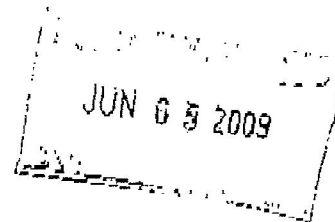


1 Code: 2650  
2 **CHESTER H. ADAMS, #3009**  
3 Sparks City Attorney  
4 **SHIRLE T. EITING, #3616**  
5 Senior Assistant City Attorney  
6 P. O. Box 857  
7 Sparks, Nevada 89432-0857  
8 (775) 353-2324  
9 Attorneys for Respondent  
10 CITY OF SPARKS



11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
12 **IN AND FOR THE COUNTY OF WASHOE**

13 **LABORERS' INTERNATIONAL UNION**  
14 **OF NORTH AMERICA, LOCAL 169, and**  
15 **RICHARD DALY**

16 Petitioners,

Case No. CV09-01895

17 vs.

Dept No. 1

18 **CITY OF SPARKS,**

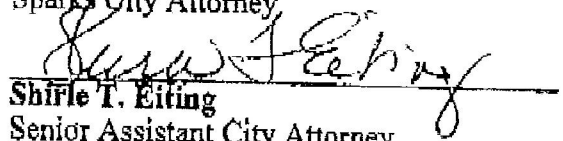
19 \_\_\_\_\_  
20 Respondent. /

21 **OPPOSITION TO PETITION FOR WRIT OF MANDAMUS,**  
22 **ALTERNATIVELY WRIT OF PROHIBITION**

23 COMES NOW, the Respondent in the above-entitled action by and through its City Attorney,  
24 Chester H. Adams and Senior Assistant City Attorney, Shirle T. Eiting and respectfully prays this  
25 Honorable Court not issue upon Petitioners' request for a Writ of Mandamus alternatively a Writ of  
26 Prohibition. The instant motion is brought pursuant to NRS 34.150 et. seq. and the accompanying  
27 Points and Authorities.  
28

Respectfully submitted this 25<sup>th</sup> day of June, 2009.

  
Chester H. Adams  
Sparks City Attorney

  
Shirle T. Eiting  
Senior Assistant City Attorney  
P.O. Box 857  
Sparks, NV 89432  
(775) 353-2324  
Attorneys for Respondent City of Sparks

1 POINTS AND AUTHORITIES

2 I.

3 The Petition is Jurisdictionally Defective on its  
4 Face thereby Divesting this Court of Jurisdiction

5 A. NRS Chapter 3

6 Petitioners' have brought the instant action seeking equitable relief from this Honorable Court  
7 pursuant to "Nevada Revised Statutes Chapter 3".<sup>1</sup>

8 NRS Chapter 3 concerns itself with the administration of the District Courts of Nevada and  
9 the creation of specialty courts. NRS Chapter 3 creates neither a substantive cause of action nor  
10 provides for any form of relief to which Petitioners are entitled.

11 It is respectfully submitted that the Court has no jurisdiction to grant the relief sought by the  
12 Petitioners and must therefore dismiss these proceedings against the Respondent, City of Sparks.

13 II.

14 Petitioners Lack Standing Because there is not Privity of Contract

15 Should this Honorable Court disregard Respondent's foregoing argument and conclude  
16 Petitioners' articulated jurisdictional statement is simply an irregularity that may be corrected *sua*  
17 *sponte*, Respondent would nevertheless maintain that Petitioners lack standing to bring the instant  
18 Petition because of lack of privity and because the matter is non-justiciable.

19 The instant matter involves Respondent's Public Works Bid #08/09-028-PWP WA-2009-221<sup>2</sup>.  
20 Petitioners speculate that Respondent's Purchasing Manager lacked the legal authority to allegedly  
21 cancel the bids received on the above-referenced Public Works Bid. Petitioners' therefore request this

22 ///

23 ///

24 ///

26 <sup>1</sup> Page 2, lns 4-5; Petition for Writ of Mandamus or in the Alternative, Writ of Prohibition filed  
27 June 18, 2009; hereinafter "Petition")

28 <sup>2</sup> Petition pg 3, lns 3-4.

1 Honorable Court to order Respondent to award a Public Works project to an "entity which was the  
2 lowest responsive and responsible bidder".<sup>3</sup>

3 A bid made pursuant to a municipality's Request for Bids is simply an offer to which the duty  
4 of good faith and fair dealing does not apply, *Fridge Const. Co., Inc. v. FEMA*, 797 F.Supp. 1321,  
5 1349 (S.D. Miss. 1991); *O'Dowd v. Waters*, 125 S.E. 644, 646 (S.C. 1924).

