ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

KETAN D. BHIRUD
General Counsel

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701

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OPINION No. 2017-04

CONTRACTORS BOARD; LICENSURE; COMMON ACTION AGENCY: The Contractors Board (Board) is charged with the responsibility to interpret and enforce the provisions of Chapter 624. Those responsibilities include the duty to make case-by-case factual determinations concerning the nature of any construction management activities (CAA) that may subject a person to the licensure requirements of Chapter 624.

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

Dear Ms. Grein:

The Nevada State Contractors Board (Board) has requested an opinion from this office on eight questions concerning potential exemptions from licensure by the Board for weatherization projects recommended and reviewed by "community action agencies" (each a CAA and, collectively, CAAs) and performed by various licensed contractors. The projects in question are performed for homeowners using public funds disbursed pursuant to contracts awarded by the Division of Housing, an agency of the Nevada Department of Business and Industry. The Board has inquired about its legal responsibilities in comparison to those of the Division of Housing and possibly other state agencies.

For purposes of this opinion, the Board's eight questions have been consolidated and restated into four general areas of inquiry concerning: (1) the legal status of CAAs under NRS Chapter 624 (Chapter 624); (2) the applicability of express exemptions from licensure under Chapter 624; (3) the possibility that implied exemptions are contained or implied in statutory provisions outside of Chapter 624; and (4) perceived jurisdictional conflicts between the state

agencies with a legal or statutory obligation to regulate CAAs or approve, monitor, or supervise the projects in which they engage.

QUESTION ONE

Is a CAA a "construction manager" and, as such, generally subject to licensure by the Board?

SUMMARY CONCLUSION TO QUESTION ONE

As we previously advised in 2002, the Board is charged with the responsibility to interpret and enforce the provisions of NRS Chapter 624. That responsibility necessarily includes the duty to determine whether a CAA has worked as a construction manager, and thus as a "contractor" as defined in NRS 624.020(4). While the statutory definition of "contractor" includes a "construction manager who performs management and counseling services on a construction project . . . ," that definition does not further describe the functions or attributes of a "construction manager." Given the continued absence of a regulation or statute further clarifying the term "construction manager," the Board is required to determine, based upon its reasonable interpretation of the phrase as it is commonly understood, whether a particular CAA has performed "construction management" activity in connection with a weatherization project undertaken pursuant to a contract awarded by the Division of Housing.

ANALYSIS

Unless NRS 624.031 sets forth an applicable exemption, "[i]t is unlawful for any person or combination of persons to . . . [e]ngage in the business or act in the capacity of a contractor . . . or [s]ubmit a bid on a job . . . without having an active license" as required by Chapter 624. *See* NRS 624.700. The definition of a "contractor" is set forth at NRS 624.020 and states in relevant part:

> 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*.

Id. (emphasis added).[1]

The terms "construction manager," "management," and "counseling services" are not further defined in statute or regulation. *See id.* In connection with a prior request for an opinion from the Attorney General in 2002, Harris & Associates (Harris), an engineering firm then performing construction management services, argued that the definition of "construction manager" must distinguish between an "at-risk" construction manager and an "agency" construction manager. Harris agreed that an at-risk construction manager is a contractor subject to the licensure requirements of Chapter 624, but disputed that an agency construction manager is likewise subject to licensure. *See* Op. Nev. Att'y Gen. No. 2002-37 (Oct. 7, 2002) (citing Harris & Associates, Position Statement to the Attorney General (June 27, 2002) (the "Harris Position Statement") at 1-2, 7).

