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Director



BRETT K. HARRIS, ESQ.
Labor Commissioner

DEPARTMENT OF BUSINESS AND INDUSTRY
OFFICE OF THE LABOR COMMISSIONER

April 29, 2025

Via Email

Colton Cole
V.P. of Operations
Soil-Tech
6420 South Cameron Street, # 207
Las Vegas, NV 89118

Re: Request for Advisory Opinion Regarding Whether Prevailing Wage Applies to Plant Establishment Work Performed After “Substantial Completion” of a Public Work Project

Dear Mr. Cole,

Pursuant to Nevada Administrative Code (“NAC”) Section 607.650, an Advisory Opinion has been requested clarifying the applicability of Nevada Prevailing Wage on Public Works law to Plant Establishment Work performed after substantial completion of the construction project.

FACTS PRESENTED

According to the Request for Advisory Opinion (the “Request”), a Nevada Public Agency issued a call for bids for a public work project (“the Project”) that included landscaping, herbicide, and dust palliative work during construction and Plant Establishment Work (the “PEW”) after substantial completion of the project. After authorization by the engineer, the PEW took place for a duration of twelve months following substantial completion of construction work on the project, this duration being beyond the number of contract days allotted to the project.

The Request contrasts the qualifications of the employees working on the construction portion of the Project with those of employees completing the PEW. Per the Request, the employees on the construction portion of the Project, who completed landscaping, herbicide, and dust palliative work, had special licensing (i.e. commercial drivers licenses and herbicide applicator licenses) and were trained and maintained proficiency in the equipment (i.e. Hydroseeder) used to perform applications. The Request characterizes these employees as “more qualified individuals” than those who perform the PEW, who were characterized as a different group than the employees on the construction work and as entry-level employees doing unskilled labor such as watering plants and picking up trash. Further, the employees performing the PEW work required no special requirements or licensing.

...

The Request details PEW as defined in Soil-Tech's contract. The PEW required Soil-Tech "to ensure an 80% survivability rate of the plants," and more specifically was defined as:

This work consists of weeding, trash removal, maintain[sic] plants, graffiti removal, and planted areas in vigorous and healthy condition in accordance with generally accepted horticultural practices and general maintenance as specified herein.

The plant establishment period will begin at such time as all landscaping, planting, seeding operations have been accomplished, all other work has been completed, and the project is in a neat and clean condition.

The Engineer may establish separate dates for the start of the plant establishment periods based on acceptance of portions of the landscape installation.

The plant establishment period shall run from the beginning date established by the Engineer for a period of one year.

Submit a schedule of plant establishment activities, manpower, and equipment, for approval before starting establishment activities. Provide monthly, summary of plant establishment activities completed, including man hours expended. Furnish a watering schedule spreadsheet for the plant establishment period that includes the date and time of day work will be performed. Submit schedule for review and approval prior to the plant establishment period.

All plants should be watered through the end of the plant establishment period using clean potable water from a portable or temporary source to hand apply water to plants. Individually water all flora. Manually check plants at a minimum of every 2 weeks with 9-inch soil moisture probe. If readings indicate "dry" soil conditions, adjust watering frequency as needed. Document probe results and locations where measurements were taken with description of actions taken on a spreadsheet report. Submit probe report every 2 weeks with the watering report. Watering frequency shall be based on probe reading results. Replace dead or damaged plants of the same species and size within 1 week of notification in accordance with warranty work specified.

Notification will be given in writing of the start of the plant establishment period and statements will be furnished regarding days credited to the plant establishment period after said notification.

Failure on any day to adequately perform required plant establishment work will not be credited as one of the plant establishment days. No extension of contract time will be granted beyond the final completion date by reason of failing to perform plant establishment work on days when such work is necessary.

Maintain the entire area within the project limits free of weeds. Implement

the noxious weed abatement plan which conforms to the Nevada Revised Statute (NRS 555). Do not allow any noxious weeds to flower or set seed within the project area. Remove weeds by hand or with herbicides approved for use on the QPL and apply according to the manufacturer's directions. The only vegetation to remain shall be seeded or planted material and existing native vegetation identified to remain.