6 Accordingly, a bid on a public works project does not of itself constitute a completed contract  
7 and thereby creates no enforceable right for any bidder until a bid is ultimately accepted, *O'Dowd*,  
8 *supra*; *Peterson v. NCNB Texas Nat'l Bank*, 862 S.W. 2d 182, 183 (TX 1993).

9 While the more liberal standard recognizes that bids could create an implied contract, it is the  
10 generally accepted view that non-bidders lack standing to submit a pre-award protest. *C.C.*  
11 *Distributors, Inc. v. U.S.*, 38 Fed. Cl. 771, 778 (1997).

12 Petitioners have not alleged they bid on the Public Works Bid which is the subject of the  
13 instant Petition.

14 Petitioners have, however, conceded that the bids associated with the Public Works Bid were  
15 allegedly rejected before any bid was accepted by Respondent.

16 Petitioners have no legal standing to seek judicial relief upon what can best be described as  
17 an executory contract between Respondent and other third parties who are not parties to this action.  
18 Petitioners lack privity and standing to seek judicial relief in what is admittedly a pre-award bid  
19 protest.

### 20 III.

#### 21 The Instant Matter is Non-Justiciable because Petitioners Lack Legal Standing

##### 22 A. Justiciable Controversy

23 In order for a Writ of Mandamus to issue, there must be a "justiciable controversy". A  
24 justiciable controversy is a "ripe dispute between two interested and adverse parties in which the  
25

---

26 <sup>3</sup> Because the bids were allegedly rejected, there was never a determination that any bidder  
27 qualified as a "responsive and responsible bidder". Petitioners' nevertheless ask this Court  
28 to make such a determination and thereafter order Respondent to contract with such an entity.  
It is respectfully submitted that for purposes of writ relief, this would be inappropriate. See  
Petition, pg 7, lns 13-17.

1 moving party's interest is legally recognized". *Mesagate Homeowner's Association v. City of*  
2 *Farnley*, 194 P.3d 1248, 1251 (NV 2008).

3 In order to establish standing, a petitioner must demonstrate a "beneficial interest" in obtaining  
4 writ relief. In *Mesagate, supra* the Nevada Supreme Court defined a beneficial interest as a "direct  
5 and substantial interest that falls within the zone of interests to be protected by the legal duty  
6 asserted."<sup>4</sup> Noted earlier was the fact that neither Petitioner has any contractual right and Respondent  
7 owes no corresponding legal duty to Petitioners. Accordingly, the instant matter falls within no  
8 legally recognized "zone of interest" that Petitioners can legally assert.

9 **B. Non-Bidder Standing**

10 Nowhere in the instant Petition does either Petitioner allege they bid on Respondent's Public  
11 Works Bid #08/09-028-PWP WA-2009-221.<sup>5</sup> Accordingly, and for the following reasons - and in  
12 accordance with the principles in *Mesagate, supra*, it is respectfully submitted that neither Petitioner  
13 has set forth a justiciable beneficial interest entitling them to writ relief in this matter.

14 **1. Mr. Richard Daly, Individually**

15 Petitioner Daly has not alleged that he brings the instant Petition as a taxpayer of the  
16 Respondent, City of Sparks. Nevertheless, and for the following reasons, even if Petitioner Daly had  
17 done so, as a matter of law Petitioner Daly lacks standing.

18 In order for an individual taxpayer to be afforded writ relief in a bidding process, they must  
19 demonstrate standing by alleging some interest peculiar to them individually and not simply as a  
20 member of the general public, *El Paso Community Partners v. B&G/Sunrise Joint Venture*, 24  
21 S.W.3d, 620, 624 (TX 2000). The instant Petition is completely devoid of such allegations.

22 Specifically, in order to demonstrate tax-payer standing in a bidding matter, Petitioner Daly  
23 must demonstrate that 1) he has sustained, or is in immediate danger of sustaining, some direct injury  
24

---

25 <sup>4</sup> *Mesagate, supra*, 194 P.3d at 1251-1252.

26 <sup>5</sup> Even if Petitioners' had been unsuccessful bidders, the Court would still lack jurisdiction  
27 because of Petitioners' failure to exhaust its administrative remedies within 5 business days  
28 from the opening of the bids as required by NRS 338.142, once again rendering the matter  
non-justiciable. *Mesagate, supra* 194 P.3d at 1252-53.



1 as a result of the complained-of wrongful act; 2) has a direct relationship between the alleged injury  
2 and the claim to be adjudicated; 3) has a personal stake in the controversy; 4) demonstrates that the  
3 challenged action has caused the Petitioner some injury in fact, either economic, recreational, or  
4 otherwise; 5) that he is an appropriate party to assert the public interest in the matter as well as his  
5 own interest, *El Paso Community Partners, supra* 24 S.W.3d at 624 (citations omitted). Once again,  
6 the instant petition sets forth absolutely no allegation remotely approaching the legal standing  
7 requirements for a justiciable controversy.

