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LEGAL ALERT

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"Nevada Jobs First" Act Alters Nevada Preference Requirements on Public Works Contracts to the Detriment of Nevada General Contractors

by Leon F. Mead II

With little fanfare earlier this year, the Nevada Legislature passed and Governor Brian Sandoval signed into law Assembly Bill 144, which is designed to increase the number of Nevada residents employed on public works projects. The "Nevada Jobs First" Act, which it is commonly called, seeks to accomplish this by adding more requirements to obtain a bidder's preference for such works under NRS 338.1389, and its companion provisions found in NRS 338.147, 338.1693, 338.1727 and NRS 408.3886. Effective upon its approval date of April 27, 2011, AB 144 affects every public work construction project bid after that date. Whether AB 144 will achieve its purpose—or become a huge bureaucratic nightmare for contractors—remains to be seen.

Nevada's public works preference law has historically merely required that a contractor demonstrate that

she has paid sales and use tax and/or government services taxes of $5,000 or more for each consecutive 12-month period, for the last 60 months immediately preceding the application for a preference. Once demonstrated, the preferred contractor would be allowed a five-percent "cushion" to his public work bids against other non-preferred contractors bidding on the same projects. As such, even if the preferred contractor's bid was higher than the non-preferred, so long as it was not more than five percent higher, the preferred contractor's bid would be considered the "best" bid and entitled to the contract award. *See for example* NRS 338.1389(2). AB 144 now adds the component of using Nevada workers and suppliers to this preferential requirement, by mandating that to receive the five-percent bidder's credit, the contractor must sign an affidavit agreeing to comply with the provisions of AB 144.

In sum, AB 144 seeks to drive public works contracts towards Nevada-based contractors by requiring any contractor seeking to obtain the five-percent preference, to execute an affidavit upon award of the public works contract, agreeing that it will ensure:

- That 50 percent of its workforce, as well as that of all subcontractors, will hold Nevada-issued driver's licenses or identification cards
- All vehicles used on the public work will be registered in Nevada, or registered and partially apportioned in Nevada (as applicable)
- At least 50 percent of the design professionals used on the public work will have Nevada-issued driver's licenses or identification cards
- Will purchase at least 25 percent of the materials used for the public work from suppliers located in Nevada
- Will maintain payroll and other records to prove such compliance during the project's duration

The penalty for breach of these obligations is the

imposition of a 10 percent gross contract price liquidated damage assessment against the contractor, or the voiding of its bid, as well as the prohibition of bidding again on a public work for one year and the prohibition of being issued a preference certificate for five years. All contract documents must reflect these requirements and liquidated damage provisions as elements of the contractor's work scope and conditions of the contract.

Obviously, a contractor's affidavit making these assurances, with the penalty of 10 percent gross contract value loss, the loss of the ability to bid public works at all for a full year, and the loss of a preference for five years, constitutes a significant impact to a contractor. The ability of the contractor to achieve these stated requirements for himself may be difficult enough, but to potentially suffer these penalties for the failure of its subcontractors or third-party design professionals raises large legal issues. But the contractor's ability to shift liability for breach also has its limitations. Subsection 6 of Section 2 of the act mandates that any indemnification contract language be apportioned to the percentage of relative fault for the breach and the liquidated damages arising therefrom. Nothing is mentioned about the loss of bidding and preference rights.

Compliance with AB 144 is checked through the certified payroll system already in place. Contractors and their subcontractors are required to keep an accurate record of the name, position, wages and benefits paid to each worker on the project. Under AB 144, these certified payroll records must also include records of the employee driver's license or identification card numbers and the jurisdiction that issued the driver's license or identification card. These records must be maintained for inspection by the public body issuing the contract, and the contractor must ensure that a copy of her report and a report for each subcontractor is delivered to the public body no later than 15 days after the end of each month. While these records are to be open to the public, the driver's license / ID card information is not and needs to be kept confidential by the public body. A concern

is raised here that the contractor may be subject to penalties under NRS 338.060 as a result of a subcontractor's failure to provide the proper certified payroll reports, however, current provisions on NRS 338.070(6) allowing for withholding of penalties for recalcitrant subcontractors are not altered by AB 144.

The legislative history of AB 144 suggests that legislators were concerned with the ability of the public bodies to use AB 144 and the penalties thereunder as leverage against retention. For this reason, the liquidated damages and loss of bid penalties cannot be extracted unless a court determines that the contractor has breached the obligations of the contract regarding AB 144. This is not true of the loss of preference penalty. There is also indication that a series of forms were created to assist the Department of Labor and the Public Bodies to streamline and unify the compliance reports and other mandates. These forms, however, did not make it into the final legislative language, and could be issued as administrative code regulations or as addenda to the public work bid specifications.

Of the biggest concerns created by this legislation is the impact on contractors. On its face, the legislation places the entire burden of compliance, as well as the penalties for breach, upon the contractor, even where the contractor has little or no control over the offending party. As a practical matter, it will be nearly impossible for the contractor to control where a subcontractor buys materials, where a design professional under contract with the public body directly has its design work performed, where a sub-subcontractor hires its workers or how any of these parties maintain their payroll and employment records. Yet under the plain language of Section 2 of AB 144 this burden is placed solely on the contractor. No provisions encompass the potential defenses of the contractor that any breach was caused by such third parties over whom the contractor has little control. Subcontractors, design professionals and material suppliers are not required to execute similar affidavits.

While there is lip service paid to allowing a contractor to push liability for liquidated damages down to subcontractors in proportion to the subcontractor's fault, there is no corresponding ability for the contractor to apportion the loss of its ability to bid for one year on future public works projects under Section 3, nor the loss of its ability to obtain a preference for five years upon finding of a breach under AB 144's section 9's amendments to NRS 338.1389(9). Moreover, this latter penalty is imposed by action of the Nevada State Contractor's Board, *not* a district court. As we have seen historically in the Contractor's Board's "money owing" enforcement actions, the Board's findings are not always based on any particular Court's findings of fact or the judicial process. The potential for abuse of this law is substantial.

But beyond the difficulties in dealing with damages and penalties for potential breach, the effect of AB 144 is already being felt. There are reports that Nevada-based contractors have been unable to bid with preferences on local paving projects because of the particular public body's experience and performance qualification requirements for a given application. Nevada based contractors with qualified and experienced work crews based in other jurisdictions were denied preference in their bid because their Nevada based crews did not have the requisite experience. Further, no effort has been made by the legislators to deal with large material based contracts, when such materials are sole sourced or only available from distributors without locations in the State of Nevada. While the burden should be on the public bodies to specify materials which are available locally, or to ensure that systems are specified on which Nevada based workers have experience to install, there is no such burden offered under AB 144. The law of unintended consequences may weigh heavily on the very people that AB 144 was intended to assist.

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