

100 CITY PARK, SUITE 1750
LAS VEGAS, NV 89106-4614
(702) 471-7000 FAX (702) 471-7070

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COMP
Stanley W. Parry, Esq.
Nevada Bar No. 1417
Jacob D. Bundick, Esq.
Nevada Bar No. 9772
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
100 City Parkway, Suite 1750
Las Vegas, Nevada 89106-4614
parrys@ballardspahr.com
bundickj@ballardspahr.com
Telephone: (702) 471-7000
Facsimile: (702) 471-7070

Attorneys for Plaintiff
Fisher Sand & Gravel Co.

FILED
APR 22 1 55 PM '09
E. J. [Signature]
CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

FISHER SAND & GRAVEL CO., a
North Dakota corporation,

Plaintiff,

vs.

CLARK COUNTY, NEVADA, a political
subdivision of the State of Nevada,

Defendants.

CASE NO. A588486
DEPT. NO. X1

VERIFIED COMPLAINT
BUSINESS COURT REQUESTED
EXEMPTION FROM ARBITRATION
(Equitable Relief Requested)
(Declaratory Relief Requested)

1 **VERIFIED COMPLAINT**

2 Comes Now, the Plaintiff, FISHER SAND & GRAVEL CO., ("FSG"), by and
3 through its counsel, Stanley W. Parry, Esq., and Jacob D. Bundick, Esq., of the law firm
4 Ballard Spahr Andrews & Ingersoll, LLP, and hereby complains and alleges against
5 Defendant CLARK COUNTY, NEVADA ("Clark County") as follows:

6 **INTRODUCTION**

7 1. This is an action to seek a writ of mandamus, declaratory relief, and
8 injunctive relief for Clark County's April 21, 2009, award of Bid No. 601309-08 to the
9 second lowest bidder, Las Vegas Paving Company ("LVPC") in violation of NRS 338.142,
10 and in violation of the instruction to bidder provided in the Invitation to Bid advertised by
11 Clark County.

12 2. FSG, the low bidder by approximately \$4,600,000 herein challenges the
13 award of the bid to LVPC at the hearing before the County Commission on April 21,
14 2009.

15 3. LVPC's protest of February 13, 2009, was untimely in accordance with NRS
16 338.142, and that Clark County should have not entertained the LVPC's protest.

17 4. FSG Clark County's interpretation of NRS 338,141, and the instruction to
18 bidder, to infer that subcontractors listed in FSG's bid form were required to maintain
19 license classifications of A, A/B, or A-2 to be considered for the project is in direct
20 contradiction of the bid specifications, common practice and proper statutory
21 interpretation.

22 5. Clark County's decision has deprived FSG of millions of dollars of profits
23 rightfully owing to it under NRS 338.1389.

24 **PARTIES**

25 6. FSG is and, at all relevant times herein, is a foreign corporation duly
26 licensed and qualified to do business as a contractor in Clark County, Nevada.

27 7. Clark County is and, at all relevant times herein, a political subdivision of
28 the State of Nevada.

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(702) 471-7070
CA 89106-4614
(702) 471-7070

1 **BACKGROUND**

2 8. On or about October 27, 2008, the County published an "invitation to bid"
3 for a highway construction project known as "Bid No. 601309-08, Northern Clark County
4 Route 215 Bruce Woodbury Beltway, from Tenaya Way to Decatur Boulevard" (the
5 "Project").

6 9. In connection with solicitation of bids for the Project, Clark County issued
7 the following (collectively, the "Bid Documents"):

- 8 (a) Contract Documents & Construction Specifications, which
9 include: (i) "invitation to bid"; (ii) "plan holder list and fax-on-demand
10 information"; (iii) "instructions to bidders"; (iv) "general conditions"; (v) bid
11 form; (vi) contract requirements and forms; (vii) disclosure of
12 ownership/principals; (viii) specials provisions and (ix) wage rates.

13 10. As set forth in the Bid Documents, the Project's scope of work is described
14 as follows:

15 The project will convert the existing interim CC215 from the current interim
16 facility to a four-lane freeway beginning in the vicinity of Jones Boulevard
17 and ending just east of Decatur Boulevard. The project includes
18 interchanges at Jones Boulevard and Decatur Boulevard. There will be one
19 auxiliary lane in each direction of the freeway between Jones and Decatur
20 and an Overpass spanning Bradley Road over the freeway. The project will
21 include construction of three post-tensioned cast-in-place concrete bridges
22 and a combination of concrete box culvert and rectangular channel
23 structures, Portland cement concrete barrier rails and bituminous
24 pavement, concrete barriers rails, curbs and gutters as well as highmast
25 and conventional lighting, traffic signals, sound walls, MSE walls, fencing,
26 freeway guide signs and conventional signs in addition to traffic control and
27 miscellaneous roadway improvements.