8 Alternatively, an exception to these rules allows a tax paying citizen to maintain an action in  
9 a court of equity to enjoin public officials from expending public funds under a contract that is void  
10 or illegal.<sup>6</sup> Petitioner Daly cannot fall within this exception because Petitioner Daly has not alleged  
11 that Respondent entered into any void or illegal contract involving the expenditure of public funds.

12 Finally, applying a more liberalized principle for taxpayer standing involving a municipal  
13 bidding process would simply require Petitioner Daly to demonstrate both 1) that he is a tax payer of  
14 the municipal entity and 2) that he alleges and demonstrates that the allegedly improper municipal  
15 conduct has caused "some pecuniary or other great injury" in his status as a taxpayer, that will  
16 probably result, directly or indirectly in an increase in either his taxes or would in some fashion, cause  
17 irreparable or great injury. *Alarm Applications Co. v. Simsbury Volunteer Fire Co.*, 427 A.2d 822,  
18 827 (Conn. 1980); *Nanta v. Borges*, 551 A.2d 781, 783-84 (Conn. 1988).

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27

---

28 <sup>6</sup> *El Paso, supra* 24 S.W.3d at 624.

1 Petitioner Daly, in his alleged individual capacity as a resident of the City of Sparks, has not  
2 alleged or otherwise demonstrated that 1) he has, or will suffer any actual, personal or economic  
3 injuries; 2) he has a personal stake in this controversy or; 3) otherwise demonstrated that he is an  
4 appropriate party to assert the public's interest or that he will suffer a great injury. In fact, neither  
5 Petitioner has alleged they suffered any harm at all.<sup>7</sup>

6 Petitioner Daly in his individual capacity has failed to demonstrate that he has a direct and  
7 substantial interest that falls within the zone of interest to be protected by the legal duty asserted.<sup>8</sup>

8 Petitioner Daly has not demonstrated - let alone alleged - any fact tending to show how he is  
9 or will be adversely injured or how such injury is related to his conclusory allegations that  
10 Respondent's Purchasing Manager lacked the legal authority to allegedly reject bids.

11 The instant Petition of Petitioner Daly should therefore be dismissed.

## 12 2. Non-Bidder Standing of Union

13 Petitioner Daly has asserted that he is a full-time employee of Petitioner Laborers' Local 169  
14 (hereinafter "Union") serving as its Business Manager, and is thereby authorized to act on behalf of  
15 the Union.<sup>9</sup>

16 There has been no allegation that the Petitioner Union actually bid on Respondent's Public  
17 Works Bid #08/09-028-PWP WA-2009-221.

18 There is absolutely no allegation set forth in the Petition explaining why the Union is a party  
19 to this action - or how the Union as a non-bidding entity has suffered any actual, perceived or  
20 threatened injury because of the alleged rejection of bids by Respondent's Purchasing Manager.

---

21  
22 <sup>7</sup> Even a conclusory allegation of "irreparable harm" is legally insufficient to establish "even  
23 the possibility of irreparable harm". *Kotok v. Homecomings Financial, LLC*, 2009 WL  
24 1652151, W.D. Wash, June 12, 2009, \*3, citing with approval *In Re Excel Innovations, Inc.*,  
25 502 F.3d 1086, 1099 (9<sup>th</sup> Cir. 2007); *Northeastern Florida Chapter of Ass'n of General*  
26 *Contractors of America*, 896 F.2d 1283, 1286 (11<sup>th</sup> Cir. 1990). Nor can irreparable harm be  
established where harm is measurable in monetary damages, *eBay, Inc. v. Merc Exchange,*  
*LLC*, 547 U.S. 388, 391, 126 S.Ct. 1837 (2006); *Rent-A-Center, Inc. v. Canyon Television and*  
*Appliance Rental, Inc.*, 944 F.2d 641 (2006).

27 <sup>8</sup> *Mesagate, supra* 194 P.3d 1251-1252.

28 <sup>9</sup> Petition, pg 2, lns 16-18.

1 Petitioner Union does not claim it was not afforded a fair opportunity to bid on or that it was  
2 improperly precluded or otherwise excluded from bidding on Respondent's Public Works Bid.<sup>10</sup>

3 The non-bidding Union Petitioner has not made a colorable claim of fraud, corruption or any  
4 act undermining the objective and integrity of the bidding process.<sup>11</sup>

5 The non-bidding Union Petitioner has alleged absolutely nothing demonstrating that it has a  
6 stake in these proceedings by way of a direct or indirect injury, *Hiland v. Ives*, 257 A.2d 822, 825  
7 (Conn. 1966).

8 In short, the Union Petitioner has failed to meet the justiciable standards established in  
9 *Mesagate, supra*<sup>12</sup> demonstrating it has a legally recognized interest warranting writ relief.

