where the regulations of the Labor Commissioner provided for notice and hearing. *Universal Elec., Inc. v. State ex rel. Office of Labor Comm'r*, 109 Nev. 127, 847 P.2d 1372 (1993), cited, *Meadow Valley Contractors, Inc. v. Johnson*, 89 F. Supp. 2d 1180, at 1186 (D. Nev. 2000)

Absent good cause for delay, aggrieved party must be provided a prompt hearing following retention of money pursuant to section. In an action by a public works contractor wherein the public works contractor claimed the provision of former NRS 338.160(5) (cf. NRS 338.515(7)), which authorize the Labor Commissioner to require a public body to withhold payment due to the contractor, were unconstitutional and sought to enjoin its application, the court held that, absent showing of good cause for delay, the aggrieved party must be provided a prompt hearing following retention of money pursuant to the provisions of former NRS 338.160 (cf. NRS 338.515). *Universal Elec., Inc. v. State ex rel. Office of Labor Comm'r*, 109 Nev. 127, 847 P.2d 1372 (1993)

Failure by the Labor Commissioner to follow regulations does not render section unconstitutional. Where a public works contractor sought to enjoin the Labor Commissioner from retaining money pursuant to the provision of former NRS 338.160(5) (cf. NRS 338.515(7)), and where the Labor Commissioner, upon making a decision to order money retained, failed to set a hearing date and notify the contractor of the decision as required under the regulations of the Labor Commissioner, the failure of the Labor Commissioner to abide by the regulations did not render the provisions of former NRS 338.160 (cf. NRS 338.515) unconstitutional. Failure by an administrative agency to follow its regulations does not create a constitutional due process right on behalf of a person who suffers wrong at the hand of an agency. *Universal Elec., Inc. v. State ex rel. Office of Labor Comm'r*, 109 Nev. 127, 847 P.2d 1372 (1993)

ATTORNEY GENERAL'S OPINIONS.

Public body is responsible for payment of interest only with respect to money under its control. Under the provision of former NRS 338.160 (cf. NRS 338.515), which require that public bodies pay contractors interest on amounts withheld from progress payments on public works contracts, each public body is responsible for bookkeeping, calculations and payment of interest only with respect to money actually in its possession and under its control. AGO 81-14 (12-22-1981)

Interest on amounts withheld from progress payments formerly to be paid at the rate earned on general fund investments. Under the provision of former NRS 338.160 (cf. NRS 338.515), which require that public bodies pay contractors interest on amounts withheld from progress payments on public works contracts, the rate of interest to be paid must be the rate which the public body doing the withholding earned on its own general fund investments during the same period. (N.B., this opinion was issued before NRS 338.160(3) (cf. NRS 338.515(6)) was amended in 1985 to require interest to be paid at the rate quoted by at least three insured banks, credit unions or savings and loan associations in this State as the highest rate paid on a certificate of deposit whose duration is approximately 90 days on the first day of the quarter.) AGO 81-14 (12-22-1981)

Certain provisions do not apply to contracts executed before July 1, 1981. The provision of former NRS 338.160 (cf. NRS 338.515) requiring public bodies to pay contractors interest on amounts withheld from progress payments on public works contracts, added by ch. 296, Stats. 1981, does not apply to amounts withheld under contracts executed before the effective date of the act (July 1, 1981). AGO 81-14 (12-22-1981)

NRS 338.515 Time for making payments; amounts paid; amounts withheld as retainage; rate of interest paid on amounts withheld; powers of Labor Commissioner when worker is owed wages. [Effective July 1, 2015.]

1. Except as otherwise provided in NRS 338.525, a public body and its officers or agents awarding a contract for a public work shall pay or cause to be paid to a contractor the progress payments due under the contract within 30 days after the date the public body receives the progress bill or within a shorter period if the provisions of the contract so provide. Not more than 90 percent of the amount of any progress payment may be paid until 50 percent of the work required by the contract has been performed. Thereafter, the public body may pay any of the remaining progress

payments without withholding additional retainage if, in the opinion of the public body, satisfactory progress is being made in the work.

2. Except as otherwise provided in NRS 338.525, a public body shall identify in the contract and pay or cause to be paid to a contractor the actual cost of the supplies, materials and equipment that:

- (a) Are identified in the contract;
 - (b) Have been delivered and stored at a location, and in the time and manner, specified in a contract by the contractor or a subcontractor or supplier for use in a public work; and
 - (c) Are in short supply or were specially made for the public work,
- ↪ within 30 days after the public body receives a progress bill from the contractor for those supplies, materials or equipment.

