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We have completed an audit of the University and Community College System of Nevada's Capital Construction Projects and Contracting and Bidding Procedures. This report represents one component of the audit required by Chapter 442, Statutes of Nevada, 2003 (A.B. 148). The purpose of legislative audits is to improve state government by providing the Legislature, state officials, and Nevada citizens with independent and reliable information about the operations of state agencies, programs, activities, and functions. The results of our audit, including findings, conclusions, recommendations, and the University and Community College System of Nevada's response, are presented in this report.

We wish to express our appreciation to the management and staff of the University and Community College System of Nevada for their assistance during the audit.

Respectfully presented,

Paul V. Townsend, CPA
Legislative Auditor

October 19, 2004
Carson City, Nevada

STATE OF NEVADA
UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA
CAPITAL CONSTRUCTION PROJECTS AND
CONTRACTING AND BIDDING PROCEDURES

AUDIT REPORT

Table of Contents

	<u>Page</u>
Executive Summary	1
Introduction	9
Background	9
Capital Construction Funding	9
Construction Management	10
Purchasing Departments	11
Scope and Objective	12
Findings and Recommendations	13
Energy Retrofits Did Not Comply With Laws and Policies.....	13
Energy Retrofit Legislation	14
Energy Retrofit Projects Not Competitively Bid.....	15
Prevailing Wage Requirements Not Documented	20
Loan Obligations Violated State Debt Provisions	22
Energy Savings Not Always Cost Neutral.....	23
Measurement and Verification Needs Further Development	24
Construction Management Process Can Be Strengthened	26
Purchase Orders Were Primary Contract Documents	26
Change Order Procedures Need Clarification	28
Project Inspections Not Documented	29
Facilities Management Sections Not Sufficiently Involved.....	30
Reliable Project Information Not Available	31
Purchasing Process Can Be Improved	32
Additional Controls Needed to Ensure Competition.....	32

STATE OF NEVADA
UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA
CAPITAL CONSTRUCTION PROJECTS AND
CONTRACTING AND BIDDING PROCEDURES

AUDIT REPORT

Table of Contents
(continued)

	<u>Page</u>
Personal and Consultant Services Policies Should Be Developed.....	34
Appendices	
A. Audit Methodology.....	36
B. Prior Audit Recommendations.....	38
C. Assembly Bill 148.....	39
D. Carlin Fire Science Academy Chronology of Events.....	40
E. Energy Retrofit Projects Conducted at UNR and UNLV.....	42
F. Legislative Counsel Legal Opinion.....	43
G. University and Community College System of Nevada's Response.....	59

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

Background

The cost of buildings and improvements at the University and Community College System of Nevada (UCCSN) was approximately \$1.2 billion according to the fiscal year 2003 audited financial statements. State laws and the Board of Regents' policies provided the framework used by UCCSN institutions to procure these assets. NRS Chapters 338 and 341 establish requirements for the construction and management of UCCSN public work projects. Energy retrofits are also subject to the general requirements of NRS Chapters 338 and 341. In addition, specific statutory provisions can apply to retrofit projects. These specific provisions recognize the unique nature and importance of energy conservation and provide optional procedures for procuring and financing these projects.

UCCSN is exempt from NRS Chapter 333—the State Purchasing Act. However, the Board of Regents has established policies for the procurement function at UCCSN institutions. Within UCCSN, there are three purchasing departments that are responsible for all purchasing functions. During fiscal year 2003, these departments purchased more than \$176 million in goods and services.

Purpose

The purpose of our audit was to determine whether energy retrofit and other capital construction projects and contracting and bidding procedures were carried out in

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

accordance with laws, policies, and appropriate management standards. Our audit included the financial and administrative activities of UCCSN's energy conservation projects, including "shared savings" programs conducted since fiscal year 1993; construction projects initiated during the period July 1, 1998, to June 30, 2003; and purchasing transactions recorded in fiscal year 2003.

Results in Brief

UCCSN's internal controls did not always ensure that capital construction projects and contracting and bidding procedures were carried out properly. We found millions of dollars in energy retrofit projects that were not conducted in accordance with state laws, Board of Regents' policies, or appropriate management standards. Due to misinterpretations of law, violations of policies, and opportunities to use a convenient financing method, many of these projects were not awarded through a competitive process. Fair and open competition for contract awards is critical to the success of construction activities. Open competition helps ensure the best price or the best overall value for money spent, in addition to demonstrating to the public that resources are used efficiently and effectively, and that contracts are awarded fairly.

While UCCSN has strengthened some controls over the process, specific policies and procedures are needed to ensure future energy retrofit projects are properly executed. Additional policies and procedures would also improve the general management of all capital construction projects and help ensure purchases are properly executed.

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

Principal Findings

- UNR executed 14 energy retrofit contracts, totaling \$8.2 million, with Sierra Pacific Power Company since 1992. None of the contracts were awarded based on a competitive bidding process. As a result, several of these projects violated the requirements of NRS Chapter 338. Additionally, all were in violation of the Board of Regents procurement policies. The failure to bid these projects also resulted in allegations of fraudulent acts associated with UNR's management of the energy retrofit program. During the course of our examination, we conducted audit steps to examine these issues. However, our examination did not identify evidence to support these allegations. (page 15)
- Sierra Pacific Power Company discontinued its energy retrofit program with UNR in May 2000. This occurred during the initiation of a proposed retrofit at the Howard Medical Building. To facilitate the completion of this project, UNR instructed Gardner Engineering, Inc., a local contractor, to install the planned energy saving measures at the building. However, UNR did not conduct a competitive bidding process nor execute a construction contract for work totaling more than \$500,000 on this project. (page 17)
- During fiscal year 2001, UNR signed a letter of understanding with Siemens Building Technologies, Inc. (Siemens) establishing a 3-year commitment for energy retrofit services. As a result, two projects totaling approximately \$6 million have been conducted. Although this commitment resulted from a competitive proposal process, the selection of Siemens was not conducted in compliance with the terms outlined in the proposal documents. For

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

example, RFP records did not reveal any evidence that the proposals were evaluated based on demonstrated competence, experience in performing comparable engagements, or reasonableness of cost. Rather, file documentation indicates the award resulted solely from Siemens submission of the lowest interest rate. (page 18)

- Since fiscal year 2000, UNLV contracted with e.three Custom Energy Solutions, LLC (e.three) to conduct five retrofit projects totaling \$6.2 million. UNLV's selection of e.three was not the result of a competitive bidding process. Rather, the decision was based on a competitive qualification process conducted by the State Public Works Board. According to UNLV records, two of these projects involved buildings that were constructed with state or federal funds and were therefore public works. Consequently, the competitive bidding requirements of State law were not complied with on these two projects. (page 19)
- Public works projects are subject to the prevailing wage provisions of NRS Chapter 338. For instance, a public body must notify the Nevada Labor Commissioner of any contract if the project is \$100,000 or more. These requirements help facilitate the enforcement of the state's prevailing wage laws. Our analysis of the 21 UNR and UNLV retrofit projects exceeding \$100,000 indicates that only 3 had documentation supporting compliance with prevailing wage requirements. The institutions did not have evidence of compliance on any of the other 18 projects that qualified as public works. (page 20)
- A UCCSN project for new construction or improvement to an existing structure is a public work if 25% or more of the costs of the building, as a whole, are paid from money appropriated from the state or from federal money. Based on this law, we considered a retrofit project a public work if 25% or

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

more of the building's total cost was provided by state appropriation or federal funds. In contrast, UCCSN staff indicate only the funding source of the current project should be considered—not the total cost of the building. That is, if 25% or more of current project funding comes from the state or federal funds, then the retrofit would be considered a public work. Since detailed cost and funding records are not required under this interpretation, they were not maintained. Because of this disparity of interpretation, clarifying legislation is needed to help ensure an accurate and consistent application of this statutory provision. (page 21)

- From 1992 to 1997, UNR incurred \$4.1 million in third-party loan obligations from nine energy retrofit projects. Each obligation was a 10-year installment loan that was paid with legislatively appropriated funds. However, these loan obligations were not created in accordance with NRS Chapter 338 nor contained a nonappropriation clause. As a result, these obligations were in violation of the State's constitutional debt provisions and NRS 353.260 until the contracts were amended in July 1998. (page 22)
- Six retrofit projects did not generate energy savings sufficient to repay the loan costs associated with these improvements. For example, a retrofit project at the Thomas and Mack Center at UNLV had an annual deficit of about \$63,000. Although changes in utility pricing and interest charges eventually eliminated the negative cash flow for some of these projects, the energy savings did not initially meet the program's criteria of cost neutrality. (page 23)
- UNR and UNLV financed their retrofit programs through loans provided by the energy service company responsible for the project. These loans were designed to be repaid with the energy savings generated by the retrofit. As such, debt retirement

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

was linked to the performance of the energy saving measures installed. Although this performance was initially verified, ongoing efforts to confirm the continued realization of energy savings were minimal. As a result, the impact of an individual retrofit project on energy consumption is not certain. (page 24)

- Our examination of 28 construction projects totaling about \$58 million indicated the primary contract document for 14 projects was a purchase order. However, these documents did not contain required contractual clauses and were not approved by the Chancellor if the project exceeded \$400,000. Purchase orders are suitable in some cases but have drawbacks if used in situations involving complex performance requirements. In contrast, seven projects utilized an owner-contractor agreement as the primary document. When this document was used, required clauses were included and contracts were forwarded to the Chancellor for approval. (page 26)
- Change orders increased the cost of two projects by more than \$500,000 each. However, these changes were not approved by the proper authority. Contract changes can have a significant impact on the cost of capital construction. Without appropriate approval, the validity of change orders may not be ensured. While UCCSN has established change order policies and procedures, they need clarification to help ensure full compliance. (page 28)
- In accordance with NRS Chapter 341, the SPWB has delegated certain construction management responsibilities to UCCSN. However, 12 projects with state funding did not have documentation indicating the SPWB performed a final inspection or delegated this responsibility. If inspections are not documented, there is diminished assurance that projects were constructed in accordance with applicable building