10 The Nevada Supreme Court has long recognized that Courts should not be zealous to interfere  
11 with letting public contracts unless they are satisfied that the public has been made to suffer, either  
12 through fraud or bad faith or careless attention to business. Nevada recognizes a legal presumption  
13 that the acts of executive officers - such as Respondent's Purchasing Manager - are done for the  
14 public good and should not be disturbed absent a clear showing of wrongdoing. *Nevada State*  
15 *Purchasing Division v. George's Eqpt. Co. Inc.*, 105 NV 798, 806, 783 P.2d 949, 954 (1989).

16 It is respectfully submitted that in light of the paucity of allegations involving the Union  
17 Petitioner, a justiciable controversy has neither been alleged nor articulated and the Union's Petition  
18 should thereby be dismissed.

19 ///

20 ///

21 ///

---

23  
24 <sup>10</sup> See, for example, *Northeastern Florida Chapter of Associated General Contractors of*  
25 *America v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297 (1993); *Adarand Constructors,*  
26 *Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097 (1995); *Dynalantic Corp. v. Dept. of Defense*, 115  
27 F.3d 1012 (D.C. Cir. 1997).

28 <sup>11</sup> *Ardmore Construction Co. v. Freedman*, 467 A.2d 674, 678 (Conn. 1983); *Unisys Corp. v.*  
*Dept. of Labor*, 600 A.2d 1019, 1021-22 (1991).

<sup>12</sup> *Mesagate Homeowner's Association v. City of Fernley*, 194 P.3d 1248, 1251 (NV 2008).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

III.

Petitioner's Request for a Writ of Prohibition is Moot

Petitioners have requested this Honorable Court to issue a "Write [sic] of Prohibition against Respondent City of Sparks prohibiting it from rebidding the Project".<sup>13</sup>

Prior to the instant Petition being filed in this matter, Respondent rebid a new and different project of similar scope on Wednesday, June 17, 2009.

Accordingly, Petitioners' inaction has mooted this request.

IV

A Writ of Prohibition Is Not a Proper Remedy

Viewing the allegations in a light most favorable to Petitioners, Petitioners request this Honorable Court for a writ of prohibition, that would prohibit Respondent from rebidding Project Bid 08 109-029-PWP WA-2009-221.<sup>14</sup>

A Writ of Prohibition is intended to arrest the proceedings of a tribunal or some other board, body or person exercising a judicial function. NRS 34.320. A writ of prohibition does not correct errors because it affects acts of a judicial nature only. A writ of prohibition is not intended to interfere with actions that are ministerial, legislative or executive, *Gladys Baker Olsen Family Trust v. Eight Judicial District*, 110 Nev. 548, 552, 874 P.2d 778, 780-781 (1994) citing with approval, *O'Brien v. Trousdale*, 41 Nev. 90, 167 P. 1007 (1917)

Petitioners have not alleged that Respondent is - or is about to - perform any act of a judicial nature. Indeed, Petitioners seek to arrest a discretionary act - as compared to judicial - because rejection of a bid award is a discretionary act left to the executive department and is not a judicial function that should be arrested by and through a Writ of Prohibition, *City of Pawtucket*, 2002 WL 31324105 \*4 (R.I. Super. 2002; Unpublished) *Montauk Bus Co., Inc., v. Utica City School Dist.*, 30 F.Supp.2d 313,319 (N.D.N.Y. 1998). In fact, it has been held that the rejection of a bid does not even amount to a quasi-judicial function, *City of Inglewood - L.A. v. Superior Court*, 500 P.2d 601, 607

---

<sup>13</sup> Petition, pg 1, lns 26-28; pg 7, lns 20-22.

<sup>14</sup> Petition, pg 1, lns 27-28; pg 7, lns 20-22.

1 (Ca 1972); *Newell v. Franklin*, 74A 1009, 1011-12 (R.I. 1910).

2 Accordingly, a Writ of Prohibition is not an appropriate remedy in this matter and should not  
3 issue.

4 V.

5 **Petitioners Have No Standing in Mandamus**

6 The Nevada Supreme Court has long held that mandamus is not a proper remedy if there exists  
7 a plain, speedy and adequate remedy at law. *Garaventa v. Garaventa*, 61 Nev. 407, 131 P.2d 513  
8 (1942); *State v. Boerlin*, 30 Nev. 473 at 475, 98 P. 402 at 404 (Nev. 1908); *State v. Jumbo Ext. M.*  
9 *Co.*, 30 Nev. 192, 94 P. 74, 76 (1908). As noted by Nevada Supreme Court Justice Sweeney in *State*  
10 *v. Jumbo Ext. M. Co.*, *supra*, 30 Nev. At 194; 94 P at 76:

11 The Writ of Mandamus being justly regarded as one of the highest writs known to our  
12 system of jurisprudence, it issues *only* where there is a clear and specific legal right  
13 to be enforced, or a duty which ought to be and can be performed, and *where there is*  
14 *no other specific and adequate legal remedy...*the object of mandamus is not to  
supersede legal remedies, but rather to supply the want of them...  
(Emphasis added).