3. A public body shall pay or cause to be paid to the contractor at the end of each quarter interest for the quarter on any amount withheld by the public body pursuant to NRS 338.400 to 338.645, inclusive, at a rate equal to the rate quoted by at least three insured banks, credit unions or savings and loan associations in this State as the highest rate paid on a certificate of deposit whose duration is approximately 90 days on the first day of the quarter. If the amount due to a contractor pursuant to this subsection for any quarter is less than \$500, the public body may hold the interest until:

- (a) The end of a subsequent quarter after which the amount of interest due is \$500 or more;
 - (b) The end of the fourth consecutive quarter for which no interest has been paid to the contractor; or
 - (c) The amount withheld under the contract is due pursuant to NRS 338.520,
- ↪ whichever occurs first.

4. If the Labor Commissioner has reason to believe that a worker is owed wages by a contractor or subcontractor, the Labor Commissioner may require the public body to withhold from any payment due the contractor under this section and pay the Labor Commissioner instead, an amount equal to the amount the Labor Commissioner believes the contractor owes to the worker. This amount must be paid by the Labor Commissioner to the worker if the matter is resolved in the worker's favor, otherwise it must be returned to the public body for payment to the contractor.

(Added to NRS by 1973, 1159; A 1977, 1035; 1981, 552; 1983, 1591; 1985, 491; 1999, 1992; 2003, 799, 2448; 2007, 2512; 2011, 1619, effective July 1, 2015)

NRS 338.520 Payment of outstanding balance upon occupancy, use or recording of notice of completion. Except with respect to any payment withheld pursuant to NRS 338.525, if:

- 1. A public body or a person acting with the authority of the public body occupies or begins use of a public work or a portion of a public work;
 - 2. A notice of completion for a public work or a portion of a public work is recorded as provided in NRS 108.228; or
 - 3. A public body partially occupies one or more buildings of a public work,
- ↪ the public body shall pay or cause to be paid to the contractor any outstanding payment due, including, without limitation, retainage, and any interest accrued thereon within 30 days after whichever event described in subsection 1, 2 or 3 occurs first. The amount paid must be in the proportion that the value of the portion of the public work which is used or occupied bears to the total value of the public work.

(Added to NRS by 1999, 1984)

NRS 338.525 Withholding amounts for failure of contractor to comply with contract or applicable building code, law or regulation; payment of amounts withheld upon confirmation of correction of condition. [Effective through June 30, 2015.]

1. Except as otherwise provided in NRS 338.515, a public body may, but is not required to, withhold from a progress payment or retainage payment an amount sufficient to pay the expenses the public body reasonably expects to incur as a result of the failure of the contractor to comply with the contract or applicable building code, law or regulation.

2. A public body shall, within 20 days after it receives a progress bill or retainage bill from a contractor, give a written notice to the contractor of any amount that will be withheld pursuant to this section. The written notice must set forth:

(a) The amount of the progress payment or retainage payment that will be withheld from the contractor; and

(b) A detailed explanation of the reason the public body will withhold that amount, including, without limitation, a specific reference to the provision or section of the contract, or any documents related thereto, or the applicable building code, law or regulation with which the contractor has failed to comply.

↪ The written notice must be signed by an authorized agent of the public body.

3. If the public body receives a written notice of the correction of the condition that is the reason for the withholding, signed by an authorized agent of the contractor, the public body shall, after confirming that the condition has been corrected, pay the amount withheld by the public body within 30 days after the public body receives the next progress bill or retainage bill.

(Added to NRS by 1999, 1984; A 2005, 1814)

NRS 338.525 Withholding amounts for failure of contractor to comply with contract or applicable building code, law or regulation; payment of amounts withheld upon confirmation of correction of condition. [Effective July 1, 2015.]

1. A public body may, but is not required to, withhold from a progress payment or retainage payment an amount sufficient to pay the expenses the public body reasonably expects to incur as a result of the failure of the contractor to comply with the contract or applicable building code, law or regulation.

2. A public body shall, within 20 days after it receives a progress bill or retainage bill from a contractor, give a written notice to the contractor of any amount that will be withheld pursuant to this section. The written notice must set forth:

(a) The amount of the progress payment or retainage payment that will be withheld from the contractor; and

(b) A detailed explanation of the reason the public body will withhold that amount, including, without limitation, a specific reference to the provision or section of the contract, or any documents related thereto, or the applicable building code, law or regulation with which the contractor has failed to comply.

↪ The written notice must be signed by an authorized agent of the public body.

3. If the public body receives a written notice of the correction of the condition that is the reason for the withholding, signed by an authorized agent of the contractor, the public body shall, after confirming that the condition has been corrected, pay the amount withheld by the public body within 30 days after the public body receives the next progress bill or retainage bill.

