

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2002-37 CONTRACTORS' BOARD; ARCHITECTURE; ENGINEERS; LICENSES: In the context of NRS 624.020(4), a registered architect or licensed professional engineer who also performs construction management services must be cautious to ensure that the construction management functions are permitted within the scope of his primary professional license under NRS chapters 623 or 625, or are appropriately incidental to his performance as a registered architect or licensed professional engineer. If the Contractors' Board desires to further define the term "construction manager," the Board should do so in accordance with NRS chapter 233B or seek statutory clarification from the Nevada Legislature. If the construction management functions performed are outside the scope of the architect's or engineer's professional license, and not incidentally related thereto, the Contractors' Board may have jurisdiction over any complaint that arises under the provisions of NRS chapter 624.

Carson City, October 7, 2002

Margi Grein, Executive Officer, Nevada State Contractors Board,, 2310
Corporate Circle, Suite 200, Henderson, NV 89074

Dear Ms. Grein:

The Nevada State Contractors' Board (Contractors' Board) has requested an opinion from this office involving eight questions concerning the scope of practice of contractors, architects, and professional engineers under their respective statutory licensing provisions. In large part, the Contractors' Board's inquiries focus on the consequences attending overlapping functions between the disciplines involving the performance of construction management services. For the purposes of this opinion, the Contractors' Board's eight questions have been consolidated and restated into three general areas of inquiry.

QUESTION ONE

Is a registered architect or a licensed professional engineer who performs construction management services also a "contractor" as defined under NRS 624.020(2) or NRS 624.020(4) and thus subject to the licensure requirements and jurisdiction of the Nevada State Contractors' Board under Nevada Revised Statutes (NRS) chapter 624?

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ANALYSIS

Unless otherwise exempt under NRS 624.031,¹ “it is unlawful for any person or combination of persons to . . . engage in the business or act in the capacity of a contractor . . . or submit a bid on a job . . . without having an active license” as required by chapter 624. NRS 624.700. The definition of a “contractor” is set forth in NRS 624.020 and, in part, is defined as:

2. A contractor is any person, except a registered architect or a licensed professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, offers to undertake to, purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. . . .

. . . .

4. A contractor includes a construction manager who performs management and counseling services on a construction project for a professional fee. [Emphasis added.]

A. NRS 624.020(2)

The definition of a “contractor” under NRS 624.020(2) specifically excludes registered architects and licensed engineers. The issue concerning whether an architect is exempt from licensure under NRS chapter 624 when

¹ Registered architects and licensed professional engineers are not expressly exempt under NRS 624.031.

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acting as a contractor has been addressed in a previous Attorney General Opinion. In Op. Nev. Att'y Gen. No. 108 (October 28, 1959), this office opined that "although a licensed architect may be a contractor, he is not a builder and is, therefore, exempt from the application of the Contractors' Law. See Op. Nev. Att'y Gen. No. 781 (July 22, 1949)." The opinion concluded that,

In the absence of a preponderance of evidence showing that an architect is, in fact, engaged in the business of a "contractor" or "builder," or performing such functions in excess of services authorized as a duly licensed architect, or agent, acting for and on behalf of an owner, issuance of a building permit cannot be denied a licensed architect on an owner's behalf, merely because the architect does not have a contractor's license."

Id. at 447 (first emphasis added).

Accordingly, registered architects and licensed engineers acting in their professional capacities as such are not "contractors" as defined under NRS 624.020(2).

B. NRS 624.020(4)

The definition of a "contractor" also includes a "construction manager who performs management and counseling services . . . for a professional fee." NRS 624.020(4). Thus we must also examine whether a registered architect or licensed engineer who performs construction manager services is subject to the Contractors' Board's jurisdiction and licensure requirements under NRS chapter 624.

The scope of practice of both registered architects and licensed engineers generally includes construction management functions as part of their respective disciplines. The practice of architecture is defined in NRS 623.023 as follows:

The "practice of architecture" consists of rendering services embracing the scientific,

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esthetic and orderly coordination of processes which enter into the production of a completed structure which has as its principal purpose human habitation or occupancy, or the utilization of space within and surrounding the structure, performed through the medium of plans, specifications, administration of construction, preliminary studies, consultations, evaluations, investigations, contract documents and advice and direction. [Emphasis added.]

