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REPLY TO:

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Department of Business & Industry OFFICE OF THE LABOR COMMISSIONER

November 10, 2015

Mr. Graig A. Madole
Assistant Executive Director, Nevada Chapter
Associated General Contractors of America
5400 Mill Street
Reno, NV 89510

Re: Request for Advisory Opinion – Service Providers on Prevailing Wage Projects

Dear Mr. Madole:

Pursuant to Nevada Administrative Code (NAC) section 607.650, an Advisory Opinion has been requested clarifying whether Service Providers should be paid Prevailing Wage on Public Works Projects. In your Request for an Advisory Opinion, you have stated that Service Providers provide services that are often performed incidental or ancillary to the supply of equipment or materials directly related to the construction, alteration, or repair of a Public Works Project. The following were listed as Service Providers: (1) Manufacturing Representatives responsible for installation, certification, calibration, and startup/testing; (2) Training Operations Personnel for manufactured equipment and devices; (3) Vacuum Trucks; (4) Portable Toilet Rental Employees. In the case of Manufacturing Representatives and Training Operations Personnel, they are often flown in from out of the state or from out of the country to perform limited services related to the piece of manufactured equipment, and do not perform duties directly related to the construction, alteration, or repair at the site of the Public Works Project. In addition, Service Providers as they have been listed above are typically not part of the Public Works Project bidding process, or part of the final contract. The services that are provided by Service Providers are incidental or ancillary to the main Public Works Project, and do not fit within the worker classifications and job descriptions that require payment of the Prevailing Wage on the Public Works Project.

Pursuant to NAC sections 338.007 and 338.015, Prevailing Wages are required to be paid on Public Works Projects for each recognized class of workers that is a distinct craft or type of work.

Nevada Revised Statutes (NRS) 338.040 sets forth the requirements for when workers are deemed to be employed on public works.

Workers deemed to be employed on public works.

1. Except as otherwise provided by specific statute, workers who are:
 - (a) Employed at the site of a public work; and
 - (b) Necessary in the execution of the contract for the public work, are deemed to be employed on public works.
2. The Labor Commissioner shall adopt regulations to define the circumstances under which a worker is:
 - (a) Employed at the site of a public work; and
 - (b) Necessary in the execution of the contract for the public work.

Nevada Administrative Code (NAC) 338.009 provides as follows:

1. As used in NRS 338.040, the Labor Commissioner will interpret:
 - (a) "Employed at the site of a public work" to mean the performance of work in the execution of a contract for a public work at the physical place or places at which the work is performed or at which a significant portion of the public work is constructed, altered or repaired if such place is established specifically for the execution of the contract for the public work or dedicated exclusively, or nearly so, to the execution of the contract for the public work.
 - (b) "Necessary in the execution of the contract for the public work" to mean the performance of duties required to construct, alter or repair the public work and without which the public work could not be completed.
2. As used in this section, "site of a public work" includes job headquarters, a tool yard, batch plant, borrow pit or any other location that is established for the purpose of executing the contract for the public work or that is dedicated exclusively, or nearly so, to executing the contract for the public work. The term does not include a permanent home office, branch plant establishment, fabrication plant, tool yard or any other operation of a contractor, subcontractor or supplier if the location or the continued existence of the operation is determined without regard to a particular public work.

Nevada Revised Statutes (NRS) section 338.020 requires the payment of Prevailing Wages on Public Works Projects based on the classification of work being performed by workers on the project.

Exemptions to the Prevailing Wage requirements include the following: (1) Contracts awarded which are directly related to the normal operation of the Public Body or the normal maintenance of its property (NRS 338.011); (2) Contracts awarded to meet an emergency which threatens the health, safety, or welfare of the public (NRS 338.011); (3) Any contract for a public work under \$250,000 and charter schools construction (Assembly Bill 172); (4) Apprentices recorded under the provisions of NRS 610 (NRS 338.080); (5) Any work performed by or for any railroad company (NRS 338.080); and (6) Design professionals as defined under NRS 338.010.

Merriam-Webster Dictionary (2015 Edition) defines *Incidental* as the following: “happening as a minor part or result of something else; being likely to ensue as a chance or minor consequence; and occurring merely by chance or without intention or calculation”. *Ancillary* is defined as: “providing something additional to a main part or function.”

In the case of Service Providers as has been listed above, the first question would be to determine whether the type of service or work being performed fits within the recognized class of workers based on the distinct craft or work being performed pursuant to NAC sections 338.007 and 338.015. For example, a Portable Toilet Employee that is simply dropping off or servicing the portable toilets would not fit within the current job classifications or job descriptions that require payment of the Prevailing Wage on a Public Works Project. The same would likely be true of a Manufacturing Representative or Training Operations Personnel in that the services that they are providing would not be one of the recognized job classifications performing a distinct craft, such as an Electrician, Carpenter, Laborer, etc.

The second question would be whether the Service Provider is performing work at the site of the public work. While it may be assumed that if a Portable Toilet Employee, Vacuum Truck, Manufacturing Representative, and Training Operations Personnel who visit a Public Works Project are technically at the site of the public work, the service that they are providing is temporary in nature, and there is no tool yard, batch plant, borrow pit or any other location that is established for the purpose of executing the contract for the public work, or where there is an office or equipment maintained at the site of the public work. In most cases, these Service Providers return to a permanent home office, branch plant establishment, etc. It is possible that a Service Provider, Manufacturing Representative, or Training Operations Personnel may be required to spend days or weeks on a Public Works Project. However, if the work that they are performing does not fit within the recognized job classifications, and is not performed at the work site pursuant to NAC 338.009, in that no designated location, office, etc., is established at the public work site, then there is no requirement that Prevailing Wage be paid for these types of services.

The final question would be to determine if the services being provided by the Service Providers is directly related to the construction, alteration, and repair of the public works project and necessary to complete the project. In the case of the Service Providers listed above, (Portable Toilet Employee, Vacuum Truck, Manufacturing Representative, Training Operations Personnel, etc.), they are not actually performing duties related to the construction, alteration, or repair of the public work in that they are performing a service, and not building or erecting a building, pouring concrete, paving asphalt, installing electrical wires, putting up drywall, installing pipes and plumbing, etc. The services they are providing may be “necessary” in that they support the Public Works Project as a whole, such as water or coffee delivery, but the actual duties that they are performing are incidental or ancillary in relation to a piece of equipment or service, and not part of the main contract for the actual construction, alteration, or repair of the Public Works Project. Therefore, the payment of Prevailing Wage is not required for these types of services.

Should any Awarding Body, Contractor, Subcontractor, or other interested party wish to review a particular service, duty, or work type to be performed on a Public Works Project that is, or is not part of the contract for the construction, alteration, or repair of the project, they should contact the Office of the Labor Commissioner for clarification.

Sincerely,



Shannon M. Chambers
Labor Commissioner