15 The Nevada Supreme Court in *State v. Jumbo Ext. M. Co.*, *supra*, went on to say that a  
16 Petitioner must prove he has an undisputed, clear and complete legal right to be protected. This  
17 principle was again affirmed in *Garaventa*, *supra*, at 411.

18 Petitioners are at best, attempting to base their argument upon the rights of the bidders to  
19 Respondent's Public Bid. In other words, if the allegedly rejected bidders believed their rights had  
20 been circumvented by the alleged rejection of their bids, those bidders could have availed themselves  
21 of the bid protest provisions of NRS 338.142.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 While noted *supra*<sup>15</sup> that the bid protest remedy has long since lapsed, any substantive protest  
2 by a rejected bidder would have been tenuous at best.<sup>16</sup>

3 Quite simply, Petitioners have not alleged, inferred or otherwise suggested they have an  
4 "undisputed, clear and complete legal right to be protected".<sup>17</sup> Having articulated no entitlement to  
5 such, Petitioners have no standing to seek the equitable remedy of Mandamus.

## 6 VI.

### 7 A Writ of Mandamus Is an Improper Remedy in this Action

8 Petitioners have asked this Court to issue a Writ of Mandamus forcing Respondent to "award  
9 the contract on the above-referenced Project to the entity which was the lowest responsive and  
10 responsible bidder and that submitted its bid in accordance with Nevada law as required in the  
11 Request for Bids on or about May 20, 2009."<sup>18</sup>

12 Mandamus is not a proper remedy in the matter. Mandamus will not lie to compel an officer  
13 or board to perform a discretionary act. *Young v. Board of County Comm'rs*, 91 Nev. 52, 530 P.2d  
14 1203 (1975). Nor will mandamus lie to control a discretionary action, *Gragson v. Toco*, 90 Nev. 131,  
15 520 P.2d 616 (1974), unless discretion is manifestly abused or is exercised arbitrarily or capriciously.  
16 *Henderson v. Henderson Auto*, 77 Nev. 118, 359 P.2d 743 (1961). Further, "when public officers are

---

17  
18 <sup>15</sup> See footnote 5.

19 <sup>16</sup> In addition to establishing a violation of the law or a regulation, a protester must also show  
20 that the violation caused the protestor prejudice. See *Bannum, Inc. v. U.S.*, 404 F.3d 1346,  
21 1351 (Fed. Cir. 2005) ("[I]f the trial court finds that the government's conduct fails the APA  
22 review...then it proceeds to determine, as a factual matter, if the bid protestor was prejudiced  
23 by that conduct."); see also *Impresa Const. v. U.S.*, 238 F.3d 1324, 1333 (Fed. Cir. 2001)  
24 ("When a challenge is brought on the second ground, the disappointed bidder must show 'a  
25 clear and prejudicial violation of applicable statutes or regulations.'" (citations omitted). A  
26 claim on the merits of a bid protest will only succeed if both requirements are satisfied. See  
27 *Bannum, supra*; see also *Galen Med. Assocs., Inc. v. U.S.*, 369 F.3d 1324, 1330 (Fed. Cir.  
28 2004) ("[T]o prevail in a protest the protestor must show not only a significant error in the  
procurement process, but also that the error prejudiced it.") (quoting *Data Gen. Corp.*, 78  
F.3d at 1562); *Industrial Property Management, Inc. v. U.S.*, 59 F.Ct. 318, 325 (Bid protestor  
must have a direct economic interest in the outcome of a bid protest proceeding).

27 <sup>17</sup> *State v. Jumbo Ext. M. Co.*, *supra* 30 Nev. At 194; 94 P. At 76.

28 <sup>18</sup> Petition pg 7, lns 12-18.

1 bound to exercise their own judgment, no superior court will attempt to exercise it for them or to  
2 substitute its judgement for that of the officer even though the complained of action is manifestly  
3 erroneous. A writ cannot be invoked to control the discretionary functions of a municipal legislative  
4 body, or, even though there is no other method of review or correction provided by law to review,  
5 reverse or correct the erroneous decision of an executive officer upon matters within the officer's  
6 discretion." McQuillin Mun Corp § 51.16 (3<sup>rd</sup> Ed).