Additionally, the practice of professional engineering is defined in NRS 625.050 as follows:

1. ‘The practice of professional engineering’ includes, but is not limited to:

(a) Any professional service which involves the application of engineering principles and data, such as surveying, consultation, investigation, evaluation, planning and design, or responsible supervision of construction or operation in connection with any public or private utility, structure, building, machine, equipment, process, work or project, wherein the public welfare or the safeguarding of life, health or property is concerned or involved.

(b) Such other services as are necessary to the planning, progress and completion of any engineering project or to the performance of any engineering service.

2. The practice of engineering does not include land surveying or the work ordinarily performed by persons who operate or maintain machinery or equipment. [Emphasis added.]

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The issue concerning whether an architect is subject to licensure under NRS chapter 624 when acting as a construction manager has been addressed in a previous Attorney General Opinion dated May 4, 1995, for Johnnie B. Rawlinson, Assistant District Attorney, Civil Division, by Jonathan L. Andrews, Chief Deputy Attorney General. The opinion specifically addressed whether a joint venture, comprised of two members with unlimited contractors' licenses under chapter 624 and an architect member not licensed under chapter 624, needed a separate license pursuant to NRS 624.290² to perform construction management services. The members who had unlimited licenses under chapter 624 were not at issue in that opinion because with their unlimited licenses they could perform construction management services without any further licensure. The issue was whether the architect member was required to be licensed under NRS 624 to provide construction management services.

The analysis of the opinion began with the definition of the practice of architecture, as provided in NRS 623.023, with emphasis on the services of an architect in the coordination of processes.³ The opinion explained as follows:

Most jurisdictions require design professional (architects and engineers) licensure for construction management. Construction and Design Law, vol. 1, sec. 5.6b (1994). *In Attlin Construction Inc. v. Muncie Community Schools*, 413 N.E.2d 281 (Ind. App. 1980), the court held that public bid statutes do not apply to construction management contracts because they more closely resemble contracts for architectural services than construction contracts. It has been suggested that many architectural licensing statutes could be interpreted to prohibit anyone but an architect from acting as a construction manager, and that some courts might require a construction manager to be licensed as an architect or engineer. 46 Law and Contemporary Problems 25,

² NRS 624.290 no longer exists.

³ NRS 623.023 was amended in 1995, but the amendments to the statute were largely technical in nature and are not relevant for the purposes of this opinion.

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27 (Winter, 1983). Therefore, licensure as an architect in Nevada certainly appears sufficient to perform services as a construction manager.

Id. at 4.

The opinion concluded that an architect performing services as a construction manager did not require licensure under NRS chapter 624.

Moreover, in analyzing whether a license is required under NRS chapter 624, it is also necessary to examine the specific functions performed by an architect or engineer:

Some jurisdictions have determined that a licensed professional engineer must also have an architectural license when he or she performs work that might lawfully be done by an architect, but only when the functions he or she has performed are outside the scope of his or her engineering license. See, 82 A.L.R. 2d 1004, 1018-19. Other jurisdictions have concluded that when a licensed professional is performing services “which could properly be regarded as within the reach of both the statutes governing the licensing of the two professions, the architect or engineer is considered to perform under the statute under which he or she was licensed and is not affected by the fact that the services came incidentally within the purview of the other licensing statute.”

Schmidt v. Kansas State Bd. of Technical Professions, 21 P.3d 542, 551 (Kan. 2001) (emphasis added).

The *Schmidt* case further underscores the need for specific facts for meaningful analysis in determining whether an architect or engineer who performs construction management services is acting outside the scope of his respective professional licenses. The Contractors’ Board must carefully examine whether the construction management services performed are

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outside the scope of the professional engineering or architectural license or are incidental to the functions performed as a licensed engineer or registered architect. The Contractors' Board must make its determinations on a case-by-case basis when evaluating whether an architect (licensed under NRS chapter 623) or an engineer (licensed under NRS chapter 625) who also performs construction management services is acting as a contractor as defined under NRS 624.020(4).