Have weed control chemicals applied according to their manufacturer's instructions by licensed applicators and as required by authorities having jurisdiction over such activity.

Remove and dispose of surplus earth, papers, trash, and debris, which accumulate in the seeded areas according to Subsection 107.14. Care for the seeded areas as to present a neat and clean condition at all times.

Remove graffiti off any surface located within the project limits, includes new improvements, existing structures, equipment and supplies.

Work shall be done within 24 hours of graffiti occurrence or notification. For existing improvements (for example bridge columns), paint over graffiti to color match or as directed by NDOT.

Repair and re-groom all decorative rock areas damaged by vehicle traffic or erosion. Work includes sweeping any decorative rock off adjacent pavement areas.

The Request identifies that prevailing wage classifications applicable to the Project listed two landscape employees: Landscape Decorative Rock Installer (Ponds, Waterfalls, Etc.) and Landscape Gardener (Must have knowledge of plant materials and how to plant them. Lays out plant arrangements to follow the landscape plan).

AUTHORITY

Pursuant to NRS 338.015, the Labor Commissioner is tasked with enforcing the provisions of NRS 338.010 to NRS 338.130, inclusive. NRS 338.020 requires the payment of prevailing wage to skilled mechanics, skilled workers, semiskilled mechanics, semiskilled workers or unskilled labor on public works projects in Nevada. In determining prevailing wage rates, the Nevada Labor Commissioner surveys worker classifications and publishes the prevailing wage survey for all regions in Nevada, which includes publishing job descriptions when the prevailing wage for a classification prevails from a collective bargaining agreement. *See* NRS 338.030, NAC 338.010, NAC 338.020. NAC 338.0095(1)(a) requires a worker employed on a public work be paid the applicable prevailing rate of wage "for the type of work that the worker actually performs on the public work and in accordance with the recognized class of the worker."

NRS 338.010(19) defines a public work as any project for the new construction, repair or reconstruction of a project financed in whole or in part from public money for:

- a. Public buildings;

- b. Jails and prisons;
- c. Public roads;
- d. Public roads;
- e. Public highways;
- f. Public utilities;
- g. Publicly owned water mains and sewers;
- h. Public parks and playgrounds;
- i. Public convention facilities which are financed at least in part with public money; and
- j. All other publicly owned works and property.

Under NAC 338.144, a public work project can be used for its intended (non-construction site) purpose upon “substantial completion.” However, to be considered “successfully completed” pursuant to NAC 338.231, the project should be closed out within ninety (90) days from substantial completion.

Workers deemed employed on a public work are those who are employed at the site of a public work and necessary in the execution of the contract for the public work, except as otherwise provided by specific statute. NRS 338.040(1). NAC 338.009(1) expands on this test and states:

- 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 would not be completed.
- c. The terms interpreted in paragraphs (a) or (b) do not include an instance in which a person provides services to the prime contractor or a subcontractor at the site of a public work for a limited period of time if the services provided:
 - 1. Do not include work typically performed by a recognized class of workers; and
 - 2. Are incidental or ancillary to the construction, repair or reconstruction of the public work.

The Labor Commissioner has interpreted service providers to be exempt from prevailing wage requirements if the type of work they perform does not fit within the recognized class of workers based on the distinct craft of work being performed pursuant to NAC §§ 338.007 and 338.015, if the worker is not performing on the job site pursuant to NAC 338.009(2), and if the services being provided are not directly related to the construction, alteration, or repair of the public works project and necessary to complete the project in that they are incidental or ancillary to such work. Advisory Opinion (AO) 2015-05. To elaborate on this point, the Labor Commissioner explained that “the services they are providing may be ‘necessary’ in that they support the Public Works Project as a whole . . . 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.” *Id.* The Labor Commissioner relied on Merriam-Webster Dictionary (2015 Edition) definitions to define *incidental* as “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,” and *ancillary* as “providing something additional to a main part or function.” *Id.*

The Nevada Supreme Court defines repair work under NRS Chapter 338 prevailing wage requirements as tasks exceeding normal maintenance that would fall under a “project” within the meaning of NRS 338.010(15) and require skilled technicians to complete, while it defines normal maintenance work exempted from prevailing wage as patterned upkeep of property to keep it operating that does not require a lot of training and technical skills. *Bombardier Transp. (Holdings) USA, Inc. v. Nev. Lab. Comm’r*, 433 P.3d 248, 251-254, 256-257 (2019).