7 As the authorized agent for Respondent, the Purchasing Manager is a "person designated by  
8 the governing body or city manger to be responsible for the development, award and proper  
9 administration of purchases and contracts or the development and award of contracts for public works  
10 for a local government or a department, division, agency, board or unit of local government made  
11 pursuant to this code.<sup>19</sup> The act of rejecting a bid pursuant to the terms of the bid documents<sup>20</sup> and  
12 NRS 338.1385(d) is a discretionary act by the authorized agent.<sup>21</sup> "Mandamus cannot be used to  
13 control discretion of administrative officer or agency, and will not issue to compel doing of an act in  
14 particular manner." *Rodriguez v. Solis*, 1 Cal.App.4th 495, 507, 2 Cal.Rptr.2d 50, 57 (1992).

15 Further, mandamus is not proper to compel Respondent to reinstate the bids that were rejected  
16 and to force Respondent to withdraw the newly advertised corrected bid. (See *U.S. ex rel.*  
17 *International Constructing Co. v. Lamont*, 155 U.S. 303, 15 S.Ct. 97, 39 L.Ed. 160 (1894) wherein  
18 the Court ruled that mandamus will lie to an officer to do only such ministerial duty as existed when  
19 application for mandamus was made. Mandamus cannot be used to resurrect a bid which was  
20 withdrawn and to force Respondent to accept contractors' bids that are inaccurate and do not meet  
21 the needs of Respondent.

22  
23  
24 <sup>19</sup> Sparks Municipal Code 2.25.020(C)

25 <sup>20</sup> City's Bid No 08/09-028 states in two separate locations "the right is reserved to reject any  
26 Proposals or too accept the Proposal which is deemed by the City of Sparks to be in the bets  
27 interest of the City of Sparks."

28 <sup>21</sup> See *Rodrigues v. Solis*, 1 Cal.App.4th 495, 2 Cal.Rptr.2d 50 (1992) "Discretion" is the power  
conferred on public functionaries to act officially according to dictates of their own judgment.



VII.

**Petitioners Claims Are Barred by the Doctrine of Laches**

Even if the Court were to determine that Respondent wrongfully rejected the contractors' bids, Petitioners's claims are barred by the doctrine of laches. Laches is an equitable doctrine which may be invoked when delay by one party works to the detriment of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable. *Building and Construction Trades Council of Northern Nevada v. State*, 108 Nev.605,611, 836 P.2d 633,637 (1992). (Citing *Erickson v. One Thirty-Three, Inc.*, 104 Nev. 755, 766 P.2d 898 (1988)) "As an extraordinary remedy, a writ of mandamus is subject to the doctrine of laches."<sup>22</sup> *Construction Trades* at 611. (Citing *Buckholt v. District Court*, 94 Nev. 631, 584 P.2d 672 (1979)). In deciding whether the doctrine of laches applies the Court must apply a three-part test:

1. Whether there was an inexcusable delay in seeking the petition;
2. Whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions; and
3. Whether there were circumstances causing prejudice to the respondent. *Trades Council* at 611 (Citations omitted.)

In this matter the bids were received by Respondent on May 20, 2009, and notice was given on June 9, 2009 that the bids were being rejected as a result of Respondent withdrawing and issuing a new bid. This notice also informed the bid recipients that the newly defined project would be advertised within two weeks. The Purchasing Department mailed, e-mailed and supplied all contractors who had bid on the original product documents with the new bid on June 17, 2009. It was not until June 19 that Respondent was served with notice of the Petition.

1. There has been an inexcusable delay by Petitioners. Petitioners have given no reason for the delay between the time the June 9 notice of rejection was published and waiting to file their Petition. The Petition was filed after the new bid had already been prepared, advertised and published

---

<sup>22</sup> Similarly, the doctrine of laches also applies to Petitioners' request for a Writ of Prohibition because NRS 34.320 defines a writ of prohibition as the counterpart to the writ of mandate.



1 to potential bidders. Petitioners were well aware of Respondent's intention but did nothing for ten  
2 days. During this time Respondent expended man hours and money in preparing the bid documents,  
3 advertising the new bid and providing the contractors with the revised documents. Prior to the new  
4 bid being sent out, Petitioners could have filed for an injunction or restraining order none of which  
5 was done.

6 2. An implied waiver by Petitioner arose from the Petitioners' knowing acquiescence to  
7 the existing conditions. Petitioners knew of the rejection and the new bid no later than June 11 when  
8 Petitioner Skip Daly met with the City Attorney and questioned the Purchasing Manager's authority  
9 to reject the bids. Obviously at this point Petitioners knew of their alleged issue but chose to take no  
10 action until June 18.

11 3. Petitioners' delay has prejudiced Respondent. After the rejection of the bids,  
12 Respondent staff spent time and money preparing the new bid, preparing it for advertisement,  
13 advertising it and delivering it to the participating bidders. Further, of major concern are time  
14 deadlines being imposed by outside agencies by which Respondent must finish the sewer project.  
15 These scheduling issues were set out in the June 9, 2009 letter. By waiting to file their Petition,  
16 Petitioners are potentially preventing Respondent from starting the project on time which could  
17 increase the cost of the project. Lastly, due to the delay caused by the filing of the Petition, federal  
18 funding may be put at risk.