CONCLUSION TO QUESTION ONE

A registered architect or a licensed professional engineer acting within the scope of his professional license is not a "contractor" as defined under NRS 624.020(2). In the context of NRS 624.020(4), a registered architect or licensed professional engineer who also performs construction management services must be cautious to ensure that the construction management functions are permitted within the scope of his primary professional license under NRS chapters 623 or 625, or are appropriately incidental to his performance as a registered architect or licensed professional engineer. Otherwise, under NRS 624.020(4), the Contractors' Board may find factual support for a determination that the performance of construction management services which are outside the scope of the architect's or engineer's professional license constitute acts of a "contractor" under NRS chapter 624.

QUESTION TWO

May the Contractors' Board clarify the definition of the term "construction manager" as used in NRS 624.020(4)?

ANALYSIS

If an agency desires to make a rule or statement of general applicability, which interprets law or policy, such rule or statement of interpretation would be considered a regulation pursuant to NRS 233B.038(1). The Contractors' Board is specifically authorized to adopt regulations for the purpose of carrying out its duties as set forth in NRS chapter 624. NRS 624.100. To date, however, the Contractors' Board has not adopted any regulations with respect to the definition of the term "construction management." See Nevada Administrative Code (NAC) chapter 624. Consequently, the Contractors' Board should consider

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adopting regulations pursuant to NRS chapter 233B for the purpose of defining the term “construction manager.”

In doing so, however, the Contractors’ Board’s adoption of such regulations must not be “inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts or impairs, limits or restricts the statute” to be administered by the agency. 1 AM.JUR.2d Administrative Law § 132; *Carmen v. Sims*, 115 S.E.2d 140, 144 (W. Va. 1960). An administrative agency may only carry into effect the intent of the legislature as expressed by the statute. *Id.* “An agency may not legislate under the guise of rule making power. Rules must be written within the framework and policy of the applicable statutes. They may not amend or change enactments of the legislature.” *Kitsap-Mason Dairymen’s Assoc. v. Washington Tax Comm.*, 467 P.2d 312, 315 (Wash. 1970) (citations omitted).

Although the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend. . . . In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. The agency is only authorized to determine facts which will make the statute effective.

Sheriff, Clark County v. Luqman, 101 Nev. 149, 153, 697 P. 2d 107, 110 (1985) (citations omitted)..

The use of the term “construction manager,” as set forth in NRS 624.020(4) (definition of “contractor”), is not specifically defined by statute or regulation. NRS chapter 624 also does not define the terms “management” or “counseling services.” Harris & Associates (Harris), an engineering firm that performs construction management services, argues that the definition of “construction manager” must distinguish between an “At-Risk” construction manager and an “Agency” construction manager. Such a distinction has not been addressed in Nevada law; however, Harris argues that an “At-Risk” construction manager is a contractor subject to the licensure requirements of NRS chapter 624, but an “Agency” construction manager is not. Harris & Associates, Position Statement to the Attorney General (June 27, 2002) at 1-2, 7. The distinction is that an “At-Risk”

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construction manager commits to delivering the project at a guaranteed maximum price and acts as a consultant to the owner in the development and design phases, and as a general contractor during the construction phase. *Id.* at 4, Ex. A. An “Agency” construction manager has been described as providing a fee-based service in which the construction manager is responsible exclusively to the owner and acts in the owner’s interests at every stage of the project. *Id.* The “Agency” construction manager is involved in comprehensive management of every stage of the project, beginning with the original concept. *Id.*

Harris raises these concerns regarding the definition of construction manager. The Board’s statutes and regulations, however, do not address or provide for the “At-Risk” and “Agency” distinctions. Moreover, the legislative history is not helpful in rendering an accurate interpretation and creates more uncertainty as to the definition of construction manager. See Assembly Bill 172, Hearing Before the Assembly Committee on Government Affairs, 1975 Legislative Session 3-4 (February 11, 1975) and Hearing Before the Senate Committee on Government Affairs Committee, 1975 Legislative Session 18 (April 30, 1975). See also Senate Bill 342, Hearing Before the Assembly Committee on Ways and Means, 1981 Legislative Session 20 (May 14, 1981).