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

codes and that life/safety issues were addressed. (page 29)

- Facilities management personnel were not sufficiently involved in two campus construction projects. Specifically, entities other than facilities management administered the construction of UNR's Carlin Fire Science Academy and UNLV's Thomas and Mack Center renovation. These two projects had significant cost overruns. Effective construction management requires active participation of personnel with specialized skills. Without these personnel, there is a greater risk that projects will not be carried out in accordance with laws and procedures. (page 30)
- To determine the magnitude of UCCSN's construction program, we requested financial information for projects conducted during the 5 fiscal years ended June 30, 2003. However, written policies and procedures have not been established to ensure institutions collect this information. As a result, three of the four institutions we examined did not provide reliable data. Without reliable information, management decisions related to capital construction could be impacted. (page 31)
- Forty-three of the purchases we examined were subject to competitive procurement requirements outlined in the Board of Regents' Handbook. A formal bid process was not conducted in three instances and two purchases had only one quote instead of two. Adherence to sound procurement policies and procedures will help ensure UCCSN obtains the best goods or services at the best price. (page 32)
- Personal and consultant services involving technical, professional, or specialized skills are exempted from the competitive pricing requirements established for UCCSN purchases. Approximately 10 percent of the purchase orders we reviewed were for the

EXECUTIVE SUMMARY

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA CAPITAL CONSTRUCTION PROJECTS AND CONTRACTING AND BIDDING PROCEDURES

procurement of these services. Even though Board policy requires the development of policies relative to the procurement of personal and consultant services, UCCSN's three purchasing departments had not done so. Without policies and procedures, these services may not be properly procured. (page 34)

Recommendations

This report contains six recommendations to improve the management of capital construction projects and contracting and bidding procedures. Specifically, UCCSN policies and procedures regarding the management of capital construction projects, including the energy retrofit program, and purchasing practices should be developed to help ensure compliance with laws and Board policy. In addition, legislation should be requested to clarify the definition of a public work. Further, UCCSN needs to finalize an agreement with the State Public Works Board outlining project management and inspection responsibilities. (page 62)

Agency Response

The agency in its response, to our report accepted all 6 recommendations. (page 59)

Introduction

Background

The cost of buildings and improvements for the University and Community College System of Nevada (UCCSN) was approximately \$1.2 billion according to the fiscal year 2003 audited financial statements. State laws and the Board of Regents' policies provided the framework used by UCCSN institutions to procure these assets.

NRS Chapters 338 and 341 establish requirements for the procurement and management of public work projects at UCCSN institutions. The specific applicability of these statutes to an individual project is impacted by the location and cost of the related building. Energy retrofits are considered capital construction projects and, in certain instances, are subject to the general requirements of these chapters. In addition, specific sections of NRS can apply to UCCSN retrofit projects. These specific provisions recognize the unique nature and importance of energy conservation and provide optional procedures for procuring and financing these projects.

The Board of Regents' Handbook also establishes general guidelines for the award of capital construction contracts. For projects with no state funding, institutions may select a contractor based on any qualifications they establish. Projects using state funding must be procured through a competitive quotation or bidding process.

Capital Construction Funding

UCCSN institutions fund their capital construction projects through a variety of sources. UCCSN records indicate most of the funding has been provided by the State since fiscal year 1991. Other funding sources include federal, institutional, and private funds. Exhibit 1 shows the total state funds appropriated for UCCSN capital improvement projects from the 1997, 1999, and 2001 legislative sessions.

**UCCSN Capital Improvement Projects
State Appropriations**

<u>Legislative Session</u>	<u>Appropriation</u>
1997	\$ 128,604,789
1999	92,819,028
2001	128,524,148
Total	\$ 349,947,965

Source: Capital improvement projects legislation.

The State Public Works Board was responsible for the management of most of the projects funded with these appropriations.

Construction Management

A facilities management section has been established to oversee the construction program at each of the four institutions we examined. Professional staff assigned to these sections have the responsibility for construction management. Staffing can include architects, engineers, construction managers, and certified building inspectors. Additionally, the business center for each institution participates in the contract award process and also in the preparation of construction related documents.

The associated cost of construction management is reflected in the institution's annual budget as part of the operation and maintenance of its physical plant. Exhibit 2 shows the total fiscal year 2003 operating and maintenance expenditures and full-time equivalent (FTE) positions at the four institutions we visited during our audit.

**Operation and Maintenance of Plant
FTE's and Expenditures
Fiscal Year 2003**

<u>Institution</u>	<u>FTE's</u>	<u>Total Expenditures</u>
University of Nevada, Reno	291	\$ 23,906,948
University of Nevada, Las Vegas	325	\$ 23,383,702
Community College of Southern Nevada	141	\$ 10,314,261
Truckee Meadows Community College	60	\$ 5,953,382

Source: Fiscal year 2003 state operating and self-supporting budget to actual comparison reports.

Purchasing Departments

UCCSN is exempt from NRS 333—the State Purchasing Act. However, the Board of Regents has established policies for the management of the procurement function at UCCSN institutions. These procurement policies generally require a competitive purchasing process with contracts awarded to the lowest responsive and responsible bidder based on a variety of criteria. However, exceptions are provided for personal and consultant services, proprietary or single source items, and emergencies.

Three purchasing departments are responsible for procuring goods and services for UCCSN. These departments are located at the Business Center North, on the UNR campus; the Business Center South, on the UNLV campus; and the Community College of Southern Nevada (CCSN). The purchasing departments at the two business centers are responsible for multiple institutions. The department at CCSN is only responsible for purchases at that institution. Exhibit 3 illustrates the value of purchase orders processed at each of these departments in fiscal year 2003.

Exhibit 3

Purchase Orders Processed Fiscal Year 2003

Business Center North (BCN)	Amount
System Administration	\$ 16,321,435
University of Nevada, Reno (UNR)	75,088,236
Desert Research Institute (DRI)	6,829,818
Great Basin College (GBC)	1,647,320
Truckee Meadows Community College (TMCC)	5,918,008
Western Nevada Community College (WNCC)	1,737,913
BCN Total	\$ 107,542,730
Business Center South (BCS)	
University of Nevada, Las Vegas (UNLV)	\$ 52,169,230
Nevada State College (NSC)	1,456,053
BCS Total	\$ 53,625,283
Community College of Southern Nevada (CCSN)	\$ 15,147,013
UCCSN Total	\$ 176,315,026

Source: Purchase order files provided by purchasing departments.

Scope and Objective

This audit was required by Chapter 442, Statutes of Nevada, 2003 (A.B. 148) and was conducted pursuant to the provisions of NRS 218.737 to 218.893. The Legislative Auditor conducts audits as part of the Legislature's oversight responsibility for public programs. The purpose of Legislative audits is to improve state government by providing the Legislature, state officials, and Nevada citizens with independent and reliable information about the operations of state agencies, programs, activities, and functions.

This audit included the financial and administrative activities of UCCSN's energy conservation projects, including "shared savings" programs conducted since fiscal year 1993; construction projects initiated during the period July 1, 1998, to June 30, 2003; and purchasing transactions recorded in fiscal year 2003. The objective of our audit was to determine whether energy retrofit and other capital construction projects and contracting and bidding procedures were carried out in accordance with laws, policies, and appropriate management standards.

Findings and Recommendations

The University and Community College System of Nevada's (UCCSN) internal controls did not always ensure that capital construction projects and contracting and bidding procedures were carried out properly. We found millions of dollars in energy retrofit projects that were not conducted in accordance with state laws, Board of Regents' policies, or appropriate management standards. Due to misinterpretations of law, violations of policies, and opportunities to use a convenient financing method, many of these projects were not awarded through a competitive process. Fair and open competition for contract awards is critical to the success of construction activities. Open competition helps ensure the best price or the best overall value for money spent, in addition to demonstrating to the public that resources are used efficiently and effectively, and that contracts are awarded fairly.

While UCCSN has strengthened some controls over the process, specific policies and procedures are needed to ensure future energy retrofit projects are properly executed. Additional policies and procedures would also improve the general management of all capital construction projects and help ensure purchases are properly executed.

Energy Retrofits Did Not Comply With Laws and Policies

UCCSN institutions did not always comply with existing requirements relevant to the management of energy retrofit projects. For example, contracts were awarded without a competitive bidding process required by state law and the Board of Regents' policy. We also found that prevailing wage requirements were not documented on some of these projects. In addition, loan obligations were incurred in violation of the state's constitutional debt provisions. Further, the energy savings realized on several projects were not sufficient to fully fund the related loan costs. Finally, measurement and verification programs associated with these projects need to be further developed to determine the cost effectiveness of these projects. We attribute these problems to

the general lack of UCCSN policies and procedures related to the performance of energy retrofit programs.

Energy Retrofit Legislation

To help promote energy efficiency in state buildings, Chapter 314, Statutes of Nevada, 1993, amended the public works laws by adding NRS sections 338.1905 and 338.1906. This legislation allowed the Governor to appoint energy retrofit coordinators to facilitate the installation of energy saving measures. After consulting with state agencies, including UCCSN, the coordinator would advertise for retrofit proposals. If sufficient energy savings were demonstrated, the coordinator would select the best proposal and obtain the State Board of Examiners' approval to proceed. To pay for the installation of the project, third-party financing was authorized and debt payments could extend beyond the biennium. Initially, the total amount of money committed under this program could not exceed \$5 million. This maximum was amended to \$15 million by the 2001 Legislature.

The general applicability of NRS Chapter 338 and other statutes to UCCSN was addressed in a legal opinion¹ we requested from the Legislative Counsel. In that opinion, the Legislative Counsel indicated that Section 4 of Article 11 of the Nevada Constitution provides for a separate entity to govern the University System—the Board of Regents. However, the provisions of NRS Chapter 338 simply prescribe the duties of any public body when conducting a public work. Therefore, it was the opinion of the Legislative Counsel that UCCSN was subject to the provisions of Chapter 338 of NRS for any project that falls within the definition of a public work.