ANALYSIS

In the case of the PEW workers in this Request, the question that determines whether these workers are subject to prevailing wage requirements is whether the Plant Establishment Work is part of the public work project? It is the Opinion of the Labor Commissioner that Plant Establishment Work as described is not part of the public work project in the Advisory Opinion Request with concerns related to the length of time between “substantial completion” of the project and its close-out—a factual component not in the control of the Requester. Therefore, the PEW workers are not employed on a public work project and are not subject to prevailing wage requirements.

Whether the PEW is for new construction, repair, or reconstruction is a fact-specific inquiry that would likely require more information than in the facts presented (i.e. the contract itself) to make a more informed determination. The Request distinguished that the workers on the PEW were less skilled than those on the main construction work. That the workers are performing unskilled labor isn’t dispositive of being subject to prevailing wage if they meet other requirements. NRS 338.020. However, it appears that based on the facts as presented, the PEW would not fall under new construction, repair, or reconstruction as the duties of the PEW workers happen after construction of the project during “substantial completion,” and therefore, the work is ancillary to the public work project. The duties of maintaining landscaping by watering plants on the site and other maintenance work to maintain the property appear to be patterned upkeep of property to keep it operating and are secondary to its construction.

a. The Plant Establishment Work Workers are Not Employed on a Public Work

In the interest of a full analysis, whether the PEW workers are employed on a public work will be addressed. Two questions that must be addressed as part of this inquiry are whether the workers are employed at the site of a public work and if they are necessary in the execution of the contract for the public work.

i. PEW workers are employed at the site of a public work.

In terms of the first question, whether workers are employed at the site of a public work as

further defined in NAC 338.009, it appears that the facts as presented support the PEW workers probably being employed at the site of a public work. This is another fact-specific inquiry that would require more information than provided in the request to make a more informed determination. Based on the facts as presented, the PEW workers are presumed to be doing the work on the same site where the main landscaping, herbicide, and dust palliative work took place. The Request suggests that PEW could fall under the service provider exemption as described in AO 2015-05. However, unlike services providers at issue in AO 2015-05, who technically perform work on the site of the public work but return to a home office and don't utilize a "borrow pit" of supplies and tools, the PEW workers, while not specifically described in the Request, are presumed to be utilizing a tool yard on the site of the public work maintained for the public work and do not return to a home office. Based on these presumptions, the PEW workers would be considered employed at the site of a public work.

ii. PEW workers are not necessary in the execution of the contract.

In terms of the second question, whether the workers on the PEW are necessary in the execution of the contract for the public work, NAC 338.009(1) defines this further as the performance of duties required to construct, alter or repair the public work and without which the public work would not be completed. Based on the analysis above on whether the PEW falls under repair or maintenance, where it was concluded that the PEW would probably fall under maintenance, the first piece of this definition would not be satisfied. In terms of the "without which the public work would not be completed" piece, the facts as presented in the Request point to the PEW not being part of the public work if the work is limited to only the landscaping, herbicide, and dust palliative work project. As described in the Request, the PEW is not part of the allotted contract days for the project and the PEW started after "substantial completion" of the Project. Because the PEW work appeared after construction of the public work, this points to the PEW being separate upkeep that is not required for the completion of the public work but to maintain the property after construction. Based on this analysis, the workers on the PEW would not satisfy this portion of the definition, of being necessary in the execution of the contract, and would thus take PEW out of the prevailing wage requirements.

b. PEW probably does not satisfy both prongs of the NAC 338.009(c) exemption.