(Added to NRS by 1999, 1984; A 2005, 1814, effective July 1, 2015)

**NRS 338.530 Payment of interest on amounts withheld improperly.
[Effective through June 30, 2015.]**

1. If a public body receives:
 - (a) A progress bill or retainage bill, fails to give a contractor a written notice of any withholding in the manner set forth in subsection 2 of NRS 338.525, and does not pay the contractor within 30 days after receiving the progress bill or retainage bill; or
 - (b) A contractor's written notice of the correction of a condition set forth pursuant to subsection 2 of NRS 338.525 as the reason for the withholding, signed by an authorized agent of the contractor, and fails to:
 - (1) Pay the amount of the progress payment or retainage payment that was withheld from the contractor within 30 days after the public body receives the next progress bill or retainage bill; or
 - (2) Object to the scope and manner of the correction, within 30 days after the public body receives the notice of correction, in a written statement that sets forth the reason for the objection and is signed by an authorized agent of the public body,
↪ the public body shall pay to the contractor, in addition to the entire amount of the progress bill or retainage bill or any unpaid portion thereof, interest from the 30th day on the amount delayed, at a rate equal to the amount provided for in subsection 6 of NRS 338.515, until payment is made to the contractor.
2. If the public body objects pursuant to subparagraph (2) of paragraph (b) of subsection 1, it shall pay to the contractor an amount equal to the value of the corrections to which the public body does not object.
(Added to NRS by 1999, 1985; A 2011, 1621)

**NRS 338.530 Payment of interest on amounts withheld improperly.
[Effective July 1, 2015.]**

1. If a public body receives:
 - (a) A progress bill or retainage bill, fails to give a contractor a written notice of any withholding in the manner set forth in subsection 2 of NRS 338.525, and does not pay the contractor within 30 days after receiving the progress bill or retainage bill; or
 - (b) A contractor's written notice of the correction of a condition set forth pursuant to subsection 2 of NRS 338.525 as the reason for the withholding, signed by an authorized agent of the contractor, and fails to:
 - (1) Pay the amount of the progress payment or retainage payment that was withheld from the contractor within 30 days after the public body receives the next progress bill or retainage bill; or
 - (2) Object to the scope and manner of the correction, within 30 days after the public body receives the notice of correction, in a written statement that sets forth the reason for the objection and is signed by an authorized agent of the public body,
↪ the public body shall pay to the contractor, in addition to the entire amount of the progress bill or retainage bill or any unpaid portion thereof, interest from the 30th day on the amount delayed, at a rate equal to the amount provided for in subsection 3 of NRS 338.515, until payment is made to the contractor.
2. If the public body objects pursuant to subparagraph (2) of paragraph (b) of subsection 1, it shall pay to the contractor an amount equal to the value of the corrections to which the public body does not object.
(Added to NRS by 1999, 1985; A 2011, 1621, effective July 1, 2015)

NRS 338.535 Public body to provide notice concerning progress payments and retainage payments to certain subcontractors and suppliers. Within 5 working days after a public body receives a written request from a subcontractor or supplier of the contractor with respect to a contract which has not been fully performed, the public body shall notify the subcontractor or supplier in writing of the following:

1. The date the public body made a specified progress payment or retainage payment to a contractor;
 2. Whether the public body has paid the entire amount of a specified progress payment or retainage payment to the contractor; and
 3. The amount withheld by the public body from a specified progress payment or retainage payment to the contractor, if any.
- (Added to NRS by 1999, 1985)

**PAYMENTS MADE BY CONTRACTOR TO
SUBCONTRACTORS AND SUPPLIERS**

NRS 338.550 Time for making payments; amounts paid. Except as otherwise provided in NRS 338.555, 338.560 and 338.565:

1. Each contractor shall disburse money paid to the contractor pursuant to this chapter, including any interest which the contractor receives, to his or her subcontractors and suppliers within 10 days after the contractor receives the money, in direct proportion to the subcontractors' and suppliers' basis in the progress bill or retainage bill and any accrued interest thereon.
 2. A contractor shall make payments to his or her subcontractor or supplier in an amount equal to that subcontractor's or supplier's basis in the payments paid by the public body to the contractor for the supplies, material and equipment identified in the contract between the contractor and the public body, or between the subcontractor or supplier and the contractor, within 10 days after the contractor has received a progress payment or retainage payment from the public body for those supplies, materials and equipment.
- (Added to NRS by 1987, 559; A 1999, 1993)

NRS 338.555 Amounts withheld as retainage; payment of interest.
[Effective through June 30, 2015.]