Regarding the energy retrofit provisions of NRS 338.1905 and 338.1906, the Legislative Counsel indicated the use of these sections was discretionary. Consequently, UCCSN institutions were not required to conduct their retrofit projects pursuant to these provisions. However, if they did not, the projects would be subject to other aspects of the public works statutes.

¹ See Appendix F for legal opinion.

Energy Retrofit Projects Not Competitively Bid

The energy retrofit program at UCCSN has been concentrated at two institutions—the University of Nevada, Reno (UNR) and the University of Nevada, Las Vegas (UNLV). These two institutions have completed a total of 22 projects with costs exceeding \$21 million, of which 15 did not involve any competitive process.² As a result, several of these projects violated NRS Chapter 338 and most were in violation of the Board of Regents’ procurement policies. Without a competitive selection process, UCCSN may not have obtained the best project at the best available price.

UNR has had the most active energy retrofit program. It has conducted 17 projects totaling about \$15 million since July 1992. UNLV has conducted five projects totaling approximately \$6 million since fiscal year 2000. Both universities have contracted with energy service companies to manage the design and installation of these projects. UNR contracted with Sierra Pacific Power Company and Siemens Building Technologies, Inc., while UNLV contracted with e.three Custom Energy Solutions, LLC.

UNR Projects With Sierra Pacific Power Company

UNR executed 14 energy retrofit contracts totaling \$8.2 million with Sierra Pacific Power Company (SPPCO) under programs approved by the Public Utilities Commission of Nevada (then called the Public Service Commission). These programs—referred to as “Peak Performance” and “Shared Savings”—were designed to postpone the power company’s acquisition of new generation facilities by reducing the demand for energy. To achieve this program goal, SPPCO financed the installation of energy saving measures at its large customers’ facilities. The interest rate charged on this financing was based on a tariff approved by the Public Utilities Commission. The interest rate implicit in this tariff was approximately 13%. However, this amount was not considered to be entirely interest. Program documentation indicates that it included construction management services as well.

² See Appendix E for detailed schedule of UNR’s and UNLV’s projects.

To identify energy saving measures at UNR, SPPCO retained professional engineers to perform energy audits of the campus buildings. Once the measures were identified and agreed to, UNR contracted with SPPCO to finance and install the energy saving measures. However, SPPCO subcontracted with local construction professionals to design and install the equipment. Gardner Engineering, Inc. received 12 of the 14 subcontracts. The other two subcontracts were awarded to Quality Controls Systems and Saveco Electric Co. Although SPPCO subcontracted the design and installation, UNR collaborated with SPPCO in this selection. According to the legal opinion we obtained, this collaboration did not violate any provision of NRS Chapter 338.

Bidding Requirements

UNR executed the first of its 14 “Shared Savings” contracts with SPPCO on July 20, 1992. Two aspects of NRS Chapter 338 regarding competitive bidding could have applied to most of these contracts—the general provisions related to public works, or the discretionary energy retrofit provisions contained in NRS 338.1906. Our review of project management files indicated that UNR did not follow the energy retrofit process pursuant to this section of NRS. That is, a retrofit coordinator was not involved in these transactions, proposal requests were not advertised, and the Board of Examiners’ approval was not obtained. Consequently, these projects were not conducted pursuant to these discretionary provisions. As a result, UNR was required to advertise and award a contract to the lowest responsive and responsible bidder on any of these projects exceeding \$100,000 that met the definition of a public work.

A UCCSN project for new construction or improvements to an existing structure is a public work if 25% or more of the costs of the building, as a whole, are paid from money appropriated from state or from federal money. Therefore, a complete accounting of the cost of a building is needed to determine if an energy retrofit project is a public work. Based on our analysis of UNR’s accounting records and legislative appropriations, we were able to determine that some of the retrofit projects met the definition of a public work. For example, records indicate that the Getchell Library had a cumulative cost of \$6.3 million, of which approximately \$2.6 million was provided by a 1959 Legislative appropriation. As such, about 41% of the building’s cost was paid with

state funding. By performing similar procedures, we were able to conclude that at least three retrofit projects (Getchell Library, Sage, and Howard Medical) were public works subject to the competitive bidding requirements of NRS Chapter 338.

In addition to statutory bidding requirements, the Board of Regents' Handbook requires capital construction projects in excess of \$100,000 (\$25,000 prior to September 1999) to be advertised and sealed bids submitted. During the period the SPPCO projects were conducted, this requirement applied if more than 25% of the project was paid from a state appropriation or federal money. Since UNR made loan repayments from accounts funded with state appropriations, all were subject to the competitive bidding requirements of this policy.

Despite these requirements, none of the 14 contracts with SPPCO were awarded based on a competitive bidding process. The failure to bid these projects resulted in allegations of fraudulent acts associated with UNR's management of the energy retrofit program. During the course of our examination, we conducted audit steps to examine these issues. However, our examination did not identify evidence to support these allegations.

In response to questions about the lack of competition, UNR officials stated few firms were interested in the work or met the requirements of the program when these projects were initiated. Consequently, SPPCO was considered the only source available for these services. However, correspondence from the State Public Works Board to UNR prior to the first retrofit project in 1992 indicates at least one other company was willing to conduct these projects. Additionally, our analysis indicates that the energy service industry had been developing since the mid-1980's and was well established by the mid-1990's.

UNR Project Conducted Without a Contract

In April 1999, UNR executed its fourteenth retrofit contract with SPPCO. Subsequent to this project, an energy study was completed on the Howard Medical Building. This study indicated a retrofit would result in significant energy savings. To initiate this project, UNR requested SPPCO prepare the fifteenth energy retrofit agreement. However, in May 2000, SPPCO notified UNR that the "Shared Savings" program was no longer being offered. Consequently, a contract with SPPCO was not

executed for the Howard Medical Building retrofit. Despite lacking a contract, UNR authorized Gardner Engineering, Inc., the firm that prepared the energy study, to proceed with the installation in July 2000. A competitive bidding process was not conducted. The final cost for this retrofit project was about \$530,000. These actions did not comply with the bidding requirements of NRS 338 or the Board of Regents' policies.

During this time, UNR was requesting proposals to refinance existing retrofit loans and to establish a new funding source for future projects. The agreement that resulted from this process was not executed until November 2000. Although the Howard Medical Building retrofit was eventually incorporated into this financing, the project was initiated prior to the finalization of this agreement.

UNR facilities management staff indicated that the energy saving measures installed at the Howard Medical Building were also designed to provide utility services to a new building which was under construction at that time. If the retrofit had not been conducted, the energy systems of the new building would have required a redesign. This would have resulted in substantial costs to the University. To avoid this problem, the University chose to complete the retrofit project even though SPPCO had discontinued the "Shared Savings" program.

Current UNR Retrofit Projects

During fiscal year 2001, UNR signed a letter of understanding with Siemens Building Technologies, Inc. (Siemens) establishing a 3-year commitment for retrofit services³. As a result, Siemens has conducted two projects totaling approximately \$6 million. Although this commitment resulted from a competitive proposal process, the selection of Siemens as the energy service company was not conducted in compliance with the terms outlined in the proposal documents. Failure to comply with established proposal terms can impact the integrity of the award process.

On August 28, 2000, the Business Center North issued a Request for Proposal (RFP) to serve a dual purpose. The primary goal was to reduce UNR's interest costs by refinancing the loans associated with the SPPCO retrofit projects. Secondly, UNR

³ This agreement may be renewed for up to three additional one-year periods. UNR exercised the first one-year renewal option in April 2004.

wanted to identify an energy service company to develop new energy conservation measures. The RFP stated that all proposals would be evaluated by an independent committee and scored in accordance with seven criteria including demonstrated competence, experience in performance of comparable engagements, and reasonableness of cost.

Of the five responses to the RFP, two were from businesses involved primarily in providing financing to educational institutions. The other three were from companies in the energy retrofit industry. After an evaluation of these proposals, UNR executed a lease/purchase agreement with Siemens on November 15, 2000, to refinance the existing project loans. However, RFP records did not reveal any evidence that an independent committee evaluated the five proposals based on the stated selection criteria. Rather, file documentation indicates the award resulted solely from Siemens' submission of the low interest rate. Although UNR officials have indicated the award was based primarily on the interest rate, they state other factors were considered.

For the two projects conducted by Siemens, subcontractors were used to install most of the associated energy saving measures. This is similar to the approach used on UNR's earlier retrofit projects. Unlike the earlier projects, most of these subcontractor awards resulted from a competitive process. Others were awarded based on "sole source" justifications. In all cases, the basis of the award was documented in the project files.

The lack of documentation noted in the contract award to Siemens resulted from a breakdown in internal controls associated with the management of the RFP process. To maintain the integrity of this process, it is important that all evaluation criteria communicated in the RFP be followed. Additionally, the selection process used in this RFP did not fully comply with the competitive bidding requirements of NRS Chapter 338. Statutory provisions of this chapter do not authorize the use of a qualifications process to select an energy service company on public works projects.

UNLV Projects

Since fiscal year 2000, UNLV contracted with e.three Custom Energy Solutions, LLC (e.three) to conduct five retrofit projects totaling about \$6.2 million. UNLV's selection of e.three was not the result of competitive bidding. Rather, the selection was

based on a competitive qualification process conducted by the State Public Works Board (SPWB). According to UNLV records, two of these projects involved buildings that were constructed with state or federal funds. Consequently, these two projects were public works subject to the competitive bidding requirements of State law.

The SPWB identified e.three in a Request for Qualifications (RFQ) process initiated in 1998. This process was designed to identify energy service companies interested in conducting retrofit projects for state agencies. Nine companies responded to the RFQ. The SPWB evaluated these responses and announced that three of the companies had been selected to conduct state projects. These three firms would be asked to provide proposals for future retrofit projects as they were requested by state agencies. Subsequent to this selection, UNLV expressed an interest to the SPWB in conducting energy retrofits. On January 20, 1999, the Manager of the SPWB issued a memo instructing UNLV to proceed with an energy retrofit program using e.three—one of the selected companies. As a result, UNLV contracted with e.three and proceeded with its retrofit program.

