

2017 Legislation Impacts Nevada Construction

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The 2017 Nevada Legislature produced laws affecting public works purchasing and construction, which both present contractors and their lawyers challenges and opportunities. Most of these laws expand opportunities and funding for public works projects along with altering bidding preferences for those public works projects and for state purchasing contracts. However, some also impose additional restrictions upon construction managers, contractors or subcontractors operating or seeking to operate in public projects or purchasing contracts.

Bidder Preferences for State Purchasing Contracts and Public Works Projects

AB160 revises NRS Chapter 333 to add bidder preferences on public works projects and state purchasing contracts for Nevada businesses that certify they pay their employees equal pay for equal work without regard to gender. This new law also proscribes the method by which the certification will be awarded and how employers can self-certify. Most importantly, NRS 333.300(6) now provides, bidding preferences for that certification. Specifically in awarding contracts for the purchase of supplies, materials and equipment, if two or more of the lowest bids are within 5 percent of each other, none is by a bidder in the state of Nevada and one or more of the lowest bids is a vendor that is certified, the bid or proposal submitted shall be deemed to be 5 percent lower than the bid or proposal actually submitted. While AB160 is effective immediately with respect to the development of the method of certification, the bidder preferences and other aspects of the legislation will not be effective until January 1, 2018.

Similarly, AB280 grants a bid preference in state purchasing contracts of 5 percent for bids submitted by:

1. Local businesses operated by a veteran with a service-connected disability;
2. Nevada-based businesses; and
3. Businesses certified under NRS 333.300 (AB160).

However, both AB280 and AB160 also impose penalties on businesses that fraudulently self-certify under NRS 333.300, including:



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1. A prohibition on bidding for state purchasing contracts;
2. A prohibition on being awarded state purchasing contracts for one year; and
3. Losing the possibility of a preference, after the certification is actually achieved, for five years.

AB280 became effective on July 1, 2017.

Minority Affairs Management Analyst to Look for Racial Discrimination in Public Works

SB373 requires the director of the Department of Business and Industry to appoint a minority affairs management analyst within the Office of the Director, who is required to perform statistical analysis and investigation as to whether discrimination on the basis of race is occurring in state or local purchasing, public works or other areas. While this law does not provide a bidder preference for minority-owned businesses at this time, it may result in additional reporting requirements for contractors involved in state purchasing contracts or public works projects. Once a minority affairs management analyst is appointed, the impact upon contractors operating in public works or wishing to operate in public works will become more clear. SB373 went into effect on July 1, 2017.

Expansion of Funding for Public Projects

The opportunity to work in public projects has also expanded. AB486 revises NRS 482.182 to require 25 percent of government services tax proceeds paid for the privilege of operating any vehicle upon the highways of the state to be distributed to the State General Fund for the fiscal years of 2017-2018 and 2018-2019, and for 75 percent of those proceeds to be distributed to the State Highway Fund. This bill went into effect on July 1, 2017, and should ultimately result in greater opportunity to participate in the improvement or addition of roadway infrastructure throughout the state.

Additionally, SB149 authorizes the establishment of a regional transportation commission in any county with a population of more than 700,000 (right now, just Clark County) to:

1. Provide financial grants for research into, and to otherwise develop and implement, certain transportation projects;

2. Enter into agreements with private entities for certain transportation projects in accordance with federal law;
3. Impose civil penalties for unauthorized parking at a transportation facility; and
4. Impose fees for the use of services or facilities of the commission.

It also authorizes the regional transportation commission to construct, develop and operate a high-capacity transit system with the approval of the city or county that owns any public right of way that would be affected. This provides an additional opportunity for Nevada contractors to enter into public works projects and opens the door on the creation of additional infrastructure. SB149 went into effect immediately upon passing.

Use of Public-Private Partnerships Authorized

Perhaps the most significant and promising of the new legislation that authorizes and encourages additional public works projects in Nevada, is SB448; it amends NRS Chapter 338 to authorize use of public-private partnerships for the development and construction of transportation facilities, and imposes conditions and restrictions upon the same. Public-private partnerships can take many forms, but generally can be described as arrangements between a private entity and a public body to design, build, finance, operate and maintain a public facility. In Nevada, public-private partnerships have been authorized for the development of transportation facilities only.

Specifically, under NRS Chapter 338 as revised, a public-private partnership may include:

1. A predevelopment agreement leading to another implementing agreement for a transportation facility as described in the chapter;
2. A design-build contract for the construction of a transportation facility;

3. A design-build contract that includes the financing, maintenance or operation, or any combination thereof of the transportation facility;
4. A contract involving a construction manager at risk for the construction of a transportation facility;
5. A concession, including, without limitation, a toll concession and an availability payment concession;
6. A construction agreement that includes the financing, maintenance or operation, or any combination thereof, of the transportation facility;
7. An operation and maintenance agreement for a transportation facility; or
8. Any other method for completion of a transportation facility.

In other words, SB448 allows public-private partnerships to be established for the purposes of constructing and operating transportation facilities, by almost whatever method of construction the public-private partnership finds most appropriate.

There are some restrictions on the ways a public body can enter into such a public-private partnership; however, again, the methods are left largely to the discretion of the public body. SB448 allows a public body to procure

a public-private partnership by means of requests for proposals describing a class of transportation facilities or a geographical area in which private entities are invited to submit proposals; solicitations using requests for qualifications; short-listings of qualified proposers; requests for proposals; negotiations; procurements seeking from the private sector; best-value selection procurements; or other procedures. There are also requirements for evaluation of any proposals the public body may receive from private entities interested in such public-private partnerships, as well as limitations on from where the financing can originate. Unsurprisingly, the limitations upon financing are not all that limiting. SB448 went into effect as of July 1, 2017.

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Local Improvement Districts Authorized

AB5 authorizes a governing body to create a local improvement district, including energy-efficient improvement projects and renewable energy projects on certain commercial and industrial real property, so long as the owner and any lenders who hold a mortgage or a lien on the property consent to the project. AB5 also lays out certain requirements for construction of these improvements. Specifically, it requires the construction to be facilitated by independent contracts with Nevada-licensed contractors approved by the governing body in charge of the improvement project. The municipality must not be responsible for the construction or any liability arising out of it. Additionally, the laws that typically apply to public bidding, public works or public procurement do not apply to the construction of energy-efficient improvement projects under this statute. This seems to include the new bidding preferences added by AB160, AB280 and any that may be added by SB373. AB5 became effective on July 1, 2017.

Other Legislation

SB246 also imposes additional restrictions and conditions in public projects involving construction managers at risk and

removes the sunset provisions that would have disallowed the use of Construction Manager at Risk (CMAR) as a construction delivery method for public works projects after 2017. This legislation allows the continued use of CMAR as a public project delivery method for the foreseeable future.

SB338 also revised the NRS 608.150 liability for prime contractors whose subcontractors fail to make payments for labor incurred on their projects. Revised in the last legislative session under 2015 SB223, those changes were halted when the U.S. District Court ruled that legislation was pre-empted under the Employee Retirement Income Security Act (ERISA) legislation. While appeal of that decision remains pending before the Ninth Circuit Court of Appeals, SB338 was an attempt to resolve the ERISA preemption claims.

The 2017 legislative session resulted in important law for those involved in the construction industry to consider. The new laws include important and relevant changes and additions that construction attorneys should educate their clients about in order to foster successful operation in future construction projects, particularly for those clients involved in, or seeking to become involved in, public works projects or state purchasing contracts. **NL**

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