1. If a public body and a contractor enter into a contract for a public work, the contractor may withhold as retainage not more than 5 percent from the amount of any progress payment due under a subcontract which is made before 50 percent of the work has been completed under the subcontract.
2. After 50 percent of the work required by the contract has been performed, the contractor shall pay any additional progress payments due under the subcontract without withholding any additional retainage if, in the opinion of the contractor, satisfactory progress is being made in the work under the subcontract, and the payment must be equal to that paid by the public body to the contractor for the work performed by the subcontractor. If the contractor continues to withhold retainage from remaining progress payments:
 - (a) If the contractor does not withhold any amount pursuant to NRS 338.560:
 - (1) The contractor may not withhold more than 2.5 percent of the amount of any progress payment; and

(2) Before withholding any amount pursuant to subparagraph (1), the contractor must pay to the subcontractor 50 percent of the amount of any retainage that was withheld from progress payments pursuant to subsection 1; or

(b) If the contractor withholds any amount pursuant to NRS 338.560:

(1) The contractor may not withhold more than 5 percent of the amount of any progress payment; and

(2) The contractor may continue to retain the amount of any retainage that was withheld from progress payments pursuant to subsection 1.

3. If the contractor receives a payment of interest earned on the retainage or an amount withheld from a progress payment, the contractor shall, within 10 days after he or she receives the money, pay to each subcontractor or supplier that portion of the interest received from the public body which is attributable to the retainage or amount withheld from a progress payment by the contractor to the subcontractor or supplier.

4. If, pursuant to subsection 3 of NRS 338.515, the public body pays to the contractor an amount of any retainage that was withheld from progress payments pursuant to subsection 1 of NRS 338.515 for the portion of the work which has been performed by the subcontractor, the contractor must pay to the subcontractor the portion of any retainage withheld by the contractor pursuant to this section for the portion of the work.

(Added to NRS by 1973, 1160; A 1981, 553; 1983, 1592; 1999, 1994; 2011, 1622)

REVISER'S NOTE.

Subsection 4 of this section was moved in revision from part of subsection 4 of section 1 of chapter 289, Statutes of Nevada 2011, at p. 1619.

**NRS 338.555 Amounts withheld as retainage; payment of interest.
[Effective July 1, 2015.]**

1. If a public body and a contractor enter into a contract for a public work, the contractor may withhold as retainage not more than 10 percent from the amount of any progress payment due under a subcontract which is made before 50 percent of the work has been completed under the subcontract. Thereafter the contractor shall pay any additional progress payments due under the subcontract without withholding any additional retainage if, in the opinion of the contractor, satisfactory progress is being made in the work under the subcontract, and the payment must be equal to that paid by the public body to the contractor for the work performed by the subcontractor.

2. If the contractor receives a payment of interest earned on the retainage or an amount withheld from a progress payment, the contractor shall, within 10 days after he or she receives the money, pay to each subcontractor or supplier that portion of the interest received from the public body which is attributable to the retainage or amount withheld from a progress payment by the contractor to the subcontractor or supplier.

(Added to NRS by 1973, 1160; A 1981, 553; 1983, 1592; 1999, 1994; 2011, 1622, effective July 1, 2015)

NRS 338.560 Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation or for claim for wages against subcontractor; payment of amounts withheld upon correction of condition. [Effective through June 30, 2015.]

1. Except as otherwise provided in subsection 2 of NRS 338.555, a contractor may withhold from a progress payment or retainage payment an amount sufficient to pay:

(a) The expenses the contractor reasonably expects to incur as a result of the failure of his or her subcontractor or supplier to comply with the subcontract or applicable building code, law or regulation.

(b) An amount withheld from payment to the contractor by a public body pursuant to subsection 7 of NRS 338.515 for a claim for wages against the subcontractor.

2. A contractor shall, within 10 days after the contractor receives:

(a) A progress payment or retainage payment from the public body for an amount that is less than the amount set forth in the applicable progress bill or retainage bill; or

(b) A progress bill or retainage bill from his or her subcontractor or supplier,
→ give a written notice to his or her subcontractor or supplier of any amount that will be withheld pursuant to this section.

3. The written notice must:

(a) Set forth:

(1) The amount of the progress payment or retainage payment that will be withheld from his or her subcontractor or supplier; and

(2) A detailed explanation of the reason the contractor will withhold that amount, including, without limitation, a specific reference to the provision or section of the subcontract, or documents related thereto, or applicable building code, law or regulation with which his or her subcontractor or supplier has failed to comply; and

(b) Be signed by an authorized agent of the contractor.