Although the selection of e.three was approved by the SPWB, statutory provisions did not authorize the use of an RFQ process to identify the energy service company engaged for an energy retrofit project. Consequently, UNLV did not fully comply with the competitive bidding requirements of NRS Chapter 338 for the two projects identified as public works (Main Campus and Classroom Building/McDermott Physical Ed.). In this matter, it was UNLV's responsibility to ensure their program was conducted in compliance with the law—regardless of the direction given by the SPWB.

Prevailing Wage Requirements Not Documented

Public works projects are subject to the prevailing wage provisions of NRS Chapter 338. Prevailing wages constitute the minimum rate which a public body can pay certain workers on these projects. On all public works, a public body must notify the Nevada Labor Commissioner of any contract if the project is \$100,000 or more. In addition, every contract for a public work in which an institution is party to must include the wages of mechanics and workmen. These requirements help facilitate the enforcement of the state's prevailing wage laws. Our analyses of the 21 UNR and UNLV retrofit projects exceeding \$100,000 indicates that only 3 had documentation

supporting compliance with prevailing wage requirements. Consequently, the institutions did not have evidence of compliance on any of the other 18 projects qualifying as public works.

The absence of a competitive bidding process associated with the award of the retrofit projects contributed to the lack of prevailing wage documentation. Since these jobs were not advertised or bid, they were not subjected to the standard procurement procedures generally conducted at these universities. Other non-retrofit construction projects we examined had documentation supporting compliance with these notification requirements.

In addition, the lack of policies related to prevailing wage requirements also contributed to this problem. The Board of Regents' policies that address the management of capital construction projects do not include references to the state's prevailing wage laws. This absence of policy weakens the control environment associated with this issue.

The three energy service companies selected by UNLV and UNR to perform these retrofits generally subcontracted project installation to local contractors. While we did not examine subcontractor records to ensure prevailing wages were paid, each institution should maintain adequate records to document this compliance.

Definition of Public Work Needs Clarification

As discussed earlier, we were able to determine that some of the retrofit projects conducted did meet the definition of a public work provided by statute based on the opinion of the Legislative Counsel. As such, these projects were subject to the competitive bidding and prevailing wage requirements of NRS Chapter 338. We made these determinations by researching legislative appropriations and analyzing institution accounting records. If our research indicated that 25% or more of the cost of the building was provided by state appropriation or federal funding, we considered the project a public work. However, this approach was not sufficient to make a conclusion on every project. For example, UNR has buildings that were constructed more than 50 years ago, thus making it difficult to determine the total costs and funding source(s). In addition, multiple buildings were involved on some projects which further complicated the evaluation process.

In contrast, UCCSN staff indicate only the funding source of the current project should be considered—not the total cost of the building. That is, if 25% or more of current project funding comes from state or federal funds, then the retrofit would be considered a public work. Since detailed cost and funding records are not required under this interpretation, they were not maintained. However, using their approach, many of the projects would have been public works because the loans were repaid from legislatively appropriated utility funds. Because of this disparity of interpretation, clarifying legislation is needed to help ensure an accurate and consistent application of this statutory provision.

Loan Obligations Violated State Debt Provisions

From 1992 to 1997, UNR incurred \$4.1 million in third-party loan obligations from nine energy retrofit projects. Each obligation was a 10-year installment loan that was paid with legislatively appropriated funds. However, these loan obligations were not created in accordance with NRS 338.1906 and did not contain a nonappropriation clause until amended in July 1998. As a result, these obligations were in violation of the state's constitutional debt provisions and NRS 353.260.

NRS 338.1906 authorizes state agencies to incur third-party liabilities to accomplish retrofit projects. Financing methods authorized by this statute include: installment contracts, shared savings contracts, or other reasonable financing arrangements. The payment term created by these debt instruments can extend beyond a biennium. However, all debts have to be repaid by May 1, 2013, and the total amount committed beyond the biennium was originally limited to \$5 million. This maximum was increased to \$15 million by the 2001 Legislature.

The general applicability of NRS 338.1906 to energy retrofit projects conducted by state agencies was addressed in a legal opinion requested from the Legislative Counsel. In that opinion, the Legislative Counsel stated the following:

Upon a careful examination of the provisions of NRS 338.1905 and 338.1906, we are unable to find a requirement that a department, board, commission, agency or other entity of the state follow the procedures set forth in NRS 338.1906 when conducting an energy retrofit project. Therefore, it is the opinion of this office that these entities are not required to conduct an energy retrofit project pursuant to the provisions of NRS 338.1906 but may do so if they wish to use a portion of the \$15,000,000 authorized for these projects by NRS 338.1906.

Since UNR did not follow the approval process prescribed in NRS 338.1906, the related debt instruments did not fall under the statutory limit authorized for these projects. However, these obligations were subject to other state debt limitations. Section 3 of Article 9 of the Nevada Constitution establishes that the State may not enter into a contract of indebtedness unless the indebtedness is authorized by law for a distinct purpose. In addition, NRS 353.260 states that it is unlawful to bind the State of Nevada in any amount in excess of the specific amount provided by law. Every claim allowed in violation of these provisions shall be void. The applicability of these laws to energy retrofit projects was also addressed by the Legislative Counsel in the requested legal opinion. The Legislative Counsel stated:

In analyzing whether a particular agreement implicates the public debt provisions of Section 3 of Article 9, the Nevada Supreme Court held that a public debt is not created “[a]s a general rule...where the lease (1) contains a nonappropriation clause; (2) limits recourse to the leased property; and (3) does not create a long term obligation binding on future legislatures.” EICON v. State Bd. of Exam’rs, 117 Nev. 249, 258 (2001). Therefore, if the contracts entered into by UNR and UNLV contained a nonappropriation clause and limited the recourse to the property that was subject of the contract, the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution would not be violated.

Since the nine loan contracts did not contain a nonappropriation clause, these obligations initially violated the provisions of Section 3 of Article 9 of the Nevada Constitution and NRS 353.260. However, this issue was resolved in 1998 when all contracts were amended to include this clause.

Current UCCSN policies and procedures do not adequately address debt issues related to energy retrofit programs. Therefore, additional policies and procedures are needed to ensure loan obligations are incurred in compliance with all debt provisions.

Energy Savings Not Always Cost Neutral

Overall, the retrofit programs at UNR and UNLV were cost neutral. As illustrated in Appendix E, original annual savings for the 22 projects conducted at these institutions totaled approximately \$3 million with annual loan payments of about \$2.8 million. However, 6 of the 22 individual projects generated a negative annual cash flow after loan principal and interest payments were made. Although changes in utility pricing and interest changes eventually eliminated the negative cash flow for some of these

projects, the energy savings did not initially meet the program’s criteria of cost neutrality.

Program documentation at UNR and UNLV indicated that retrofit projects were designed to be cost neutral. That is, energy savings resulting from the projects would be sufficient to fund the repayment of the loan costs associated with the installation. Exhibit 4 shows the annual cash flow initially associated with these retrofits based on engineering reports issued after the completion of each project.

Exhibit 4

**Energy Retrofit Projects
Annual Savings Compared to Loan Payments**

<u>UNR Projects</u>	<u>Annual Savings</u>	<u>Loan Payments</u>	<u>Annual Cash Flow</u>
Atmospherium	\$ 7,120	\$ 11,621	\$ (4,501)
Legacy Hall	\$ 28,805	\$ 43,221	\$ (14,416)
Main Campus IV-A	\$ 122,733	\$ 157,338	\$ (34,605)
Main Campus IV-C	\$ 45,904	\$ 67,858	\$ (21,954)
<u>UNLV Projects</u>			
Moyer Student Union	\$ 46,732	\$ 74,894	\$ (28,162)
Thomas and Mack	\$ 11,133	\$ 74,454	\$ (63,321)

Source: UNR and UNLV project records.

Written policies and procedures addressing minimum payback requirements have not been developed. As a result, the energy retrofit program in some cases helped fund additional improvements regardless of whether the project met the informal payback criteria established by the institution. The convenient financing opportunities provided by the program contributed to this condition. Policies and procedures should be developed to address the proper execution and management of energy retrofit projects. Specifically, acceptable payback criteria should be defined.

Measurement and Verification Needs Further Development

As discussed above, UNR and UNLV financed their retrofit programs through loans provided by the energy service company responsible for the project. These loans were designed to be repaid with the energy savings generated by the retrofit. As such, debt retirement was linked to the performance of the energy saving measures installed.

Although this performance was initially verified, ongoing efforts to confirm the continued realization of energy savings were minimal. Therefore, further development of the existing Measurement and Verification (M&V) programs at the two institutions is warranted.

Energy savings realized on retrofit installations were guaranteed by a provision in the project contract. Accordingly, any savings shortfall would result in a proportionate decrease in the amount owed by the institution. To determine the level of savings realized, various M&V procedures were conducted. The energy service company that installed the project had primary responsibility for these procedures. University personnel indicated they were also involved in monitoring this process.

At UNR, the verification process generally involved pre- and post-installation measurements with the results communicated in an engineering report. Although there is little documentation in the project files to indicate M&V activities beyond this initial effort were conducted, we did note that UNR monitors total campus energy consumption. However, this effort only provides an overall trend analysis—not project specific data. Since many variables can affect this trend, the impact of an individual retrofit project would not be apparent from this analysis. Project specific analysis was difficult at UNR because campus buildings were not individually metered. This issue is being addressed by a “sub-metering” project currently in progress at UNR. When completed, energy consumption data will be available on a building-by-building basis.