In Harris' view, the distinction between at-risk and agency construction management concerns the manager's assumption or non-assumption of a contractual obligation to furnish labor and materials for specified consideration. According to Harris, the at-risk manager acts as a consultant to the owner in the development and design phases but later acts as a general contractor during the construction phase, thus assuming an obligation to deliver a physical improvement to real property at a guaranteed maximum price. *See* Harris Position Statement at 4, Ex. A. Harris further argued that an agency construction manager may supervise or monitor the general contractor on the owner's behalf, but does not incur a separate obligation to furnish labor and materials for the construction of the improvement. *Id.* Unlike the at-risk construction manager, the agency construction manager performs a singular management function at every stage of the project, beginning with the original concept and ending with the completion of construction. *Id.; see also Fifth Day, LLC v. Bolotin,* 172 Cal. App. 4th 939 (2009) (holding that, under a *differently-worded* California statute, an entity providing services akin to an agency construction manager was not subject to licensure in California).

The distinction between management and construction functions is not recognized in Nevada law as a basis for exempting isolated or segregated management activity from licensure requirements. In this regard, NRS 624.020 does not confine a person's status as a "construction

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[1] As used in subsection 4 of NRS 624.020, the term "professional fee" means "any compensation" received by a construction manager for the provision of management and counseling services. *See* NAC 624.010.

manager" to situations in which the person performs a combination of management and construction functions. According to the plain language of NRS 624.020(4), the only relevant inquiry is whether the person performs "management and counseling services on a construction project for a professional fee." As noted above, the Board has not adopted a regulation to describe or delineate the types of activity that may constitute management or counseling services. As a result of this omission, the Board must enforce licensure requirements on a case-by-case basis in view of all relevant facts and circumstances. As further noted by the Office of the Attorney General in an official opinion issued in 2002 (the "2002 Opinion"):

> The ... Board is charged with the responsibility of carrying out the provisions of NRS [C]hapter 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 ... Board would be required to apply a given set of facts and, based upon its reasonable 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 ... Board seek to define the term by way of a duly adopted regulation or by way of statutory clarification.*[2]

Op. Nev. Att'y Gen. No. 2002-37 (October 7, 2002) (emphasis added).

Since the issuance of the 2002 Opinion, neither the Board nor the Legislature has adopted any provisions of law that supplement the definition of "construction manager" as set forth at NRS 624.020(4). Given the absence of regulatory guidance on the topic of construction management, it remains the responsibility of the Board to ascertain on a case-by-case basis whether a person has provided management or counseling services on a construction project for a professional fee. Those determinations should be made in reference to all available facts

[2] Further guidelines as to the proper process and threshold concerns relative to the same are discussed in that 2002 Opinion from this Office. *See Id.*

according to the principles stated in the 2002 Opinion, and must ultimately be rendered on the basis of substantial evidence.[3]

QUESTION TWO

Assuming the relevant facts of a case demonstrate that a CAA has acted as a construction manager in connection with a contract awarded by the Division of Housing, is the CAA properly characterized as an "authorized representative" of the state, such that the CAA is exempt from licensure by the Board pursuant to NRS 624.031(1)?

SUMMARY CONCLUSION TO QUESTION TWO

If the relationship between the Division of Housing (DOH) and a CAA is one of "government" to "authorized representative," whereby the DOH directs or controls the acts of the CAA and thereby assumes, expressly or by implication, responsibility for the CAA's management activities, NRS 624.031(1) exempts that CAA from licensure by the Board.

ANALYSIS

While Chapter 624 is broad in scope as to the persons and entities subject to licensure thereunder, it also provides a limited number of exemptions. Of potential relevance to CAAs is the exemption for "*[w]ork performed exclusively by an authorized representative* of the United States Government, the State of Nevada, or an incorporated city, county, irrigation district, reclamation district, or other municipal or political corporation or subdivision of this State." NRS 624.031(1) (emphasis added).

The scope of this exemption was explained in some detail in a 1950 opinion of the Attorney General (the "1950 Opinion"). *See* Op. Nev. Att'y Gen. No. 1950-904 (Apr. 11, 1950). The 1950 Opinion reads in relevant part as follows:

> *The term authorized representative has no technical meaning and should not be construed to mean that contractors who submit bids and undertake to do work for the state, counties and municipalities should be exempt from the provisions of an Act the purpose of which is for the protection and safety of the public.* The plain meaning of the word representative is being or acting as the agent of another especially by authority . . . . '[On the other hand,

[3] "Substantial evidence is that which a reasonable mind could find adequate to support a conclusion." *Kolnick v. Nev. Emp't Sec. Dep't*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996).