In summary, the legislative history indicates that in 1975 the State Public Works Board had a need to define the term “contractor” to include “construction manager.” In 1981, however, when the role of a “construction manager” was expanding to apply to all projects, not just federally funded projects, the term “construction manager” was no longer necessary and was removed from the statutes governing Public Works’ projects under NRS chapter 341. However, the term “construction manager” was not removed from NRS chapter 624 in 1981. Accordingly, the legislative history concerning the term “construction manager,” as defined by NRS 624.020(4), does not prove to be helpful in determining its meaning.

The Contractors’ Board is charged with the responsibility of carrying out the provisions of NRS chapter 624. That responsibility necessarily may include determining whether an individual is acting as a construction manager, and thus a contractor, as defined in NRS 624.020(4). In such circumstances, and in the absence of a regulation or statute further clarifying the term “construction manager,” the Contractors’ Board would be required to apply a given set of facts and, based upon its reasonable

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interpretation of the phrase as it is commonly understood, determine whether an individual was engaged in construction management. However, given the lack of a regulatory or statutory definition of the phrase “construction manager,” and given the differences that may exist as to what constitutes a reasonable and commonly understood definition, it is recommended that the Contractors’ Board seek to define the term by way of a duly adopted regulation or by way of statutory clarification.

CONCLUSION TO QUESTION TWO

The Contractors’ Board’s interpretation of a statute, in this case NRS 624.020(4), must be consistent with the statutory framework established by the Legislature. Since the legislative history does not provide any guidance and the Contractors’ Board has not adopted any regulations to further define the term “construction manager,” any desire by the Contractors’ Board to further clarify the term “construction manager” should be carried out in accordance with NRS chapter 233B. Should the Contractors’ Board desire statutory clarification, action by the Nevada Legislature would be required.

QUESTION THREE

Does the State Board of Architecture, Interior Design and Residential Design and the State Board of Professional Engineers and Land Surveyors have disciplinary authority over its licensees when those licensees perform construction manager services?

ANALYSIS

As addressed in the analysis of Question One, above, the functions of performing construction management services may be viewed in appropriate circumstances as functions that are also performed within the scope of an architect’s or engineer’s practice. If a complaint were to arise against a registered architect or licensed engineer who also performed construction management functions within the scope of his primary license, the respective licensing board would have authority to discipline the architect or engineer depending on the violation. NRS 623.150; 623.270; 625.152; and 625.410. Otherwise, if the construction management functions performed and at issue are outside the scope of the architect’s or engineer’s practice, and not incidentally related thereto, the Contractors’ Board may have jurisdiction over the complaint under the provisions of NRS chapter 624. See NRS 624.700 and 624.020(4).

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A licensing board does not have authority to enforce another board's statutes or regulations. Such boards possess only that authority specifically granted to them by the Legislature. Consequently, the Board of Architecture, Interior Design and Residential Design and the State Board of Professional Engineers and Land Surveyors could not bring disciplinary action for a violation of NRS chapter 624.⁴

CONCLUSION TO QUESTION THREE

Neither the State Board of Architecture, Interior Design and Residential Design nor the State Board of Professional Engineers and Land Surveyors has authority to bring disciplinary action for violations of NRS chapter 624.

Architects and engineers acting in their professional capacities and performing construction management functions are subject to disciplinary actions under NRS chapters 623 and 625, respectively. Moreover, if the construction management functions performed and at issue are outside the scope of the architect's or engineer's practice, and not incidentally related thereto, the Contractors' Board may have jurisdiction over the complaint under the provisions of NRS chapter 624.

Sincerely,

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⁴ Contractors are provided an exemption to the architect licensing statutes, pursuant to NRS 623.330, to allow contractors to provide their own drawings for their own construction activities. However, NRS 624 provides no grounds for disciplinary action for falling below the standard of care in the design of the plans or for plans prepared by someone other than the contractor.