At UNLV, provisions for continuing M&V efforts were included in most of the energy retrofit contracts. These provisions required the energy service company to issue an annual report documenting the actual savings realized. The service company received a fee for this report. Facilities personnel eventually concluded that this effort was not cost-beneficial and discontinued the annual reporting. Similar to UNR, UNLV also monitors campus wide energy consumption. However, this was not done on a project-by-project basis. Unlike UNR, UNLV has sub-metering on the majority of its campus buildings. Consequently, individual project analysis is feasible at this campus.

Assembly Bill 398 was passed during the 2003 legislative session. This bill amended NRS Chapter 333 and added new energy retrofit provisions to state law. One aspect of this bill established specific monitoring criteria for future energy retrofit

projects conducted by state agencies. Monitoring during the entire term of the retrofit contract, along with annual performance reporting, is now required on these projects. To meet these new requirements on future retrofit projects, institutions will need to upgrade their monitoring programs.

Recommendations

1. Develop policies and procedures for conducting energy retrofit projects that:
 - a) help ensure projects comply with procurement, prevailing wage, and measurement and verification requirements; and
 - b) identify acceptable energy savings levels.
2. Request legislation to clarify the definition of a public work contained in NRS 338.010 as it relates to UCCSN.

Construction Management Process Can Be Strengthened

During our audit, we noted certain aspects of the construction management process can be strengthened to help ensure projects are administered more effectively. For example, the lack of clearly defined procedures resulted in the inconsistent use of key contract documents. Accordingly, some contracts did not include required construction clauses and were not properly approved. Furthermore, project inspections were not always documented, and some projects were administered without sufficient involvement from the institution's facilities management section. Finally, reliable project information was not always maintained. Inadequate construction management procedures can result in significant cost overruns and building code violations.

Purchase Orders Were Primary Contract Documents

Our examination of 28 construction projects totaling about \$58 million indicated the primary contract document for 14 projects was a purchase order. However, neither the purchase order nor the incorporated documents contained required contractual clauses for these projects. Furthermore, purchase orders exceeding \$400,000 were not approved by the Chancellor. In contrast, seven projects utilized an owner-contractor

agreement as the primary document. When this document was used, required clauses were included and contracts were forwarded to the Chancellor for approval.

A purchase order is a contract form suitable for most purchases of supplies and equipment. It is also appropriate when procuring personal services that do not involve complex performance requirements. However, the purchase order has drawbacks when it is used as the primary contract document. For example, the space used to describe the purchased service is limited. As a result, there is an increased potential for excluding detailed performance requirements or legally required clauses. Additionally, UCCSN purchase orders only require the signature of the buyer and do not include a signature block for the Chancellor's approval. This may result in an inadequate review process and unnecessarily expose UCCSN to the liability of an improperly written contract.

The Board of Regents' Handbook identifies the Chancellor as UCCSN's contracting officer. Accordingly, Chancellor's Memorandum 02-04 established procedures for the preparation and approval of UCCSN contracts. One criterion established by this memorandum requires the Board of Regents to be identified as the contracting party. In addition, the Chancellor is required to approve all contracts exceeding \$400,000. NRS Chapter 338 also provides guidance relevant to the preparation of construction contracts for public works. For example, contracts subject to prevailing wages must contain the prevailing wage rates and all contracts must contain nondiscrimination and arbitration clauses.

Exhibit 5 shows the projects exceeding \$400,000 in which a purchase order was the primary document.

Exhibit 5

**Projects Exceeding \$400,000
Conducted With Purchase Orders**

Project Description	Expenditures
LRC/ARF Chiller (UNR)	\$ 426,770
Stead Remediation (UNR)	841,754
Residence Hall Fire Sprinklers (UNR)	431,958
Chemistry Building (UNR)	909,700
Total	\$ 2,610,182

Source: UCCSN construction files.

A well-executed contract helps protect the interests of the parties involved. It identifies specific responsibility, defines the deliverables, and documents the substance and parameters of the agreement. Although current policies and procedures address aspects of the contracting process, they do not identify all documents and clauses that must be used when contracting for these services. Further, this policy is unclear as to whether a purchase order used in the capacity of a construction contract is subject to the Chancellor's approval. Without clear and complete policies, the preparation and approval of construction contracts may not occur as intended.

Change Order Procedures Need Clarification

Change orders can have a significant impact on the cost of capital construction. Furthermore, significant changes to the scope of a project can impact the competitive bidding process. For example, change orders increased the cost of two projects by more than \$500,000 each. However, these changes were not approved by the proper authority. While UCCSN has established change order policies and procedures, they need clarification to help ensure full compliance.

UCCSN policies and procedures governing change order approval is addressed in a Chancellor's Memorandum. Specifically, change orders exceeding 10 percent of the contract or that increase the contract to over \$400,000 must be approved by the Chancellor. However, one TMCC project had change orders totaling approximately \$520,000—65 percent of the base contract—that were not submitted to the Chancellor for signature. In another instance, UNR issued a sole-source purchase order to a consultant for environmental remediation work at the Stead campus. Changes to the original \$79,000 purchase order increased the project costs by \$537,000. Despite this significant increase, these changes were not approved by the Chancellor.

The Chancellor's Memorandum also requires the original parties to the contract to sign any amendments. In accordance with this requirement, any change orders to contracts exceeding \$400,000 should be signed by the Chancellor. However, we found this did not always occur. For instance, UNLV initially sent all change orders to the Chancellor if the contract had been approved by the Chancellor. However, beginning December 2002, UNLV revised their procedures and submitted only those change orders that exceeded 10 percent of the original contract amount.

The inconsistent approval of change orders can be attributed to the conflicting guidance provided by these two sections of the Chancellor's Memorandum. In addition, procedures do not adequately address change orders when a purchase order is the primary contract document. Appropriate approval will help ensure the validity of change orders and provide accountability for project costs.

Project Inspections Not Documented

The Legislature has declared that the authority for the construction of buildings upon state property is vested in the State Public Works Board (SPWB). In accordance with NRS Chapter 341, the SPWB has delegated certain construction management responsibilities to UCCSN. However, 12 projects with state funding did not have documentation indicating the SPWB performed a final inspection or delegated this responsibility. Inspections should be documented to help ensure projects were constructed in accordance with applicable building codes and that life/safety issues were addressed.

In 1971, the State Planning Board (now the SPWB) signed an agreement with UCCSN that outlined each party's responsibilities regarding capital construction. The final acceptance of projects funded in whole or in part by state appropriations were the State Planning Board's responsibility. On the other hand, projects financed by nonappropriated funds were UCCSN's responsibility. A subsequent amendment to this agreement, which is codified in the Board of Regents' Handbook, states final inspections on state-funded projects will be made by the SPWB.

SPWB officials indicated they do not inspect all UCCSN projects. However, if the SPWB is notified of a project, they will conduct inspections or delegate this responsibility to the institution. In general, SPWB staff will inspect projects that involve the construction of a new building or that impacts an existing building's structural or life/safety systems. To resolve the problems associated with inspections, UCCSN is currently working with the SPWB to further define these responsibilities in a new cooperative agreement. When finalized, this agreement should help ensure all campus construction is properly inspected.

Facilities Management Sections Not Sufficiently Involved

Facilities management personnel were not sufficiently involved in two campus construction projects we reviewed. These projects were managed by campus entities that acted autonomously of facilities management on construction issues. These two projects had significant cost overruns. Effective construction management requires the active participation of personnel with specialized skills. Without these personnel, there is a greater risk that projects will not be carried out in accordance with laws and UCCSN's policies and procedures.

The Legislature has identified the importance of proper construction management. NRS 341.153 (1) states:

The Legislature hereby finds as facts: (a) That the construction of public buildings is a specialized field requiring for its successful accomplishment a high degree of skill and experience not ordinarily acquired by public officers and employees whose primary duty lies in some other field. . . .

Each of the four UCCSN institutions we reviewed has a facilities management section. These sections are generally staffed with a variety of construction professionals. Because of the complex nature of this environment, these professionals should have some involvement in the management of all campus construction projects. However, the renovation of UNLV's Thomas and Mack Center and the construction of UNR's Carlin Fire Science Academy occurred without the involvement of their respective facilities management section. Both projects experienced construction and financial difficulties.

First, the Thomas and Mack Center hired an independent project manager to oversee the renovation. However, the project manager terminated the contract prior to completing the project. Consequently, change orders totaling about \$1.1 million were completed without obtaining UCCSN's approval. Second, UNR's facilities section was not directly involved with the construction of the Carlin Fire Science Academy. Numerous construction defects were eventually discovered which led to the Academy's closure for 18 months. Additional construction costs totaling more than \$7 million have been incurred to resolve these defects.⁴

⁴ See Appendix D for a chronology of events regarding the Fire Science Academy.

A recent UCCSN Internal Audit report also identified the need for proper management on construction projects. This audit identified issues similar to those we noted and suggested it would be more efficient and appropriate for the institutions' facilities management sections to oversee all construction projects.

Reliable Project Information Not Available

To determine the magnitude of UCCSN's construction program, we requested financial information for projects conducted during the 5 fiscal years ended June 30, 2003. However, written policies and procedures have not been established to ensure institutions collect this information. As a result, three of the four institutions we examined did not provide reliable data. Without reliable information, management decisions related to capital construction could be impacted.

Exhibit 6 shows the number of capital construction projects and the total expenditures by funding source reported by each institution during fiscal years 1999 through 2003. Capital improvement projects managed by the State Public Works Board were not included in these numbers.

Exhibit 6

**UCCSN Capital Construction Project Expenditures
by Funding Source
Fiscal Years 1999 to 2003**

Institution	# Projects	Funding Source				Total
		State	Institution	Federal	Private	
UNR	168	\$ 16,819,662	\$ 47,648,586	\$ 1,455,045	\$ 192,438	\$ 66,115,731
UNLV	83	34,278,463	91,690,074	3,600,000	21,045,000	150,613,537
DRI	17	840,049	565,425	-	172,938	1,578,412
WNCC	9	344,317	457,408	-	836,507	1,638,232
TMCC	21	1,439,976	2,893,750	-	36,959	4,370,685
CCSN	49	1,748,304	8,077,250	-	-	9,825,554
GBC	11	502,503	784,800	-	4,150,000	5,437,303
Total	358	\$ 55,973,274	\$ 152,117,293	\$ 5,055,045	\$ 26,433,842	\$ 239,579,454

Source: UCCSN.