> as stated in *American Jurisprudence,*] [a]n independent contractor . . . [of any entity, including of the government] may be distinguished from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in the performance of such contract, but only as to the result.' The term 'authorized representative' is . . . [further] defined in *Bowles v. Wheeler*, wherein the Court, in construing the provisions of the Emergency Price Control Act, held ... that: 'The Act (Sec. 201 (a)) authorizes the appointment of employees 'to carry out the functions and duties' of the administrator. Other provisions of this section in any place, and the administrator is authorized to issue such regulations and orders as he deems necessary to carry out the purposes and provisions of the act. The language is sufficient to give the administrator power to delegate the suite bringing function to any authorized representative.' [Accordingly,] *[a]n independent contractor* who contracts to build, construct, alter, repair, add to or improve any building is not performing any delegated function, and *is not an authorized representative of the county.*

Id. (internal citations omitted; emphasis added).

As noted in the 1950 Opinion, a "representative" is the equivalent of an "agent" under principles of agency law. "In an agency relationship, the principal possesses the right to control the agent's conduct." *Hunter Mining Laboratories, Inc. v. Management Assistance, Inc.*, 104 Nev. 568, 570, 763 P.2d 350, 352 (1988) (*citing Restatement (Second) of Agency* § 14 (1958)). However, a contractual right to control some aspect of another party's conduct will not necessarily give rise to an agency relationship. *Id.* Similarly, a written contract that purports to disavow an agency relationship between two parties is not conclusive as to the nature of the relationship. *See Bruntjen v. Bethalto Pizza, LLC*, 18 N.E. 3d 215, 239 (2014) (holding that the facts of a case may demonstrate an agency relationship notwithstanding contractual provisions to the contrary).

There is no reason to believe that a CAA must be characterized as a government representative simply because of its status as an authorized recipient of public funds. Here, CAAs or "'community action agencies' mean private corporations or public agencies established pursuant to the Economic Opportunity Act of 1964, Public Law 88-452, which are authorized to administer money received from federal, state, local or private funding entities to assess, design, operate, finance and oversee antipoverty programs." NRS 701B.921 (9); *see also* Senate Bill

152, Hearing Before the Senate Committee on Energy, Infrastructure and Transportation, 2009 Legislative Session 3 (March 30, 2009) (stating that the source of reference to "community action agencies" is federal law).

Under the Economic Opportunity Act of 1964 (Act), originally codified at 42 U.S.C. § 2790 but later repealed, community action agencies were generally described as public or private nonprofit agencies created to administer the public funds designated for use in connection with "community action programs." *See* Pub. L. No. 88-452 § 202, August 20, 194, 78 Stat. 508, 516. The current source of funding for community action programs is the Community Service Block Grant (CSBG), authorized by the Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, August 13, 1981, 95 Stat. 357, as amended by the Coates Human Services Reauthorization Act of 1998, P.L. 105-285. This legislation authorizes federal funding for a variety of projects including weatherization projects administered by the DOH and its authorized representatives.

In summary, CAAs are nonprofit agencies that contract with the DOH to manage weatherization projects funded fully or in part through the CSBG. As a general rule, a CAA would not be an "authorized representative" of the state unless the factual specifics of the relationship suggested that the DOH directed or controlled the actions of the CAA, thereby asserting indirect or attenuated control over the management of the project itself. In other words, with respect to the management of the project, the CAA would be an authorized representative of the state if the CAA acted on behalf of and not independently of the DOH.[4] Under these circumstances, the state would potentially be liable for the errors or omissions of the CAA. *See In Re Amerco Derivative Litigation*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011) (holding that, under corporate agency law, the tortious acts of corporate agents are imputed to the corporation).

