



## UNDER CONSTRUCTION

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### **Contractor Payment Protections in Public Private Partnerships Under Nevada Law**

by Leon F. Mead II

On February 23, 2012, the Snell & Wilmer Infrastructure Development and Project Finance Industry Group hosted "Moving Nevada Forward," its first annual forum on Nevada public private partnerships. The event was well attended by many public officials and high-level development industry professionals. In the course of the seminar, questions arose about the protections afforded to contractors, subcontractors and materialmen in public private partnerships (P3s).

P3s are cooperative agreements between public bodies and private developers to design, finance, construct, operate and maintain facilities for public use. The types of financing for these projects can be as varied as creative minds can consider, but will be backed by some public obligation ensuring the initial investment and a reasonable rate of return to the private developer in exchange for undertaking the risks inherent in property development, operation and maintenance. The public body, relieved of its risk of liability for construction claims, impacts, cost overruns, change orders, design errors and the like, pays for the facility through long-term lease agreements or concessions, with ownership of the facility usually turned over to the public body at the end of the financing agreement. So the P3 project is not quite a public work, and it's not quite a private work of improvement. Therefore, the applicability of private work mechanics' liens and/or public work payment bonds simply may not be available absent mandating legislation or negotiated obligations in P3 agreements.

Nevada is relatively new to P3s. While some municipalities have entered into

P3 agreements for certain structures or other public facilities (such as the new City of Las Vegas City Hall project), there have been few roads or transportation facilities attempted because of public protection concerns among our political leaders. In fact, the first enabling statutes for these P3s were enacted only in 2011, and can be found in NRS 338.161, et seq. for "transportation facilities" which expressly excludes toll road construction, and the Boulder City Bypass Toll Road Demonstration Project Act (BCBTRDPA), found as Chapter 478, Statutes of Nevada 2011. Unfortunately, none of these legislative acts expressly provide payment protections for contractors, subcontractors or materialmen.

NRS 338.161 through 338.168, inclusive, allowing a public body to contract with a private person to "develop, construct, improve, maintain or operate, or any combination thereof" a transportation facility is devoid of any procedural mandates for payment protections whatsoever. Rather, the public body is mandated to review and consider the developer's proposal for risks inherent in the project development as well as the use of money for the facility's development, operations and maintenance before entering into any such agreement. This type of enabling statute will rely on the negotiators for the public body or market conditions to require payment protections.

Selection of a developer for the Boulder City Bypass ambiguously mandates that such a developer "award contracts using competitive bidding in accordance with the provisions of chapter 338 of NRS and *solely* for the purposes of those provisions regarding competitive bidding, the demonstration project shall be deemed to be a public work..." BCBTRDPA, Section 47(1)(a), emphasis added. While NRS 338 competitive bidding requirements require proof that a prime contractor be financially able to perform the contract (NRS 338.1375(3)(b)(1)) or provide the required bonding (NRS 338.1377(2)), the mandating statute to provide payment and performance bond is found in NRS 339.025, *not* in NRS 338.1375 through 338.148 which call out the procedures for competitive bidding. Thus, most likely as a result of the last minute passage of the BCBTRDPA, there is apparently no explicit mandate that payment bonds be provided for construction of the Boulder City Bypass. Whether there is an *implied* one is up to interpretation and may be the subject of a future court case.

So, if there is no mandated payment bond, could the P3 project be subject to the mechanics' lien provisions of NRS 108.221 through 108.246, inclusive? The question is answered by the definition of the term "owner" under these statutes. To this end, owner is defined as including:

This State or a political subdivision of this State, including, without limitation, an incorporated city or town, that *owns* the property or an improvement to the property if the property or improvement is *used for a private or nongovernmental use or purpose*; or

A person ... who *leases* the property or an improvement to the property to this State or a political subdivision of this State, including, without limitation, an incorporated city or town, if the property or improvement is *privately owned*.

NRS 108.22148(1)(f) & (g), emphasis added. Stated another way, property is subject to a mechanics' lien if it is (a) government owned but leased to a private party, or (b) privately owned but leased to the government. A P3 project *could* meet these criteria if the deal is structured as a lease transaction, however, for the Boulder City Bypass at least the project must remain available for public use (Section 34(3)(b)) and be owned by the Regional Transportation Commission of Southern Nevada (Section 34(3)(d)). The provisions of NRS 338.161 through 338.168 are silent on ownership and public use, although public use is clearly contemplated by NRS 338.164 and leasing options would probably be allowed under NRS 338.167.

P3 projects, then, may pose some payment risk for contractors and suppliers unless the P3 agreements mandate that the private developer provide for such relief or are structured purely as a private ownership with lease-back provisions. Contractors and suppliers should carefully review and consider insisting on contract provision requiring payment bonds or having the underlying financing transaction or project analyzed by competent counsel before signing on to perform the work.

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