Our examination of 46 project files indicated the data reported was either inaccurate or incomplete for 21 projects. As a result, the number of projects and total expenditures reported were understated.

Reliable financial and operational information is critical to properly manage an organization. Among other things, this data is needed to make decisions, monitor

performance, and to develop external reporting. The need for capital construction data is also demonstrated by legislation passed during the 2003 Legislative session. NRS Chapter 338 now requires a public entity to submit quarterly reports to its governing body of all public works contract awards greater than \$100,000. In addition, there are quarterly reporting requirements for public works between \$25,000 and \$100,000.

Recommendations

3. Revise UCCSN policies and procedures to ensure:
 - a) construction documents exceeding \$400,000 are properly approved and key clauses are included in construction contracts;
 - b) change orders are properly approved;
 - c) facility management sections are sufficiently involved in project management; and
 - d) institutions collect and report reliable project information.
4. Continue to work with the State Public Works Board to finalize an agreement regarding project management and inspection responsibilities.

Purchasing Process Can Be Improved

UCCSN's three purchasing departments generally complied with Board of Regents' policies relevant to the procurement of goods and services. However, aspects of the purchasing process can be improved. For example, additional controls are needed to ensure all required competition takes place. In addition, policies and procedures related to the procurement of personal and consultant services need to be developed. Adherence to sound procurement policies and procedures will help ensure UCCSN obtains the best goods or services at the best price.

Additional Controls Needed to Ensure Competition

Of the 105 fiscal year 2003 purchases we examined, 43 were subject to the competitive procurement requirements outlined in the Board of Regents' Handbook. However, five were not executed in compliance with these policies and procedures.

The 62 items that did not require a competitive process involved single source items, various professional services, and emergency purchases.

UCCSN purchasing departments are exempt from the requirements of the State Purchasing Act. However, they must follow purchasing policies established by the Board of Regents. Exhibit 7 illustrates the Board’s general requirements.

Exhibit 7

**Board of Regents’ Handbook
General Purchasing Requirements**

<u>Estimated Value of Purchase</u>	<u>Competitive Requirement</u>
<u>\$5,000 - \$24,999</u>	<u>Two quotes required.</u>
<u>\$25,000 or greater</u>	<u>Sealed bids required after advertisement in newspaper.</u>

Source: Board of Regents’ Handbook.

When reviewing any bids or quotes, the respective purchasing department is required to give consideration to various evaluation factors. These include: the item’s price, quality, availability, and conformance to specifications; the financial capability of the vendor; the availability of service; and the best interests of UCCSN. After considering these factors, the contract must be awarded to the lowest responsive and responsible bidder. The Handbook also provides exemptions to the above requirements. Key exemptions include single source items, emergencies, and certain personal and consultant services.

Although most purchases were in compliance with the competitive requirements, a formal bid process was not conducted in three instances and two purchases had only one quote instead of two. One item involved the renewal of a Desert Research Institute purchase order for printing services. The Purchasing Department recognized this error and indicated it would bid this service when the purchase order expired. The other two items that were not bid involved CCSN purchases that were reportedly made under the terms of existing contracts awarded by other governmental entities. One item was for copying services and the other for carpet installation. However, after reviewing documentation provided by the Purchasing Department, we were unable to correlate the pricing received on these purchases with the pricing quoted in the original contracts. Concerning the carpet installation, we noted this transaction for \$36,000 involved the

same vendor that had been discussed in a March 2001 investigative report prepared by the Office of the Attorney General. This report indicated that CCSN had paid the vendor more than \$1 million without a competitive bid process.

The lack of adequate policies and procedures contributed to these weaknesses. For instance, the Purchasing Departments' policies and procedures are generally directed toward users of the Departments' services. They do not provide specific guidance to purchasing agents regarding the proper execution of transactions. The further development of these policies would help ensure that transactions are processed as intended.

Personal and Consultant Services Policies Should Be Developed

Personal and consultant services involving technical, professional, or specialized skills are exempted from the competitive bidding requirements established for UCCSN purchases. However, Board policy requires each purchasing department to develop internal policies relative to the procurement of these services. Despite this requirement, UCCSN's three purchasing departments had not developed these policies. Approximately 10 percent of the purchase orders we reviewed were for the procurement of personal and consultant services. Therefore, policies and procedures should be developed to ensure these services are properly procured.

The importance of formal policies and procedures for personal and consultant services was illustrated during our analysis of the construction management process. On 18 of the 28 construction projects tested, we noted that the institutions utilized the services of professional architects. While these services are not required to be competitively bid, there was no documentation indicating a systematic process was used to select the architects. A systematic process would help ensure an appropriate selection is made for these services.

The Board of Regents has recognized the importance of developing comprehensive policies regarding the procurement of personal and consultant services. When developed, these policies will communicate management directives to staff and provide an important internal control. In their absence, this communication may not occur and transactions may not be processed as intended.

Recommendations

5. Ensure purchases are in compliance with UCCSN's competitive bidding requirements.
6. Develop written policies and procedures for the procurement of personal and consultant services as required by the Board of Regents' Handbook.

Appendices

Appendix A Audit Methodology

To gain an understanding of the University and Community College System of Nevada's (UCCSN) energy retrofit, capital construction, and purchasing processes, we conducted interviews with responsible officials and staff. Our interviews included current and prior employees associated with the administration of these programs at UNR, UNLV, CCSN, and TMCC. Further, we reviewed laws, regulations, and UCCSN policies and procedures applicable to energy retrofits, construction, and purchasing. Additionally, we documented and assessed the control environments associated with these functions. We also reviewed UCCSN institutions' operational information, budgets, prior audit reports, and other information describing the institutions' activities.

To accomplish our audit objective, we obtained project information related to the energy retrofit programs conducted at UNR and UNLV. From this information, we developed a schedule of energy retrofit projects which included project costs, financed amounts, change orders, relevant contract dates, energy savings amounts, and projected loan payoff dates. We then reviewed related project files to determine compliance with state laws, the Board of Regents' policies, and institution procedures related to project procurement and management. We also evaluated any change orders issued on these projects and considered their impact on project cost and payback. We obtained a legal opinion from the Legislative Counsel addressing certain statutory issues related to the procurement and management of these energy retrofit projects. We also interviewed management and staff at the State Public Works Board and energy service companies regarding their participation in these projects.

We also obtained a list of capital construction projects initiated during fiscal years 1998 through 2003 from each UCCSN institution. To determine the accuracy of these lists, we selected a judgmental sample of 21 projects from selected institutions' construction files. We then traced the project description, time of performance, and

expenditure information from these files to the respective institution's project list. We also selected 25 projects from these lists and traced this information to the construction files and accounting records. Next, we selected a judgmental sample of 28 projects from the institutions' lists and tested each project for compliance with appropriate laws, the Board of Regents' policies, and construction management standards. In addition, we reviewed project files related to construction projects that were not managed by UCCSN facilities personnel.

Finally, we obtained databases of purchase orders executed in fiscal year 2003 from the Business Center North, Business Center South, and CCSN. To verify the reliability of these databases, we reviewed their contents for any unusual items or characteristics. Next, we selected a total of 90 purchase orders from the three business centers' physical records and traced the amount, date, and vendor name back to the databases. We then randomly selected a sample of 105 purchase orders exceeding \$10,000 from the databases and traced each sample item to underlying physical documentation. Through this process, we determined the transaction's accuracy and whether it was executed in compliance with selected Board of Regents' policies.

Our audit work was conducted from July 2003 to May 2004, in accordance with generally accepted government auditing standards.

In accordance with NRS 218.821, we furnished a copy of our preliminary report to the Chancellor of UCCSN. On October 6, 2004, we met with UCCSN officials to discuss the results of our audit and requested a written response to the preliminary report. That response is contained in Appendix G, which begins on page 59.

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Appendix B

Prior Audit Recommendations

Our 1996 audit of the University and Community College System of Nevada (UCCSN) contained 10 recommendations. However, none of the recommendations specifically relate to our current audit of capital construction and contracting and bidding procedures. Therefore, we did not assess UCCSN's implementation of the prior audit's recommendations.

Appendix C

Assembly Bill 148

Assembly Bill No. 148—Assemblymen Perkins, Leslie, Parks, Gibbons, Knecht, Anderson, Andonov, Angle, Arberry, Atkinson, Beers, Brown, Buckley, Carpenter, Chowning, Christensen, Claborn, Collins, Conklin, Geddes, Giunchigliani, Goicoechea, Goldwater, Grady, Griffin, Hardy, Hettrick, Home, Koivisto, Mabey, Manendo, Marvel, McClain, McCleary, Mortenson, Ocegüera, Ohrenschall, Pierce, Sherer, Weber and Williams

Joint Sponsors: Senators Care, Carlton, O'Connell, Amodei, Cegavske, Hardy, McGinness, Neal, Nolan, Rhoads, Schneider, Shaffer, Townsend, Washington and Wiener

CHAPTER. 442

AN ACT relating to higher education; requiring the Legislative Auditor to conduct an audit of the University and Community College System of Nevada and the Board of Regents of the University of Nevada; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. 1. The Legislative Auditor shall conduct an audit of the University and Community College System of Nevada and the Board of Regents of the University of Nevada.

2. The audit must include, without limitation, an analysis of:

- (a) Capital construction projects;
- (b) The cost of athletic programs, including, without limitation, the sources and uses of money for such programs;
- (c) The cost of administration, including, without limitation, personnel, travel and other associated costs;
- (d) The utilization of host accounts;
- (e) The validity and reliability of enrollment data;
- (f) Policies and procedures for the generation and distribution of investment income;
- (g) Contracting and bidding procedures, including, without limitation, construction, retrofit and repair projects and the use of "shared savings" programs to pay for utility costs and energy conservation projects; and
- (h) Statewide programs, including, without limitation, program selection, funding and outcomes.