On the other hand, if the CAA were an independent contractor to the DOH, the state would likely not be liable for the errors or omissions of the CAA. For example, in the case of *United States v. Orleans*, the United States Supreme Court held that certain nonprofit CAAs designated as independent contractors were "not federal agencies or instrumentalities, nor . . . [were] their employees federal employees within the meaning of the Federal Tort Claims Act." 425 U.S. 807, 819 (1976); *see also Community Action Agency of Huntsville, Madison County, Inc. v. State of Alabama,* 406 So.2d 890, 892 (Ala. 1981) (holding that, where a nonprofit CAA is an independent contractor, it "*is not an agent of the federal, state or local government*")

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[4] As noted above, NRS 624.031(1) exempts "*work performed exclusively* by an authorized agent . . ." of the government (emphasis added). The "work performed" – as distinguishable from the "work of improvement" (see NRS 624.029) – is the work for which the authorized representative is responsible under the terms of its contract with the government. When the representative contracts to perform management services only and does not subcontract any portion of those services to others, the work is performed exclusively by the representative even though construction subcontractors may also be engaged to build the work of improvement.

(emphasis added); *Morse v. North Coast Opportunities, Inc.*, 118 F.3d 1338 (9th Cir. 1997) (holding similarly and where the government could not be liable for the action of the nonprofit CAA). In reaching this conclusion, the *Orleans* Court reasoned:

> [T]he question here is not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government. Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation. Perhaps part of the cost to the Government often includes the expense for public liability insurance, but that is a matter of either contract or choice. The respondents did not sue the community action agency itself. Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs or of state governmental bodies into federal governmental acts.

425 U.S. at 815-816.

As the Court noted in the above passage, independent contractors are "responsible . . . for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation." Agents or representatives, by contrast, act on behalf of, and take direction from the government as to the means of completing a construction project or work of improvement. Whether a CAA is properly characterized as an authorized representative of the state depends upon the extent to which the DOH directs or controls the actions of the CAA. While individual contractual provisions may purport to disavow an agency relationship between the state and the CAA, the facts of the case may suggest otherwise. As discussed in response to Question 1 above, it is the Board's responsibility to evaluate all available facts on a case-by-case basis when determining whether a construction manager qualifies for an exemption from licensure pursuant to NRS 624.031(1).

QUESTION THREE

Is a CAA impliedly exempt from licensure by the Board on account of licenses or approvals issued or held pursuant to statutes not administrated by the Board, including licensure as an "energy auditor" pursuant to NRS Chapter 645D, or the statutory authorization to issue "requests for proposal for contractors" pursuant to NRS 701B.921(6).

SUMMARY CONCLUSION TO QUESTION THREE

That a CAA may hold a license as an "energy auditor" pursuant to NRS Chapter 645D, or may otherwise be authorized to issue requests for proposal from contractors pursuant to NRS 701B.921(6), does not imply an exemption from the licensure requirements of Chapter 624.

ANALYSIS

"The primary purpose of Nevada's licensing statutes [as set forth in Chapter 624] is to protect the public against both faulty construction and financial irresponsibility." *MGM Grand Hotel v. Imperial Glass Co.*, 533 F.2d 486, 489 (9th Cir. 1976); *see also* Op. Nev. Att'y Gen. No. 1970-637 (Jan. 13, 1970) (opining similarly); Op. Nev. Att'y Gen. No. 1949-726 (Feb. 23, 1949) (opining similarly).

"[T]he Legislature intended to preempt the field of licensing contractors in the State of Nevada through the passage of . . . Chapter 624 . . . ." *See* Op. Nev. Att'y Gen. No. 1976-208 (Oct. 5, 1976) (opining that municipal licensing is merely an additional requirement, following licensure by the state); *see also* Op. Nev. Att'y Gen. No. 1970-637 (Jan. 13, 1970) (opining that, even though its affiliated general contractor already holds a license from the Board, the subdivision owner and developer must also be licensed by the Board); Op. Nev. Att'y Gen. No. 2002-37 (Oct. 7, 2002) (opining that even architects, who are otherwise expressly exempted from licensure by the Board by specific language in NRS 624.020, must still be licensed by the Board if they act as a contractor and outside the scope of their professional license as architects). As to the broad scope of Chapter 624, this Office has previously stated:

> In applying the exemption provisions of a licensing Act ... the same rule applies as in the law of taxation, i.e., the person claiming the exemption from the licensing provisions of the law must point to a statute *clearly and expressly* providing such an exemption. '*Those who seek shelter under an exemption law must present a clear case,*

> *free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public.*'

Op. Nev. Att'y Gen. No. 1949-726 (Feb. 23, 1949) (emphasis added).

