

SB246 Affects Construction Managers at Risk

BY SARAH A. MEAD, ESQ.

The 2017 Nevada Legislature created and revised several state laws affecting Nevada construction and those who participate in it. Of particular significance is Senate Bill 246 (SB246); it became effective on July 1, 2017 and revises provisions of NRS Chapter 338 governing a contract for a public work involving a construction manager at risk.

An owner hires a construction manager at risk to guarantee the cost of the work and the time for construction. The construction manager at risk is required to make strict inspections of the construction work throughout the duration of a project. While a construction manager at risk has the traditional adverse relationship to the owner, like a traditional construction manager, it also has additional liabilities that arise from the relationship due to its duty to guarantee the cost and time necessary for construction.

Under NRS Chapter 338, pre-SB246, public bodies were authorized to construct public works using methods wherein a construction manager at risk provided preconstruction services and, in some cases, construction services on the public work using a guaranteed maximum price (GMP), lump sum or a cost plus fee arrangement. Additionally, NRS Chapter 338 declared the legislative intent for authorizing this method of public works construction; explained the methods that a public body must follow in

hiring a construction manager at risk and the methods a construction manager at risk must follow in hiring subcontractors; described the procedure for awarding bids to a construction manager at risk and its subcontractors; authorized a public body to use a design-build team for the design and construction of a public work under certain circumstances; and eliminated the authority it proscribed to public bodies to engage in these contracts on July 1, 2017.

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SB246 expands and alters much of this law, and extends the authority of public bodies to enter into contracts with construction managers at risk until June 30, 2021.

First, SB246 clarifies the motivation for NRS Chapter 338, adding language to NRS 338.1685 that proscribes the state from using its authority to hire a construction manager at risk for a public work for the purpose of limiting competition, discouraging group bidding or to engage in bid shopping. The reason for this change is not expressly

apparent within the bill itself; however, it begs the question of whether a construction manager at risk will run into problems if attempting to perform its own general contract work on a public work under NRS 338.1685.

Second, SB246 provides the manner by which a public body can advertise for proposals from construction managers at risk for such a project, pointing to NRS 338.1385,

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as amended, effective July 1, 2017, for guidance. Specifically, it requires the public body to:

“advertise in a newspaper qualified pursuant to chapter 238 of NRS¹ 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 within the county.” (NRS 338.1385(1)(a).)

This change was assuredly made to ensure that those living in the county where the public work is to

be constructed have an opportunity to participate in the work as a construction manager at risk, likely because those living in the affected county will have the greatest interest in the project being constructed properly and efficiently.

SB246 also imposes this requirement on the construction manager at risk that is ultimately awarded the contract when it is advertising for bids from subcontractors.

Third, SB246 imposes limits on the construction manager at risk’s ability to change its named qualified employee after submitting its bid. This means, absent medical reasons or in the case of termination, the construction manager at risk cannot provide a bid with one qualified employee and choose a different individual to so serve once the contract is entered into, unless the

contract is not executed by more than 90 days after the final ranking of applicants. This process is likely to ensure that the public body receives the benefit of working with the specific team it evaluated during the bid ranking and evaluation process—put simply, so the public body gets what it expects to get out of the construction manager at risk it selects for the project.



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Fourth, SB246 requires the preliminary proposed compensation amounts submitted during the ranking process to include the cost of general overhead and profit, most likely to prevent financing issues during the project that could delay construction or result in litigation. It also requires that the amount of the proposed compensation be no less than 5 percent or more than 20 percent of the scoring for the selection of the most qualified applicant.

Fifth, when soliciting proposals from subcontractors, SB246 requires that subcontractors provide specific information and use specific forms to submit that information along with their submitted proposal. The form is to be prepared by the construction manager at risk and approved by the public body.

Sixth and finally, a public body may now contract with a design-build team for the design and construction of two public works projects within a 12-month period, and each of those projects can have an estimated cost of \$5 million or less. This limits the amount of design-build contracts a public body can enter into in any given year.

In sum, SB246 extends the authority of a public body to enter into contracts with construction managers at risk for the next four years, an authority that was previously set to expire on July 1 of this year. However, in extending that authority, it also places restrictions on the methods by which public bodies can hire construction managers at risk, in an attempt to promote the hiring of local companies, in addition to other restrictions and conditions aimed to promote efficient, cost-effective and low-risk public works projects using construction managers at risk.

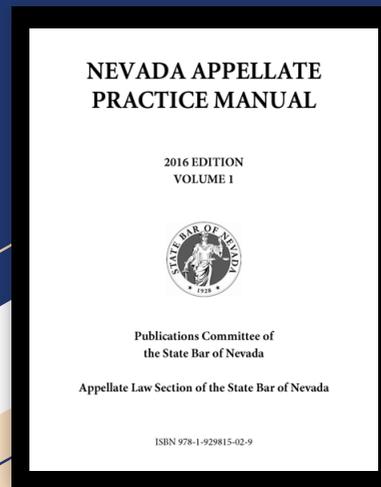
The restrictions seem to add hoops construction managers at risk and subcontractors must jump through to work on public works projects; however, the motivation to promote efficient projects and avoid project disputes is also apparent. Construction managers, contractors and subcontractors would be wise to review NRS Chapter 338 as it reads effective July 1, 2017, before submitting proposals and bids to work on public works projects, lest they lose opportunities and waste resources. **NL**

1. NRS 238 notes that a qualified newspaper is one that is printed and published triweekly, semiweekly, weekly or semimonthly, in the county, continuously and uninterrupted, during a period of at least 104 consecutive weeks prior to the first issuance thereof containing the notice of advertisement; or, if daily, for a period of one year prior to the advertisement; unless the county or city in which the newspaper is published has only one newly established newspaper.

SARAH MEAD'S biography is on page 10.



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