28 11. Clark County held a pre-bid conference on November 12, 2008 (the "Pre-
29 Bid Conference").

30 12. As set forth in the Bid Documents, Clark County estimated the construction
31 cost for the Project at \$114,234,750.00 to \$126,575,250.00.

32 13. As extended by Addendum No. 4, bids from interested contractors were
33 due at 2:15 p.m. on January 29, 2009.

34 14. Completed bid forms were received from the following contractors:

- 1 (a) FSG, with a total bid amount of 112,233,445.50;
- 2 (b) LVPS, with a total bid amount of \$116,820,814.40;
- 3 (c) Meadow Valley Contractors, with a total bid amount of
- 4 \$116,913,548.40;
- 5 (d) Frehner Construction Company, Inc. , with a total bid amount
- 6 of \$119,892,371.40;
- 7 (e) Road and Highway Builders, LLC, with a total bid amount of
- 8 \$123,777,777.00;
- 9 (f) Granite Construction, Inc., with a total bid amount of
- 10 \$134,998,273.75 ; and
- 11 (g) Perini Building Company, Inc. , with a total bid amount of
- 12 \$141,877,242.00.

13 15. FSG was the lowest bidder for the Project when the bids were opened by
14 Clark County on January 29, 2009.

15 16. Paragraph 15 of the instruction to bidders allows a protest to be filed within
16 five (5) working days.

17 17. Pursuant to NRS 338.142(1), a protest must be filed within five (5) business
18 days after the date bids are opened.

19 18. Pursuant to NRS 338.142(2), the Notice of Protest must set forth with
20 specificity the reasons the person filing the protest believes that the applicable provisions
21 of law were violated.

22 19. LVPC, via letter dated February 2, 2009, and accompanied by a protest
23 bond issued on February 3, 2009, initiated a protest claiming that FSG failed to list
24 subcontractors allegedly performing the bituminous surfacing work and Portland cement
25 concrete pavement or indicate that FSG would self-perform this work. Via letter dated
26 February 5, 2009, Clark County forwarded a copy of LVPC's protest to FSG and
27 requested FSG's response on or before February 13, 2009.

28

1 20. On February 10, 2009, FSG responded to LVPC's protest by stating that
2 FSG "fully intend[s] on self-performing the items in question."

3 21. On February 13, 2009, LVPC initiated a new protest based upon paragraph
4 6 of the Bidder's Representation regarding the contractors board licensing. This protest
5 was filed beyond the five (5) day period required by NRS 338.142. LVPC claimed that
6 bidders must have an A-2 Highway classification license. LVPC further argued that even
7 though FSG has an A license, which is admittedly the required license, its
8 subcontractors, Bravo Underground and Pipes Paving who are **NOT** bidders, must have
9 an A-2 license. LVPC requested that FSG's bid be rejected.

10 22. On February 27, 2009, the county staff responded to LVPC's two protests
11 by letter. County staff informed LVPC that FSG intended to self-perform the work related
12 to the asphalt paving work (first protest), and noted that the subcontractors listed by FSG
13 (Bravo and Pipes Paving) to perform "flatwork and pipe" and "partial excavation" are
14 qualified and properly licensed for this project and the scope of work to be performed
15 (second protest). County staff accordingly intended to recommend award of the Project
16 to FSG.

17 23. Thereafter on March 17, 2009, LVPC withdrew its first protest, but decided
18 to continue with its second protest.

19 24. On April 1, 2009, FSG responded to LVPC's second protests, and argued
20 that LVPC's the protest was untimely (submitted eleven (11) days after the bid opened.
21 FSG's response noted that the first and second protests set forth entirely different
22 assertions. FSG addressed LVPC's contention related to license classification for the
23 listed subcontractors. FSG specifically pointed out that subcontractors are not bidders in
24 the instruction to bidders pursuant to section 6(b) of the instruction to bidders, which
25 defines a bidder to include a Prime Contractor, not subcontractors.

26 25. In the same letter on April 1, 2009, FSG noted that Bravo is licensed to
27 perform flatwork and some pipe, which is the work designated in its bid. Further, FSG
28 noted that the Contractors' Board had approved an increase in Bravo's license to perform

1 the Project. Additionally, FSG set forth that Pipes Paving held the proper license to
2 perform partial excavation at the Project.

3 26. FSG is a qualified Prime Contractor who has extensive work experience in
4 Nevada.

5 27. FSG has two major projects in the State of Nevada which demonstrates its
6 ability to perform the Project. These projects include: (i) the largest public works project
7 in the state, the I-580 Freeway extension, and (ii) the largest private grading and paving
8 project in state, the Crystal Ridge/Ascaya Residential Development.

