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November 1, 2016

Mr. Bryan L. Wright, Esq.
University of Nevada Reno
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1664 No. Virginia Street/MS 0550
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Re: REQUEST FOR ADVISORY OPINION

Dear Mr. Wright:

Thank you for your letter dated October 18, 2016, requesting an Advisory Opinion pursuant to Nevada Administrative Code (NAC) Section 607.650. In your Request for an Advisory Opinion, you reference a previous Advisory Opinion issued by a previous Labor Commissioner concerning Construction Managers at Risk (CMAR) Projects. The previous Advisory Opinion issued on July 1, 2013, found that the Prevailing Wage rates in effect at the time the construction contract was awarded to the CMAR would apply.

While the July 2013 Advisory Opinion was an attempt to clarify this issue, unfortunately it has not. The Office of the Labor Commissioner continues to receive inquiries and questions about Prevailing Wage requirements concerning CMAR projects. The previous Advisory Opinion that was issued does not contain information concerning the CMAR Project that was the subject of that Advisory Opinion, so it is not entirely clear what facts and circumstances were considered in that Advisory Opinion.

As stated in that Advisory Opinion, the CMAR process can be a lengthy one, and can cross over into different Prevailing Wage Rate years. (*See also* Nevada Revised Statutes (NRS) 338.1685 – 338.16995.) NAC 338.040 provides that Prevailing Wage Rates in a locality become effective October 1st of each year and are effective for a one year period. Prevailing Wage rates can be amended or changed based on additional provisions contained in NAC 338.040, 338.050, and 338.070.

The key focus of the CMAR process should be what Prevailing Wage Rates were used to generate and deliver the Guaranteed Maximum Price (GMP) to the Public Body. In the present inquiry, the 2015-2016 Prevailing Wage Rates were used to generate the proposals for the GMP for the University of Nevada Reno. It must also be noted that information was provided to the Office of the Labor Commissioner that the CMAR Project that is the subject of this Request for an Advisory Opinion is Phase 2 of a Pre-Construction Services Contract from March of 2015, followed by a Phase 1 GMP CMAR in December of 2015.

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The “Proposal Phase” of the CMAR process is similar, and yet different from the bidding requirements set forth in NRS 338 and NAC 338, in that the proposal process for CMAR’s attempts to obtain the best possible value as compared to low-bid contracting. (*See also* NRS 338.1685). The Prevailing Wage Rates that are in effect at the time the proposals are submitted are used to generate and deliver the GMP to the Public Body, and further negotiations are conducted. It is certainly true that a contract ultimately awarded to a CMAR pursuant to NRS 338.1696 must comply with the Prevailing Wage provisions set forth in NRS 338.020 to 338.090, and the Prevailing Wage provisions contained in NAC. However, it is the opinion of the Office of the Labor Commissioner based on the facts presented and the intent of the CMAR contracting process that the Prevailing Wage Rates that are in the proposals that are used to generate and deliver the GMP should remain in effect for the duration of the project. This satisfies the intent of the CMAR provisions and meets the requirements of NAC 338.040 and NAC 338.065 in that the parties know what the Prevailing Wage Rates are if the proposals for the CMAR GMP are required to be submitted before October 1st of any given year. The parties can always negotiate changes after the GMP is generated and delivered and prior to the CMAR contract being awarded. For compliance purposes though, the Prevailing Wage Rates in effect at the time that the proposals were submitted for the GMP will be the standard that the Office of the Labor Commissioner determines to be compliant for CMAR projects.

There certainly may be situations that fall outside of the “normal” CMAR process and require further review by the Office of the Labor Commissioner. Our office can certainly review those situations that may not be addressed in this Advisory Opinion on a case-by-case basis.

This Advisory Opinion does not apply retroactively, but does supersede and replace the previous Advisory Opinion that was issued on CMARs in July of 2013.

Sincerely,



Shannon M. Chambers
Labor Commissioner
Office of the Labor Commissioner
State of Nevada