Unlike its express exemptions for architects and engineers, Chapter 624 contains no specific exemptions for "energy auditors" or for CAAs acting pursuant to NRS 701B.921(6). Similarly, the provisions of NRS Chapters 645D and 701B contain no express exemptions for community action programs or similar projects funded through the CSBG. Since exemptions are strictly construed in favor of requiring licensure, the provisions of NRS Chapters 645D and 701B are not reasonably construed to exempt CAAs from the licensure requirements of Chapter 624.

QUESTION FOUR

Which state entities are primarily responsible for regulating CAAs?

SUMMARY CONCLUSION TO QUESTION FOUR

If a CAA is exempt from the licensing requirements of the Board, either because the Board determines that a particular CAA is not a "construction manager" or the DOH has an agency relationship with the CAA, then that CAA would be regulated by the DOH and the Division of Real Estate (DRE). On the other hand, if a CAA is subject to the licensing requirements of the Board, then it would also be regulated by the Board, as only the Board has jurisdiction to enforce Chapter 624.

ANALYSIS

A public body may exercise only those powers that have been conferred upon it by statute. Where a particular mode of procedure is ordained, all other procedures are excluded. *See Caton v. Frank, Mayor Pro Tempore,* 56 Nev. 56, 44 P. 2d 521 (1935); *see also State v. Central Pacific Railroad Co.,* 21 Nev. 270, 30 P. 693 (1892) (overruled on other grounds); *see generally* Op. Nev. Att'y Gen. No. 1973-124 (Apr. 3, 1973). With respect to perceived jurisdictional conflicts between discrete regulatory agencies, this Office has stated:

> 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, . . . [another State of*

> *Nevada licensing board] could ... [and should] not bring disciplinary action for a violation of NRS [C]hapter 624.*

Op. Nev. Att'y Gen. No. 2002-37 (Oct. 7, 2002) (emphasis added).

Although the DRE licenses CAAs as "energy auditors" under NRS Chapter 645D, and the DOH in turn provides CAAs with their mandate under NRS Chapter 701B, the administration of NRS Chapter 624 is entrusted solely to the Board. *See* NRS 624.040 *et seq.* Accordingly, if a CAA is exempt from the licensing requirements of the Board, either because the Board determines that a particular CAA is not a "construction manager" or the DOH has an agency relationship with the CAA, then that CAA would be regulated by the DOH and the DRE. On the other hand, if a CAA is not exempt from the licensing requirements of the Board, then it would also be regulated by the Board, as only the Board has jurisdiction to enforce Chapter 624.

CONCLUSION

As we previously advised in 2002, the Board is charged with the responsibility to interpret and enforce the provisions of Chapter 624. Those responsibilities necessarily include the duty to make case-by-case factual determinations concerning the nature of any construction management activities that may subject a person to the licensure requirements of Chapter 624. There is a similar duty to determine on a case-by-case basis whether applicable exemptions may apply. As they may pertain to CAAs, the only applicable exemptions are those expressly set forth in Chapter 624. If the Board determines that a CAA is exempt from the licensing requirements of Chapter 624, then that CAA would be regulated solely by DOH and DRE. On the other hand, if the Board determines that a CAA is subject to the licensing requirements of Chapter 624, then the CAA would also be regulated by the Board, as only the Board has jurisdiction to enforce the provisions of Chapter 624.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
LOUIS V. CSOKA
Deputy Attorney General

LVC/JLC