In the case that all the above-mentioned requirements are satisfied, NAC 338.009(c) provides an exemption to the other two NAC 338.009 categories that, if the PEW work satisfies, it would be exempt from prevailing wage requirements. The two prongs under NAC 338.009(c), both of which must be satisfied for the exemption to apply, are services at the site of a public work for a limited period of time that 1) do not include work typically performed by a recognized class of worker **and** 2) are incidental or ancillary to the construction, repair, or reconstruction of the public work. There is no further guidance on what a limited period of time in this regulation entails. The PEW work, per the Request, is for 12 months and there is no mention of any sort of renewal period. Thus, the fact that the time is limited to a specific period of time points to the PEW being for a limited period of time. Each of the two pieces of the exemption will be analyzed in turn.

i. PEW probably includes work typically performed by a recognized class of worker.

In terms of the first piece of the exemption, that the work does not include work typically performed by a recognized class of worker, there are instances of work performed by the PEW workers as described in the Request that is work typically performed by a recognized class of worker on a public work project. The Request describes that some recognized classifications of workers on public work projects perform the listed tasks of Landscape Decorative Rock Installer (Ponds, Waterfalls, Etc) and Landscape Gardener (Must have knowledge of plant materials and how to plant them). Further duties of the PEW workers that could fall under the duties of the recognized classification of Landscape Gardener would include: “[h]ave weed control chemicals applied according to their manufacturer’s instructions by licensed applicators,” and, “[r]eplace dead or damaged plants of the same species and size within 1 week of notification in accordance with warranty work specified.” The Landscape Gardener class of worker must have knowledge of plant materials and how to plant them. Following this, a worker who is a licensed applicator of weed control chemicals would likely possess such knowledge and fall under the type of work done by this classification as this work was done in the landscaping, herbicide, and dust palliative work. The Request maintains that the PEW workers are unlicensed and less skilled workers than those on the main landscaping project, but these pieces of the work description, if performed by the PEW workers, would likely constitute work done by workers under this recognized classification. The plant replacement work would also likely fall under this classification if performed on a public work project. The Request also contends that because the PEW workers are not laying out plant arrangements to follow the landscaping plan as is described in the Landscape Gardener classification, their work should not be considered under this classification. However, this is not relevant if the PEW workers are doing work typically performed by a recognized class of worker, which it appears they do if the PEW workers are performing licensed weed control chemical spraying significantly similar to the licensed herbicide spraying that workers are described to have performed in the main landscaping work. This analysis assumes that all duties of included in the Request’s description of PEW work are performed by the PEW workers at issue in this Request. If this were to be the case, then the PEW work, encompassing some work that is typically performed by workers of a recognized class, would not satisfy this part of the prevailing wage exemption.

ii. PEW is likely incidental or ancillary to the construction, repair, or reconstruction of the public work.

In terms of the second piece of the exemption, whether the PEW is incidental or ancillary to the construction, repair, or reconstruction of the public work, the facts as presented point to the PEW likely being incidental or ancillary to the construction, repair, or reconstruction of the public work, as is argued by the Request. The Labor Commissioner determined in AO 2015-05 that even if services provided are necessary in that they support a public work project as a whole, if actual duties performed are incidental or ancillary and not part of the main contract for actual construction, alteration, or repair, then such work would be exempt from prevailing wage requirements.

As discussed previously, that the PEW is not part of the public work project and occurs after “substantial completion” of the project, when the project is ready for occupancy, points toward the PEW as not being part of the main contract for actual construction, as described in AO

2015-05. This aspect of the PEW, starting by engineer approval after substantial completion of the main construction, also lends itself to fit within the definition of *incidental* as defined by the Labor Commissioner in AO 2015-05: “happening as a minor part or result of something else.” Thus, based on the facts as presented in the Request, the PEW is incidental or ancillary to the construction of the public work project.

Based on this analysis and the facts as presented in the Request, workers on the PEW are probably exempt from prevailing wage requirements.

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 additional clarification, please do not hesitate to contact our office at (702) 486-2650.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett K. Harris".

Brett K. Harris, Esq.
Labor Commissioner