3. The Legislative Auditor shall present a final written report of the audit to the Audit Subcommittee of the Legislative Commission not later than February 7, 2005.

4. The provisions of NRS 218.737 to 218.890, inclusive, apply to the audit conducted pursuant to this section.

Sec. 2. 1. Upon the request of the Legislative Auditor, the University and Community College System of Nevada shall transfer from its budget to the Audit Division of the Legislative Counsel Bureau the sum of \$90,000 to carry out the provisions of section 1 of this act.

2. Any remaining balance of the sum transferred pursuant to subsection 1 must not be committed for expenditure after February 7, 2005, and reverts to the University and Community College System of Nevada as soon as all payments of money committed have been made.

Sec. 3. This act becomes effective on July 1, 2003.

Appendix D

Carlin Fire Science Academy Chronology of Events

- 1972** Western Oil and Gas Association (WOGA) and UNR established a fire academy under the WOGA administration in Stead, Nevada.
- 1984** UNR assumed management of the Academy.
- 1994** Encroaching residential development in the Stead area necessitated relocation of the Academy. Requests were sent to the economic development authorities of all state counties, soliciting proposals to relocate. Positive responses were received from all counties except Washoe and Clark.
- 1995** A site selection committee recommended Elko County as the location for the new academy.
- 1996** A lease agreement with Elko County was issued to lease 408 acres to UNR for the new academy in Carlin, Nevada. Terms of the lease were for 99 years at \$10 per year.
- 1997** Board of Regents authorized UNR to enter a 20 year lease-purchase agreement for the design, construction, and financing of the new Academy. The proposal included ownership of the \$27 million facility upon final payment of the lease-purchase agreement. Enrollment was projected at 6,000 by the third year and \$4 to \$6 million in additional revenue was expected by the tenth year of operation.
- 1998** Due to difficulties encountered by lessor in obtaining financing for the project, Elko County relinquished title of the property to UCCSN, which in turn transferred title of the property to the lessor.
- 1999** **January** – The Board of Regents, on behalf of UNR, entered into a 20 year lease-purchase agreement with \$250,000 monthly payments.
- March** – The Fire Science Academy (FSA) opened with a projected enrollment of 7,200 students per year.
- September** – Student enrollment at the FSA was well below projections. As a result, a new management team was established to increase enrollment.
- November** – Operational problems and design and construction deficiencies were documented for correction under project's warranty.
- 2000** **March** – A consultant's report was presented to the Board regarding the viability of the academy. Although a long-term prospect, eventual financial stability was deemed achievable.
- June** – The FSA met its revised enrollment forecast of 2,900 students. Routine well tests conducted by UNR indicated reportable contaminations in the groundwater. The Nevada Division of Environmental Protection (NDEP) and the lessor were informed of the test results.
- July** – NDEP confirmed the groundwater contamination. Firefighting burn classes were suspended pending the lessor's corrective actions.

Appendix D

Carlin Fire Science Academy Chronology of Events (continued)

- 2000** **September** – Lessor sued UCCSN for breach of contract as UNR stopped payments on the lease due to lessor's failure to remedy the construction defects. UCCSN sued the lessor for defective construction, breach of warranties, and misrepresentation and constructive eviction due to the lessor's alleged design and construction flaws of the FSA.
- November** – All but eight FSA staff had been laid off.
- 2001** **February** – Several mediation meetings had occurred. The lessor refused to disclose the cost of construction in light of the project overruns. Therefore, UNR withdrew from mediation.
- October** – Court ordered mediation of the lawsuits resulted in a legal settlement. Per the settlement, the lessor and its contractors deposited \$4.68 million into a trust account for repairs and environmental remediation at the FSA.
- 2002** **March** – UCCSN paid the lender parties \$29,785,000 to acquire title to the FSA. The payment was made from bond proceeds. The Board authorized UNR to redirect students fees, previously marked for UNR's new library building debt, to service the debt associated with these bonds. Monies deposited in the project trust account were not sufficient to complete the FSA improvements; therefore an addendum to the original settlement agreement was reached. Under the supplemental agreement, UNR will pay \$750,000 after exhausting the project trust account. Additional costs in excess of \$750,000 up to \$2,500,000 will be borne by UNR and the contractor on a 50/50 basis. Costs above the \$2,500,000 mark will be the responsibility of the contractor.
- May** – The FSA reopened pursuant to the original settlement agreement.
- August** – The costs for the remediation work performed by the contractor totaled \$7.6 million.
- 2003** **December** – The FSA had accumulated an \$8 million operating deficit.

Appendix E

Energy Retrofit Projects Conducted at UNR and UNLV

UNR

<u>Primary Contractors</u>	<u>Date</u>	<u>Cost</u>	<u>Buy Down⁽¹⁾</u>	<u>Amount Financed</u>	<u>Original Annual Payments</u>	<u>Original Annual Savings</u>
<u>SPPCO</u>						
1 Computer Center	1992	\$ 393,870	0	\$ 393,870	\$ 70,608	\$ 111,303
2 Main Campus Phase I	1992	886,000	383,621	502,379	158,831	216,300
3 Orvis School of Nursing	1993	143,940	0	143,940	25,803	24,223
4 Getchell Library	1994	295,592	0	295,592	52,980	70,984
5 Main Campus Phase II	1994	992,803	0	992,803	177,972	193,511
6 Main Campus Phase III	1996	1,154,644	0	1,154,644	206,991	244,395
7 Residence Halls	1997	514,315	379,567	134,748	24,156	29,000
8 Atmospherium	1997	64,822	0	64,822	11,621	7,120
9 Nelson Building	1997	419,058	352,000	67,058	12,021	16,558
10 Legacy Hall	1998	241,100	0	241,100	43,221	28,805
11 Main Campus IV-A	1998	877,667	0	877,667	157,338	122,733
12 Main Campus IV-B	1998	708,008	0	708,008	126,923	156,912
13 Main Campus IV-C	1998	626,526	248,000	378,526	67,858	45,904
14 Sage Building	1999	912,707	0	912,707	117,717	163,733
Total SPPCO		\$ 8,231,052	\$ 1,363,188	\$ 6,867,864	\$ 1,254,040	\$ 1,431,481
<u>Gardner Engineering, Inc.</u>						
15 Howard Medical Building	2000	\$ 529,843	\$ 8,185	\$ 521,658	\$ 67,829	\$ 86,872
<u>Siemens</u>						
16 Phase I	2002	356,416	0	356,416	45,911	53,969
17 Phase II	2003	5,817,972 ⁽⁴⁾	529,019 ⁽³⁾	5,288,953	682,630 ⁽²⁾	709,051 ⁽²⁾
Total Siemens		\$ 6,174,388	\$ 529,019	\$ 5,645,369	\$ 728,541	\$ 763,020
Total UNR Projects		\$ 14,935,283	\$ 1,900,392	\$ 13,034,891	\$ 2,050,410	\$ 2,281,373
<u>UNLV</u>						
<u>e.three</u>						
1 Student Housing	2000	769,559	0	769,559	81,083	90,967
2 Moyer Student Union	2000	695,412	0	695,412	74,894	46,732
3 Thomas and Mack Center	2000	706,642	0	706,642	74,454	11,133
4 Main Campus	2000	3,283,610	0	3,283,610	432,527	520,623
5 Classroom Building/ McDermott Physical Ed.	2003	744,332	0	744,332	85,219	89,213
Total UNLV Projects		\$ 6,199,555	0	\$ 6,199,555	\$ 748,177	\$ 758,668
Total Projects		\$ 21,134,838	\$ 1,900,392	\$ 19,234,446	\$ 2,798,587	\$ 3,040,041

Source: UNR and UNLV project management files.

- (1) Buy downs represent construction costs paid directly by the university and not financed through the primary contractor.
- (2) Based on average annual amount over the term of the project.
- (3) Buy down had not been paid by the end of audit fieldwork.
- (4) Project still in progress at the end of audit fieldwork.

Appendix F

Legislative Counsel Legal Opinion

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April 21, 2004

Paul Townsend, Legislative Auditor
401 S. Carson St.
Carson City, NV 89701

Dear Paul:

You have asked several questions related to whether the University of Nevada, Reno ("UNR") and the University of Nevada, Las Vegas ("UNLV") were required to follow various procedures set forth in chapters 338 and 341 of NRS for projects to retrofit buildings located at each University with energy conservation measures ("energy retrofit projects"). Specifically, you have asked whether UNR and UNLV were required to follow the general procedures applicable to public works, set forth in chapter 338 of NRS, relating to the solicitation of bids for and the payment of prevailing rates of wages on the energy retrofit projects, whether UNR and UNLV were required to conduct energy retrofit projects pursuant to the provisions of NRS 338.1905 and 338.1906 for any energy retrofit project entered into after the effective date of those sections and whether UNR and UNLV were required to follow the procedures set forth in chapter 341 of NRS relating to the State Public Works Board for the energy retrofit projects.

DISCUSSION

I. Questions Relating to the Provisions of Chapter 338 of NRS.

You have asked this office several questions that relate to the applicability of the provisions of chapter 338 of NRS to energy retrofit projects conducted by UNR and UNLV. Specifically, you have asked whether UNR had the authority to contract for energy retrofit projects without advertising for bids before the effective date of NRS 338.1905 and 338.1906, whether the provisions of chapter 338 of NRS prohibited UNR from influencing the selection of a subcontractor utilized on various energy retrofit projects and whether UNR and UNLV were required to comply with the provisions of NRS 338.020 to 338.090, inclusive, relating to the payment of the prevailing rates of wages on the energy retrofit projects conducted by each university respectively.