9 28. FSG provided Clark County with all documentation related to the I-580
10 Freeway extension project, including information which established that the project was
11 one on the most significant highway project in the state.

12 29. Accordingly, there is no issue as to FSG's ability to perform.

13 30. As noted in its April 1, 2009, letter, LVPC FSG and other contractors,
14 including LVPC use subcontractors who fail to possess an A or A-2 license in these types
15 of project. This fact was noted in FSG's April 1, 2009, letter.

16 31. On April 15, 2009, FSG provided Clark County with information related to
17 LVPC's paving project (Project No. 3313DB), where LVPC has used subcontractors who
18 did not have an A or A-2 license. This information demonstrated that even LVPC does
19 not believe that a subcontractor must hold an A or A-2 licenses to perform work on a
20 highway.

21 32. To support its interpretation of the statute and county staff's position, FSG
22 provided the opinion of two eminently qualified experts -- Marty Manning, the former
23 Director of Public Works for the County, and Donald Wood, the former Director of
24 Purchasing for Clark County. Both experts agreed with FSG's and county staff's
25 interpretation of the statutory requirement related to license classification for
26 subcontractors.

27 33. On April 21, 2009, the Board of County Commissioners ignored the
28 recommendations of county staff, the plain language of the statutes and Bid Documents,

1 experts, Marty Manning and Donald Wood; and the documents FSG provided that
2 demonstrated LVPC's protest was ridiculous.

3 34. There is no evidence or reasonable interpretation of law that supports the
4 Clark County's decision to impose an additional \$4,600,000 tax burden on the citizens
5 and taxpayers of Clark County.

6 **FIRST CAUSE OF ACTION**

7 **(42 U.S.C. § 1983; Violations of FSG's Fourteenth Amendment Right)**

8 35. FSG repeats and realleges each and every allegation set forth in
9 paragraphs 1 through 34 as though fully set forth herein.

10 36. FSG has the right under the Fourteenth Amendment of the United States of
11 America not to be deprived of property without due process of law.

12 37. Pursuant to NRS 338.1389, Clark County was required to award the Project
13 to the lowest responsive and responsible bidder.

14 38. On January 30, 2009, FSG's bid submission set forth and bid for
15 \$112,233,445.50.

16 39. FSG bid complied with NRS 338.1389, and with the instructions to bidder.

17 40. FSG bid of \$112,233,445.50 was the lowest bid for the Project when the
18 bids were opened by Clark County on January 29, 2009.

19 41. Clark County award of the Project to LVPC was in violation of NRS
20 338.1389.

21 42. Clark County's actions constitutes a violation of procedural due process
22 under the United State Constitution in violation of 42 U.S.C. Section 1983.

23 43. Clark County's decision to award LVPC the Project was an abuse of
24 discretion in violation of state law, and thus a violation of substantive due process under
25 the United States Constitution in violation of 42 U.S.C. Section 1983.

26 44. FSG has been required to retain the services of counsel to prosecute this
27 matter and, as such, is entitled to an award of its costs and reasonable attorney's fees
28 incurred herein.

1 SECOND CAUSE OF ACTION

2 (Petition for Writ of Mandamus)

3 45. FSG repeats and realleges each and every allegation set forth in
4 paragraphs 1 through 44 as though fully set forth herein.

5 46. FSG seeks a Writ of Mandamus compelling Clark County to vacate the April
6 21, 2009, award of the Project to LVPC, the second lowest bidder.

7 47. Clark County's action of awarding the Project to LVPC was an arbitrary and
8 capricious exercise of its discretion in contradiction of NRS 338.1389 and 338.142(1) and
9 (2), as well as the Bid Documents.

10 48. NRS 338.1389 contends "[e]xcept as otherwise provided in subsection 10
11 and NRS 338.1385, 338.1386 and 338.13864, a public body or its authorized
12 representative shall award a contract for a public work for which the estimated cost
13 exceeds \$250,000 to the contractor who submits the best bid."

14 49. NRS 338.142 set forth that a person who bids on a contract may file a
15 notice of protest regarding the awarding of the contract with the authorized representative
16 designated by the public body within five (5) business days after the date the bids were
17 opened by the public body or its authorized representative.

18 50. On January 30, 2009, FSG's bid submission set forth and bid for
19 \$112,233,445.50.

20 51. FSG was the lowest bidder for the Project when the bids were opened by
21 Clark County on January 29, 2009.

22 52. Clark County pursuant to NRS 338.1389 should have awarded FSG the
23 Project.

24 53. Clark County should not have entertained LVPC's second protest as it was
25 untimely.

26 54. FSG has no plain, speedy, and/or adequate remedy at law.

27 55. FSG herein request that the Court issue a Writ of Mandamus compelling
28 Clark County to vacate the award of the Project to LVPC.