4. The contractor shall pay to his or her subcontractor or supplier the amount withheld by the public body or the contractor within 10 days after:

(a) The contractor receives a written notice of the correction of the condition that is the reason for the withholding, signed by an authorized agent of the subcontractor or supplier; or

(b) The public body pays to the contractor the amount withheld,
→ whichever occurs later.

(Added to NRS by 1999, 1985; A 2003, 2448; 2011, 1622)

NRS 338.560 Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation or for claim for wages against subcontractor; payment of amounts withheld upon correction of condition. [Effective July 1, 2015.]

1. A contractor may withhold from a progress payment or retainage payment an amount sufficient to pay:

(a) The expenses the contractor reasonably expects to incur as a result of the failure of his or her subcontractor or supplier to comply with the subcontract or applicable building code, law or regulation.

(b) An amount withheld from payment to the contractor by a public body pursuant to subsection 4 of NRS 338.515 for a claim for wages against the subcontractor.

2. A contractor shall, within 10 days after the contractor receives:
 - (a) A progress payment or retainage payment from the public body for an amount that is less than the amount set forth in the applicable progress bill or retainage bill; or
 - (b) A progress bill or retainage bill from his or her subcontractor or supplier,
➤ give a written notice to his or her subcontractor or supplier of any amount that will be withheld pursuant to this section.
 3. The written notice must:
 - (a) Set forth:
 - (1) The amount of the progress payment or retainage payment that will be withheld from his or her subcontractor or supplier; and
 - (2) A detailed explanation of the reason the contractor will withhold that amount, including, without limitation, a specific reference to the provision or section of the subcontract, or documents related thereto, or applicable building code, law or regulation with which his or her subcontractor or supplier has failed to comply; and
 - (b) Be signed by an authorized agent of the contractor.
 4. The contractor shall pay to his or her subcontractor or supplier the amount withheld by the public body or the contractor within 10 days after:
 - (a) The contractor receives a written notice of the correction of the condition that is the reason for the withholding, signed by an authorized agent of the subcontractor or supplier; or
 - (b) The public body pays to the contractor the amount withheld,
➤ whichever occurs later.
- (Added to NRS by 1999, 1985; A 2003, 2448; 2011, 1622, effective July 1, 2015)

NRS 338.565 Payment of interest on amounts withheld improperly.

1. If a contractor makes payment to a subcontractor or supplier more than 10 days after the occurrence of any of the following acts or omissions:
 - (a) The contractor fails to pay his or her subcontractor or supplier in accordance with the provisions of subsection 1 of NRS 338.550;
 - (b) The contractor fails to give his or her subcontractor or supplier the written notice of any withholding as required by subsections 2 and 3 of NRS 338.560; or
 - (c) The contractor receives a subcontractor's or supplier's written notice of correction of the condition set forth pursuant to subsection 4 of NRS 338.560 as the reason for the withholding, signed by an authorized agent of the subcontractor or supplier, and fails to:
 - (1) Pay the amount of the progress payment or retainage payment that was withheld from his or her subcontractor or supplier within 10 days after the contractor receives the next progress bill or retainage bill; or
 - (2) Object to the scope and manner of the correction, within 10 days after receiving the written notice of correction, in a written statement that sets forth the reason for the objection and is signed by an authorized agent of the subcontractor, statement that sets forth the reason for the objection and is accompanied by a notarized affidavit signed by the contractor,
➤ the contractor shall pay to the subcontractor or supplier, in addition to the entire amount of the progress bill or the retainage bill or any unpaid portion thereof, interest from the 10th day on the amount delayed, at a rate equal to the lowest daily prime rate at the three largest banks or other financial institutions of the United States on the date the contract was executed plus 2 percent, until payment is made to the subcontractor or supplier.

2. If the contractor objects pursuant to subparagraph (2) of paragraph (c) of subsection 1, the contractor shall pay to the subcontractor or supplier an amount that is equal to the value of the corrections to which the contractor does not object.

(Added to NRS by 1999, 1986)

NRS 338.570 Contractor to provide notice concerning progress payments and retainage payments to certain subcontractors and suppliers. Within 5 working days after a contractor receives a written request from a subcontractor or supplier of his or her subcontractor or supplier with respect to a subcontract which has not been fully performed, the contractor shall notify the subcontractor or supplier of his or her subcontractor or supplier in writing of the following:

1. The date the contractor made a specified progress payment or retainage payment to his or her subcontractor or supplier;

2. Whether the contractor has paid the entire amount of a specified progress payment or retainage payment to his or her subcontractor or supplier; and

3. The amount withheld by the contractor from a specified progress payment or retainage payment to his or her subcontractor or supplier, if any.