19 As set forth above, this matter meets the three part test delineated in *Building and*  
20 *Construction Trades Council of Northern Nevada v. State, supra*. Therefore, even in if the Court  
21 were to find that Respondent has the duty to award a contract on the inaccurate original bid, in this  
22 matter, as in *Building and Construction Trades Council of Northern Nevada v. State*, the writ of  
23 mandamus and prohibition is barred by the doctrine laches.

#### 24 VIII.

#### 25 Respondent, Through its Purchasing Manager, Has the Right to 26 Cancel/Withdraw Respondent's Advertised Bid and Reject All Submitted Bids

27 On April 29, 2009, Respondent, by and through its Purchasing Department noticed and  
28 advertised that it would receive written sealed bids for Bid #08/09-028, PWP#WA-2009-221, for the

1 Federally Funded Spanish Springs Sanitary Sewer Phase 3 Project. In two separate areas the bid  
2 document prepared by Respondent's Purchasing Department states "[T]he City of Sparks reserves  
3 right to reject any Proposals or to accept the Proposal which is deemed by the City to be in the best  
4 interest of the City of Sparks." On June 9, 2009 Respondent by and through its Purchasing Manager  
5 gave notice that all bids submitted pursuant to the April 29, 2009 bid request were rejected. Rejection  
6 was deemed necessary by Respondent due to the discovery of multiple issues with the original bid  
7 documents which may have affected the prices submitted by the contractors to Respondent. This letter  
8 was issued and signed by the Purchasing Manager.

9           Petitioners base their writ of mandamus and prohibition on their claim that  
10 Respondent's Purchasing Manager lacks authority to reject the bids received by Respondent. The  
11 Petitioners go on to claim that only the City Council has the authority to reject the bids. Petitioners  
12 provide no authority either in case law, statutory authority, or past practice of the governmental  
13 authorities to support their position. Instead, Petitioners base their claim on a nonsensical reading  
14 of NRS 338.1385. In order for this Court to agree with Petitioners interpretation of NRS 338.1385  
15 the Court must ignore the Sparks Municipal Code, past practices of governmental agencies and  
16 common sense.

17           **A. Purchasing Manager is the Authorized Representative of the City.**

18           Section 2.25 of the Sparks Municipal Code (hereinafter "SMC") applies to all expenditures  
19 of public funds no matter the source under any contract. SMC 2.25.020(C) defines the "Authorized  
20 Representative" as the "person designated by the governing body or city manager to be responsible for  
21 the development, award and proper administration of purchases and contracts or the development and  
22 award of contracts for public works for a local government or a department, division, agency, board  
23 or unit of local government made pursuant to this code." SMC 2.25.030 designates Respondent's  
24 Purchasing Manager as the "authorized representative" for the City of Sparks.

25           Further, centralization for procurement authority was vested with the Purchasing Manager by  
26 SMC 2.25.040 which states "All rights, powers, duties and authority relating to the procurement of  
27 supplies, services and construction, and the management, control, warehousing, sale, and disposal of  
28 supplies, services and construction now vested in or exercised by any city department, regardless of

1 source of funding, are hereby vested in the city manager and the purchasing manager." The SMC is  
2 consistent with NRS in the designation and definition of an "authorized representative." NRS  
3 338.010(1) defines an "authorized representative" as a "person designated by a public body to be  
4 responsible for the development, solicitation, award or administration of contracts for public works  
5 pursuant to this chapter."

6 **B. Respondent's Purchasing Manager is Authorized to Reject Bids.**

7 Respondent's Purchasing Manager is Respondent's "authorized representative" for the  
8 purposes Chapter 338 of the Nevada Revised Statutes and therefore legally vested with the authority  
9 to reject bids received from contractors. Such delegation of City Council's authority is provided for  
10 in Section 2.060(2) of the Sparks City Charter. Section 2.060(2) states "When power is conferred  
11 upon the city council to do and perform something, and the manner of exercising such power is not  
12 specifically provided for, the city council may provide by ordinance the manner and details for the  
13 necessary full exercise of such power. As shown above, the City Council has delegated its authority  
14 to the Purchasing Manager by enacting the Procurement Code in Chapter 2.25 of the Sparks  
15 Municipal Code. This delegation of authority by the Sparks City Council is standard practice within  
16 government agencies throughout the State and rejection of bids by purchasing managers is common  
17 practice.