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1 56. FSG request that the Court award it the Project pursuant to NRS 338.1389.

2 57. FSG has been required to retain the services of counsel to prosecute this
3 matter and, as such, is entitled to an award of its costs and reasonable attorney's fees
4 incurred herein.

5 **THIRD CAUSE OF ACTION**

6 **(Injunction)**

7 58. FSG repeats and realleges each and every allegation set forth in
8 paragraphs 1 through 57 as though fully set forth herein.

9 59. On April 21, 2009, Clark County awarded the Project to LVPC in direct
10 contradiction of NRS 338.1389.

11 60. FSG has been irreparably harmed due to the unlawful, arbitrary and
12 capricious actions of Clark County.

13 61. FSG is entitle to injunctive relief.

14 62. FSG request injunctive relief requiring Clark County to vacate the award of
15 the Project to LVPC.

16 63. FSG request that this Court award it the Project pursuant to NRS 338.1389.

17 64. FSG has been required to retain the services of counsel to prosecute this
18 matter and, as such, is entitled to an award of its costs and reasonable attorney's fees
19 incurred herein.

20 **FOURTH CLAIM FOR RELIEF**

21 **(Declaratory Relief)**

22 65. FSG repeats and realleges each and every allegation contained in
23 paragraphs 1 through 64 as though fully set forth herein.

24 66. Under N.R.S. § 30.010 et seq., the Uniform Declaratory Judgment Act, any
25 person interested under a deed, will, written contract or other writings constituting a
26 contract, or whose rights, status or other legal relations are affected by a statute,
27 municipal ordinance, contract or franchise, may have determined any question of
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1 construction or validity arising under the instrument, statute, ordinance, contract or
2 franchise and obtain a declaration of rights, status or other legal relations thereunder.

3 67. A justiciable controversy exists as FSG has asserted a claims that Clark
4 County violated NRS 338.412 and the Bid Documents by awarding LVPC the Project
5 despite the fact that LVPC's bid protest was untimely (i.e., submitted to Clark County
6 eleven (11) days after the bid opened, and LVPC's was the second lowest bidder, claims
7 Clark County heard and denied. Accordingly, the controversy is between persons whose
8 interests are adverse.

9 68. FSG has a legally protectable interest in the controversy, i.e., his right as
10 the lowest bidder to be awarded the Project and the profits arising thereto.

11 69. The issue involved in the controversy is ripe for judicial determination
12 because there is a substantial controversy, between parties having adverse legal
13 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory
14 judgment.

15 70. Accordingly, FSG requests a declaratory judgment that it is entitled to a writ
16 of mandamus for judicial review of Clark County's action of awarding the Project to
17 LVPC; (b) injunctive relief; and (c) award 500 of the Project as the lowest bidder.

18 71. FSG has been required to retain the services of counsel to prosecute this
19 matter and, as such, is entitled to an award of its costs and reasonable attorney's fees
20 incurred herein.

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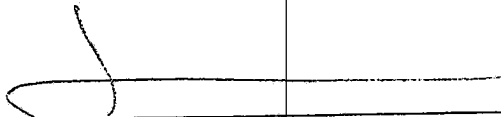
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WHEREFORE, FSG herein prays fro relief as follows:

1. For a Writ of Mandamus that Clark County vacate the award of the Project to LVPC;
2. For Injunctive Relief that Clark County vacate the award of the Project to LVPC, and award FSG the project pursuant to NRS 338.1389;
3. For judgment in favor of FSG in an amount in excess of \$10,000;
4. For Declaratory Relief;
5. For an award to FSG of its costs and reasonable attorney's fees; and
6. For such other and further relief that the Court deems just and proper.

DATED this 27th day of April, 2009.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP


Stanley W. Parry, Esq.
Nevada Bar No. 1417
Jacob D. Bundick, Esq.
Nevada Bar No. 9772
100 N. City Parkway, Suite 1750
Las Vegas, Nevada 89106
Attorneys for Plaintiff
Fisher Sand & Gravel Co.

VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) SS

JOSEPH MILLER, being first duly sworn, deposes and says:

That Fisher Sand & Gravel Co., is the Plaintiff in the above-entitled action, that I have read the foregoing Complaint on behalf of Fisher Sand and Gravel and knows the contents thereof; that the same is true of his own knowledge, except for those matters therein stated upon information and belief, and as to those matters, he believes them to be true.

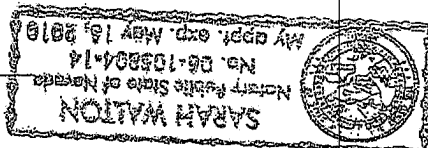
Joseph Miller

Joseph Miller

Subscribed and sworn to before me this
22nd day of April, 2009.

Sarah Walton

Notary Public in and for said
County and State



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