(Added to NRS by 1999, 1987)

PAYMENTS MADE BY SUBCONTRACTOR TO SUBCONTRACTORS AND SUPPLIERS

NRS 338.590 Time for making payments; amounts paid. Except as otherwise provided in NRS 338.595, 338.600 and 338.605:

1. Each subcontractor shall disburse money paid to him or her pursuant to this chapter, including any interest which the subcontractor receives, to his or her subcontractors and suppliers within 10 days after the subcontractor receives the money, in direct proportion to the subcontractors' and suppliers' basis in the progress bill or retainage bill and any accrued interest thereon.

2. A subcontractor shall make payments to his or her subcontractor or supplier in an amount equal to that subcontractor's or supplier's basis in the payments paid by the contractor to him or her for the supplies, materials and equipment identified in the contract between the contractor and the public body, or in the subcontract between the subcontractor or supplier and the contractor, within 10 days after the subcontractor has received a progress payment or retainage payment from the contractor for those supplies, materials and equipment.

(Added to NRS by 1999, 1987)

NRS 338.595 Amounts withheld as retainage; payment of interest.
[Effective through June 30, 2015.]

1. If a subcontractor and another subcontractor or supplier enter into a subcontract for a public work, the subcontractor may withhold as retainage not more than 5 percent from the amount of any progress payment due under a subcontract which is made before 50 percent of the work has been completed under the subcontract.

2. After 50 percent of the work required by the subcontractor or supplier has been performed, the subcontractor shall pay any additional progress payments due under the subcontract without withholding any additional retainage if, in the opinion of the subcontractor, satisfactory progress is being made in the work under the subcontract. The payment must be equal to that paid by the contractor to the

subcontractor for the work performed or supplies provided by his or her subcontractor or supplier. If the subcontractor continues to withhold retainage from remaining progress payments:

(a) If the subcontractor does not withhold any amount pursuant to NRS 338.600:

(1) The subcontractor may not withhold more than 2.5 percent of the amount of any progress payment; and

(2) Before withholding any amount pursuant to subparagraph (1), the subcontractor must pay to the subcontractor or supplier 50 percent of the amount of any retainage that was withheld from progress payments pursuant to subsection 1; or

(b) If the subcontractor withholds any amount pursuant to NRS 338.600:

(1) The subcontractor may not withhold more than 5 percent of the amount of any progress payment; and

(2) The subcontractor may continue to retain the amount of any retainage that was withheld from progress payments pursuant to subsection 1.

3. If the subcontractor receives a payment of interest earned on the retainage or an amount withheld from a progress payment, the subcontractor shall, within 10 days after receiving the money, pay to each of his or her subcontractors or suppliers that portion of the interest received from the contractor which is attributable to the retainage or amount withheld from a progress payment by the subcontractor to his or her subcontractor or supplier.

4. If, pursuant to subsection 4 of NRS 338.555, the contractor pays to the subcontractor the portion of any retainage withheld by the contractor pursuant to NRS 338.555 for the portion of the work which has been performed by the subcontractor, the subcontractor must pay to the subcontractor's subcontractors and suppliers the portion of any retainage withheld by the subcontractor pursuant to this section for the portion of the work.

(Added to NRS by 1999, 1987; A 2003, 2449; 2011, 1623)

REVISER'S NOTE.

Subsection 4 of this section was moved in revision from part of subsection 4 of section 1 of chapter 289, Statutes of Nevada 2011, at p. 1619.

**NRS 338.595 Amounts withheld as retainage; payment of interest.
[Effective July 1, 2015.]**

1. If a subcontractor and another subcontractor or supplier enter into a subcontract for a public work, the subcontractor may withhold as retainage not more than 10 percent from the amount of any progress payment due under a subcontract which is made before 50 percent of the work has been completed under the subcontract. The subcontractor shall pay any additional progress payments due under the subcontract without withholding any additional retainage if, in the opinion of the subcontractor, satisfactory progress is being made in the work under the subcontract. The payment must be equal to that paid by the contractor to the subcontractor for the work performed or supplies provided by his or her subcontractor or supplier.

2. If the subcontractor receives a payment of interest earned on the retainage or an amount withheld from a progress payment, the subcontractor shall, within 10 days after receiving the money, pay to each of his or her subcontractors or suppliers that portion of the interest received from the contractor which is attributable to the retainage or amount withheld from a progress payment by the subcontractor to his or her subcontractor or supplier.

(Added to NRS by 1999, 1987; A 2003, 2449; 2011, 1623, effective July 1, 2015)

NRS 338.600 Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation; payment of amounts withheld upon correction of condition. [Effective through June 30, 2015.]