18 If this was not the case, and the procedure suggested by Petitioners were to be followed, City  
19 Council would be saddled with the burden of reviewing contractors' bids, completing the due  
20 diligence, becoming involved in the day to day procurement procedures of the City and otherwise  
21 directing the activity of City employees all of which would violate Article III Section 3.100(2) of the  
22 City Charter.<sup>23</sup> Additionally, such direct Council participation in the contracting procedures would  
23 also expose the City Council to possible ethical violations under NRS 281A.<sup>24</sup> The result suggested  
24

25 <sup>23</sup> Article III Section 3.100(2): "The mayor or members of the council shall not direct the activity  
26 of any appointed employee on a matter pertaining to city business, but must deal through the  
27 city manager."

28 <sup>24</sup> See NRS 281A.020: "Increasing complexity of state and local government, more and more  
closely related to private life enterprise, enlarges the potentially for conflict of interests."

1 by Petitioners is not practicable and flies in the face of sound reasoning, common governmental  
2 practices and fiscal responsibility.

3 IX.

4 **Petitioners' Requested Relief Contravenes Public Policy**

5 The overriding purpose of public bidding laws is to ensure that taxpayer-funded construction  
6 projects are completed in a cost-effective manner, free from fraud, collusion, favoritism and  
7 improvidence.<sup>25</sup> The purpose of competitive bidding for local public contracts is not protection of  
8 the individual bidders, but rather the advancement of the public's interest in securing the most  
9 economical result.<sup>26</sup>

10 Petitioner Daly seeks to enjoin Respondent's ability to bid on a Public Works project  
11 estimated between seven million and twelve million dollars because bids were allegedly rejected by  
12 Respondent's Purchasing Manager without legal authority. Petitioner Daly provides no legal  
13 authority yet readily concedes in his Petition that the bids were allegedly rejected because "the City  
14 discovered multiple issues with the original bid documents and specifications" which led to  
15 "concerns" affecting pricing, the "structure of the bid schedule" and "how data was to be reported to  
16 the State of Nevada".<sup>27</sup>

17 Petitioner Daly, a non-bidding party, provides absolutely no legal authority for his position -  
18 except for his own tortured and convoluted interpretation of NRS 338.1385. Petitioner Daly simply  
19 concludes that "the Purchasing Manager did not have legal authority to reject the bids for the Project  
20 received on or about May 20, 2009".<sup>28</sup> Taking Petitioner Daly's request for Writ relief to its illogical  
21 conclusion, an order granting extraordinary relief in this matter would force Respondent to award a  
22 non-responsive bid on a deficient document, and would preclude Respondent from rectifying the  
23 situation by treating bidding parties fairly and timely re-bidding the project with more accurate bid  
24

25 <sup>25</sup> *James Cape & Sons Co. v. Mulcahy*, 672 N.W.2d 292, 305 (Wis. 2003)

26 <sup>26</sup> *Township of River Vale v. R.J. Longo Const. Co.*, 316 A.2d 737 (N.J. 1974).

27 <sup>27</sup> Petition, pg 3, lns 20-24.

28 <sup>28</sup> Petition, pg 6, lns 7-10.

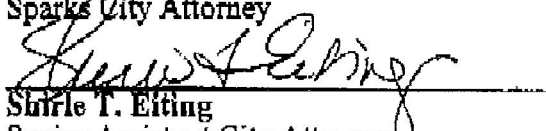
1 documents. In either event, logic, efficiency and sound public policy falls by the wayside if  
2 Respondent is obligated to pursue the most inexpedient and financially irresponsible means of  
3 completing a necessary Public Works project as propounded by the Petitioners.

4 **Affirmation**

5 The undersigned does hereby affirm that the preceding document does not contain the Social  
6 Security number of any person.

7 Respectfully submitted this 25<sup>th</sup> day of June, 2009.

8  
9   
10 **Chester H. Adams**  
11 **Sparks City Attorney**

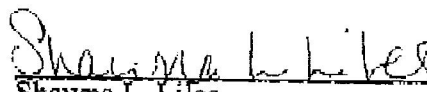
12   
13 **Shirle T. Eiting**  
14 **Senior Assistant City Attorney**  
15 **P.O. Box 857**  
16 **Sparks, NV 89432**  
17 **(775) 353-2324**  
18 **Attorneys for Respondent City of Sparks**

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Sparks City Attorney's Office, Sparks, Nevada, and that on this date, I am serving the foregoing document(s) entitled **OPPOSITION TO PETITION FOR WRIT OF MANDAMUS, ALTERNATIVELY WRIT OF PROHIBITION** on the person(s) set forth below by placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Sparks, Nevada, postage prepaid, following ordinary business practices to:

**Michael E. Langton, Esq.**  
801 Riverside Drive  
Reno, NV 89503  
*Attorney for Petitioners*

DATED this 25<sup>th</sup> day of June, 2009.

  
Shawna L. Liles