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January 1, 2023

Teresa Schlaffer
Deputy Chief, Administrative Services
Nevada Department of Transportation
1263 S. Stewart Street
Carson City, Nevada 89712

Re: Request for Advisory Opinion—NDOT Contract 3905—Delivery of Temporary Median Barrier Rail

Dear Ms. Schlaffer,

Pursuant to Nevada Administrative Code (NAC) Section 607.650, an Advisory Opinion has been requested clarifying whether Prevailing Wage rates apply to Truck Drivers delivering and off-hauling temporary median barrier rail from a storage facility site leased by the Nevada Department of Transportation (NDOT) to a public works project.

FACTS PRESENTED

In December 2022, NDOT submitted a Request for an Advisory Opinion along with supporting correspondence from Granite Construction Company (Granite) and Teamsters Local 631 regarding the applicability of prevailing wage to Truck Drivers hauling temporary barrier rail from an NDOT storage yard to the site of a public works project. According to the Request and supporting documentation, NDOT Contract 3905 is located at the I-515 Charleston Interchange (the Project). Granite Construction is using temporary barrier rail as a traffic control device at the site of the Project. The barrier rail is transported by Truck Drivers to the Project from a storage yard located at milepost 5 on I-5 South owned by US Bureau of Land Management (US BLM) and leased to NDOT.

The Truck Drivers neither load the barrier rail at the storage lot, nor unload the barrier rail at the site of the Project. According to NDOT and Granite, the storage lot is used by NDOT for general storage of materials for multiple projects. Granite has no control over the use of the lot. The temporary barrier rail has been, and will continue to be, used on multiple projects, and it will be returned to the storage yard upon completion of this project for use on future projects as designated by NDOT. As such, NDOT and Granite do not believe prevailing wage applies because the storage facility is neither dedicated to the Project, nor is it a public work. Alternatively, Teamsters Local 631 states the storage yard qualifies as a “public site,” so prevailing wage applies.

AUTHORITY

Nevada Revised Statute (NRS) 338.040 establishes when a worker is employed on a public works project for purposes of paying prevailing wage. It states, “1. Except as otherwise provided by specific statute, workers who are: (a) [e]mployed at the site of a public work; and (b) [n]ecessary in the execution of the contract for the public work, are deemed to be employed on public works...” Nevada Administrative Code 338.009 provides further clarification and guidance and instructs the Labor Commissioner to 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.

Most notably for the facts presented, Nevada Administrative Code 338.017 directly addresses when Truck Drivers are considered employed on a public work. It states, “[a] worker who performs the craft of truck driver shall be deemed to be employed on a public work while: 1. [t]ransporting materials at the site of a public work; or 2. [t]ransporting materials between the sites of a public work.”

Prior Advisory Opinions issued by the Office of the Labor Commissioner (OLC) in 2017, and 2019, also address factual situations of when Truck Drivers hauling materials must be paid prevailing wage. In 2017, the OLC issued an Advisory Opinion indicating Truck Drivers did not need to be paid prevailing wage when hauling materials to an offsite destination. In 2019, the OLC again affirmed that NAC 338.017 does not require payment of prevailing wage to Truck Drivers “engaged in the transportation and/or hauling of materials...to or from an off-site...facility to the public work.”

ANALYSIS

Here, whether Prevailing Wage applies depends on whether the NDOT storage facility is the site of the Project under Nevada law. NAC 338.017 deems truck drivers employed on a public work if transporting materials at the site of a public work or...between the sites of a public work. (Emphasis added). Either way, the regulation requires the transportation be limited to one public work project. As such, if the NDOT storage facility is part of the site of the Project, then the Truck Drivers would be transporting materials between the sites of a public work, and prevailing wage applies. However, if the NDOT storage facility is not the site of the Project, prevailing wage would not apply under NAC 338.017 and prior Opinions of this office.

Ultimately, there are insufficient facts presented to determine whether NDOT's lease and use of this particular storage facility make it part of the site of the Project. NDOT's lease and US BLM's ownership of the facility as public entities versus private companies is insufficient to establish the storage lot as part of the site of the Project. NDOT and Granite maintain the facility and the materials being hauled are used for multiple projects. Teamsters Local 631 simply calls the storage facility a "public site." As such, a determination as to whether NDOT's storage facility counts as being part of the site of the Project cannot be made at this time and is likely better suited to a full fact-finding hearing prior to a decision.

The Office of the Labor Commissioner encourages NDOT to continue to consult with the Office of the Labor Commissioner, if there are questions about a specific NDOT project and hauling by Truck Drivers that may occur at a site established for the purposes of constructing a public work or includes the transportation of materials at the site of a public work or between the sites of a public work.

Should an Awarding Body, or any other party, maintain that certain Truck Driving work is subject to Prevailing Wage that does not comply with the requirements of NAC 338.017, they should contact the OLC or pursue a potential Complaint.

Please be advised that this Advisory Opinion is limited to the specific facts and circumstances described herein. The Office of the Labor Commissioner may revisit this issue through the Administrative Rulemaking Process. Please be further advised that subsequent statutory or administrative rule changes or judicial interpretation of the statutes or rules upon which any opinion is based may require that this Advisory Opinion be modified or abandoned.

Should you need any additional clarification, please do not hesitate to contact our office at 702-486-2650.

Sincerely,



Brett K. Harris
Labor Commissioner

cc: Thomas Memmer, Teamsters Local 631
Catherine Moncada, Granite Construction Company