1. Except as otherwise provided in NRS 338.595, a subcontractor may withhold from a progress payment or retainage payment an amount sufficient to pay the expenses the subcontractor reasonably expects to incur as a result of the failure of his or her subcontractor or supplier to comply with the subcontract or applicable building code, law or regulation.

2. A subcontractor shall, within 10 days after the subcontractor receives:

(a) A progress payment or retainage payment from a contractor for an amount that is less than the amount set forth in the applicable progress bill or retainage bill; or

(b) A progress bill or retainage bill from his or her subcontractor or supplier, ➤ give a written notice to his or her subcontractor or supplier of any amount that will be withheld pursuant to this section.

3. The written notice must:

(a) Set forth:

(1) The amount of the progress payment or retainage payment that will be withheld from his or her subcontractor or supplier; and

(2) A detailed explanation of the reason the subcontractor will withhold that amount, including, without limitation, a specific reference to the provision or section of the subcontract, or documents related thereto, or applicable building code, law or regulation with which the subcontractor or supplier has failed to comply; and

(b) Be signed by an authorized agent of the subcontractor.

4. The subcontractor shall pay to his or her subcontractor or supplier the amount withheld by the public body, contractor or subcontractor within 10 days after:

(a) The subcontractor receives a written notice of the correction of the condition that is the reason for the withholding, signed by an authorized agent of his or her subcontractor or supplier; or

(b) The contractor pays to the subcontractor the amount withheld, ➤ whichever occurs later.

(Added to NRS by 1999, 1988; A 2003, 2449)

NRS 338.600 Withholding amounts for failure of subcontractor or supplier to comply with subcontract or applicable building code, law or regulation; payment of amounts withheld upon correction of condition. [Effective July 1, 2015.]

1. A subcontractor may withhold from a progress payment or retainage payment an amount sufficient to pay the expenses the subcontractor reasonably expects to incur as a result of the failure of his or her subcontractor or supplier to comply with the subcontract or applicable building code, law or regulation.

2. A subcontractor shall, within 10 days after the subcontractor receives:

(a) A progress payment or retainage payment from a contractor for an amount that is less than the amount set forth in the applicable progress bill or retainage bill; or

(b) A progress bill or retainage bill from his or her subcontractor or supplier, ➤ give a written notice to his or her subcontractor or supplier of any amount that will be withheld pursuant to this section.

3. The written notice must:
 - (a) Set forth:
 - (1) The amount of the progress payment or retainage payment that will be withheld from his or her subcontractor or supplier; and
 - (2) A detailed explanation of the reason the subcontractor will withhold that amount, including, without limitation, a specific reference to the provision or section of the subcontract, or documents related thereto, or applicable building code, law or regulation with which the subcontractor or supplier has failed to comply; and
 - (b) Be signed by an authorized agent of the subcontractor.
4. The subcontractor shall pay to his or her subcontractor or supplier the amount withheld by the public body, contractor or subcontractor within 10 days after:
 - (a) The subcontractor receives a written notice of the correction of the condition that is the reason for the withholding, signed by an authorized agent of his or her subcontractor or supplier; or
 - (b) The contractor pays to the subcontractor the amount withheld,↪ whichever occurs later.
(Added to NRS by 1999, 1988; A 2003, 2449, effective July 1, 2015)

NRS 338.605 Payment of interest on amounts withheld improperly.

1. If a subcontractor makes payment to his or her subcontractor or supplier more than 10 days after the occurrence of any of the following acts or omissions:
 - (a) The subcontractor fails to pay his or her subcontractor or supplier in accordance with the provisions of subsection 1 of NRS 338.590;
 - (b) The subcontractor fails to give his or her subcontractor or supplier the written notice of any withholding as required by subsections 2 and 3 of NRS 338.600; or
 - (c) The subcontractor receives a written notice of the correction of a condition set forth pursuant to subsection 4 of NRS 338.600 as the reason for the withholding from his or her subcontractor or supplier, signed by an authorized agent of the subcontractor or supplier, and fails to:
 - (1) Pay the amount of the progress payment or retainage payment that was withheld from his or her subcontractor or supplier within 10 days after the subcontractor receives the subcontractor's or supplier's next progress bill or retainage bill; or
 - (2) Object to the scope and manner of the correction, within 10 days after receiving the written notice of correction, in a written statement that sets forth the reason for the objection, signed by an authorized agent of the subcontractor,↪ the subcontractor shall pay to his or her subcontractor or supplier, in addition to the entire amount of the progress bill or the retainage bill or any unpaid portion thereof, interest from the 10th day on the amount delayed, at a rate equal to the lowest daily prime rate at the three largest banks or other financial institutions of the United States on the date the contract was executed plus 2 percent, until payment is made to his or her subcontractor or supplier.
2. If the subcontractor objects pursuant to subparagraph (2) of paragraph (c) of subsection 1, the subcontractor shall pay to his or her subcontractor or supplier an amount that is equal to the value of the corrections to which the subcontractor does not object.
(Added to NRS by 1999, 1988)

NRS 338.610 Subcontractor to provide notice concerning progress payments and retainage payments to certain subcontractors and suppliers. Within 5 working days after a subcontractor receives a written request from a subcontractor or supplier of his or her subcontractor or supplier with respect to a subcontract which has not been fully performed, he or she shall notify the subcontractor or supplier of his or her subcontractor or supplier in writing of the following:

1. The date the subcontractor made a specified progress payment or retainage payment to his or her subcontractor or supplier;
 2. Whether the subcontractor has paid the entire amount of a specified progress payment or retainage payment to his or her subcontractor or supplier; and
 3. The amount withheld by the subcontractor from a specified progress payment or retainage payment to his or her subcontractor or supplier, if any.
- (Added to NRS by 1999, 1989)

REMEDIES

NRS 338.630 Action by contractor for alternate writ of mandamus to compel performance by public body.

1. A contractor who believes that the public body has failed to perform a duty to:

- (a) Make a payment;
- (b) Provide written notice of any withholding; or
- (c) Provide information upon request relating to any payment with respect to a contract which has not been fully performed,

↪ pursuant to one or more of the provisions of NRS 338.515 to 338.535, inclusive, in a timely manner may apply to the district court of the county in which the public work or a part thereof is located for an alternate writ of mandamus pursuant to NRS 34.150 to 34.310, inclusive, to require the public body to perform the duty required pursuant to such a provision.

2. The provisions of this section do not prevent a public body from including a provision governing the payment of attorney's fees in a contract into which it enters with a contractor for a public work.

(Added to NRS by 1999, 1989)

NRS 338.635 Action by subcontractor or supplier to remedy unjustified or excessive withholding.

1. A subcontractor or supplier who believes that the amount withheld by the contractor or subcontractor is not justified or is excessive may apply to the district court of the county where the public work or a part thereof is located for an order directing the contractor or subcontractor to appear before the court to show cause why the relief requested should not be granted.

2. The motion must:

- (a) Set forth the grounds upon which relief is requested; and
- (b) Be accompanied by a notarized affidavit signed by the petitioner or his or her attorney that sets forth the facts upon which the motion is based.

3. If the court orders a hearing based upon the motion, the petitioner shall serve the notice of the motion and the order of the court on the respondent within 3 days after the court issues the order. The court shall conduct the hearing not less than 10 days and not more than 20 days after the court issues the order for a hearing.

4. The order for a hearing must include a statement that, if the respondent fails to appear at the time and place of the hearing, the court will order the respondent to pay to the petitioner:

(a) The entire amount that was withheld by the respondent, or a portion thereof;
(b) Interest on the amount that was withheld by the respondent, or a portion thereof;

(c) The costs incurred by the petitioner, including, without limitation, his or her attorney's fees; or

(d) Any combination of paragraphs (a), (b) and (c).

5. If, when the motion is filed, there is a civil action pending between the petitioner and the respondent, the motion must be consolidated into the civil action.

6. If the court determines that:

(a) The amount withheld is not justified, the court shall order the respondent to pay to the petitioner the amount that was withheld.

(b) The amount withheld is excessive, the court shall order the respondent to pay to the petitioner an amount determined by the court.

(c) The amount withheld is justified, the court shall issue an order approving the amount that was withheld by the respondent.

7. The proceedings conducted pursuant to the provisions of this section do not affect any other rights or remedies provided by law or contract.

(Added to NRS by 1999, 1990)

NRS 338.640 Award of reasonable costs and attorney's fees to prevailing party.

1. The court or arbitrator shall award to a contractor, subcontractor or supplier who is the prevailing party in a civil action or an arbitration proceeding to recover an amount that was required to be paid to him or her pursuant to the provisions of NRS 338.400 to 338.645, inclusive, his or her reasonable costs and attorney's fees.

2. The provisions of NRS 338.400 to 338.645, inclusive, do not prevent a public body from including a provision governing attorney's fees in a contract for a public work.

(Added to NRS by 1999, 1991)

NRS 338.645 Other rights and remedies not affected. The provisions of NRS 338.400 to 338.645, inclusive, do not impair or affect the rights of a contractor, subcontractor or supplier to whom any amount may be owed for work performed or materials, equipment or supplies furnished to maintain a civil action or to submit any controversy arising under the contract to arbitration to recover that amount.

(Added to NRS by 1999, 1991)