Paul Townsend
April 21, 2004
Page 2

A. General Applicability of Chapter 338 of NRS to Public Works Conducted by the UCCSN.

Before we address your specific questions that relate to the applicability of chapter 338 of NRS to the energy retrofit projects conducted by UNR and UNLV, we believe that it is necessary to discuss the general applicability of chapter 338 of NRS to the University and Community College System of Nevada ("UCCSN"). The provisions of chapter 338 of NRS set forth the procedures and requirements that apply to any public work sponsored or financed by a public body of this state. A project undertaken on behalf of the UCCSN is defined as a "public work" if it involves "the new construction, repair or reconstruction of . . . [a] building for the University and Community College System of Nevada of which 25 percent or more of the costs of the building as a whole are paid from money appropriated by this state or from federal money." NRS 338.010.

According to the information provided to this office, UNR entered into 14 energy retrofit projects between 1992 and 1999, and UNLV entered into 5 energy retrofit projects after 1998. However, the specific buildings that were retrofitted by each energy retrofit project were not identified for this office. Pursuant to the definition of "public work" provided in NRS 338.010, the only energy retrofit projects that were public works subject to the provisions of chapter 338 of NRS were those projects conducted on a building for the UCCSN of which "25 percent or more of the costs of the building as a whole were paid from money appropriated by [the] state or from federal money." Any energy retrofit projects that were conducted on a building for the UCCSN of which less than 25 percent of costs of the building as a whole were paid from money appropriated by the state or from federal money are not public works and, therefore, are not subject to the provisions of chapter 338 of NRS.

However, our analysis of the applicability of chapter 338 of NRS to the energy retrofit projects cannot end without discussing the principles that govern the relationship between the Nevada Legislature and the Board of Regents and how those principles apply to the applicability of chapter 338 of NRS to the UCCSN. The Nevada Constitution provides for a separate entity to govern the university system. Section 4 of Article 11 of the Nevada Constitution requires the Legislature to "provide for the establishment of a State University . . . to be controlled by a Board of Regents whose duties shall be prescribed by Law." (Emphasis added.) Further, Section 7 of Article 11 of the Nevada Constitution provides for the creation of a Board of Regents. That section states:

The Governor, Secretary of State, and Superintendent of Public Instruction, shall for the first Four Years and until their successors are elected and qualified constitute a Board of Regents to control and manage the affairs of the University and the funds of the same under such regulations as may be provided by law. But the Legislature shall at its regular session next preceding the expiration of the term of

Office of said Board of Regents provide for the election of a new Board of Regents and define their duties.

Nev. Const. Art. 11, § 7. The Nevada Supreme Court has interpreted Sections 4 and 7 of Article 11 of the Nevada Constitution as vesting the Board of Regents with exclusive executive and administrative control of the university system subject to “the right of the legislature to prescribe duties and other well-recognized legislative rights.” King v. Board of Regents, 65 Nev. 533, 565 (1948). In analyzing whether legislation violated these provisions of the Nevada Constitution, the Supreme Court stated that it had to:

[D]etermine whether the act in question does or does not “change, alter, or modify [the] constitutional powers and functions” of the board of regents created by the constitution. If it does so, then under the well- settled rule . . . we must hold the act invalid.

Id. at 546 (quoting State v. Douglass, 33 Nev. 82, 93 (1910)).

In 1981, the Nevada Supreme Court again considered legislation enacted by the Legislature to determine whether it encroached upon the constitutional power of the Board of Regents to manage and control the university system. Board of Regents v. Oakley, 97 Nev. 605 (1981). In Oakley, the Supreme Court held that a state statute which prohibited discrimination against a person because of age could constitutionally be applied to the UCCSN. Although noting that it is “the duty of courts to uphold statutes passed by the legislature, unless their unconstitutionality clearly appears,” (Oakley, 97 Nev. at 607 (quoting State v. Arrington, 18 Nev. 412, 414 (1884))), the Supreme Court held that:

[T]his statute reasonably and properly imposes upon the governing board of our state university the same obligation that it imposes on other state, county and municipal boards, namely the obligations to make hiring and retention decisions on the basis of merit and fitness and not on an immaterial factor such as age, sex, race, color, creed or national origin.

Id. (emphasis added). The Supreme Court further distinguished the holding in King by stating that:

[King] does not stand for the proposition that the Board of Regents is free from all legislative regulation; rather, it holds that the legislature may not invade the constitutional powers of the Board through legislation which directly interferes with essential functions of the University. Since the law in question simply prescribes duties concerning fair treatment of its personnel, it in no apparent way

interferes with the Board's essential management and control of the University.

Id. at 608 (emphasis added).

With these two cases as background, we must now consider whether the provisions of chapter 338 of NRS encroach upon the constitutional powers reserved to the Board of Regents to manage and control the university system. As stated before, the provisions of chapter 338 of NRS set forth the procedures and requirements that apply to any public work sponsored or financed by a public body of this state. Similar to the state statute under consideration in Oakley, the provisions of chapter 338 of NRS impose the same obligations upon the UCCSN that are imposed upon any other public body that conducts a project that falls within the definition of a "public work." Additionally, similar to the statute under consideration in Oakley, the provisions of chapter 338 of NRS simply prescribe the duties of the UCCSN when conducting a "public work." Therefore, it is the opinion of this office that the UCCSN is subject to the provisions of chapter 338 of NRS for any project that falls within the definition of a "public work."

B. Did UNR Have the Authority to Enter Into Energy Retrofit Projects Without Advertising for Bids Before the Effective Date of NRS 338.1905 and 338.1906?

Before October 1, 1993, the effective date of NRS 338.1905 and 338.1906, the applicable requirement to advertise for bids for a public work was provided in NRS 338.143. At the time, that section provided that:

[A]n agency or political subdivision of the state, or a public officer, public employee or other person responsible for awarding a contract for the construction, alteration or repair of a public work, shall not:

(a) Commence such a project, for which the estimated cost exceeds \$100,000, unless it advertises in a newspaper of general circulation in the state for bids for the project; or

(b) Divide such a project into separate portions to avoid the requirements of paragraph (a).

(Emphasis added.) Based on the plain language of NRS 338.143 at the time, an agency was required to advertise for bids on a project only if two conditions were met: first, the project must have been for the construction, alteration or repair of a "public work"; second, the estimated cost of the construction, alteration or repair must have exceeded \$100,000.

As previously discussed, an energy retrofit project for the UCCSN is only a "public work" if it involves "[a] building for the University and Community College System of Nevada of which 25 percent or more of the costs of the building as a whole are

paid from money appropriated by this state or from federal money.” NRS 338.010. Therefore, for any energy retrofit projects for buildings that did not meet the definition of a “public work,” UNR was not required pursuant to NRS 338.143 to solicit bids regardless of the estimated cost of the project. For any energy retrofit projects for buildings that did meet the definition of a “public work,” UNR was required to solicit bids only for those projects that exceeded \$100,000 in estimated cost. As the information provided to this office did not identify the buildings on which the energy retrofit projects were conducted or the estimated cost of those energy retrofit projects, this office is unable to conclude whether UNR was required pursuant to the provisions of NRS 338.143 to advertise for bids on a particular energy retrofit project. However, we believe that we have provided the appropriate test to be applied to make this determination upon the discovery of the relevant facts for each building and energy retrofit project.

C. Did UNR Have the Authority to Influence the Selection of a Subcontractor Used on an Energy Retrofit Project?

According to the information provided to this office, Sierra Pacific Power Company was the contractor selected by UNR to conduct the energy retrofit projects. Sierra Pacific Power Company chose to utilize a subcontractor to install the energy conservation measures associated with each energy retrofit project. You have asked this office if UNR had the authority to influence the selection of the subcontractor chosen by Sierra Pacific Power Company.

Chapter 338 of NRS imposes several requirements relating to the use of subcontractors on a public work. NRS 338.013 provides that “[e]ach contractor engaged on a public work shall report to the Labor Commissioner and the public body that awarded the contract the name and address of each subcontractor whom he engages for work on the project within 10 days after the subcontractor commences work on the contract.” NRS 338.141 requires that a contractor submitting a bid to a public body for a public work include a list of subcontractors who will perform certain percentages of the public work. NRS 338.141 also provides that a contractor shall not substitute another subcontractor for a subcontractor listed with the submitted bid except in certain circumstances. However, after a careful review of the provisions of chapter 338 of NRS, we have not found any provision that would prevent a public body from influencing the selection of a subcontractor used on a public work. Therefore, it is the opinion of this office that UNR was not prohibited from influencing the selection of a subcontractor used on an energy retrofit project.

D. Did the Provisions of Chapter 338 of NRS Relating to the Payment of the Prevailing Rates of Wages Apply to the Energy Retrofit Projects Conducted by UNR and UNLV?

The prevailing wage law of this state is set forth in NRS 338.020 to 338.090, inclusive. Pursuant to subsection 1 of NRS 338.020:

1. Every contract to which a public body of this state is a party, requiring the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor in the performance of public work, must contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workmen. The hourly and daily rate of wages must:

(a) Not be less than the rate of such wages then prevailing in the county in which the public work is located, which prevailing rate of wages must have been determined in the manner provided in NRS 338.030. . . .

(Emphasis added.) Pursuant to the plain language of the provisions of NRS 338.020, a public body who is a party to a contract for a public work that requires the employment of the enumerated classes of mechanics and workmen is required to ensure that the terms of the contract expressly set forth rates of wages, which are not less than the applicable prevailing rates determined by the Labor Commissioner for each such class of mechanics and workmen. However, the requirements of NRS 338.020 do not apply to all contracts for a public work. NRS 338.080 sets forth several exceptions to the prevailing rates of wages requirement provided in NRS 338.020. The applicable provisions of NRS 338.080 provide that:

None of the provisions of NRS 338.020 to 338.090, inclusive, apply to:

. . . .
. . . .

3. Any contract for a public work whose cost is less than \$100,000. A unit of the project must not be separated from the total project, even if that unit is to be completed at a later time, in order to lower the cost of the project below \$100,000.

(Emphasis added.)

As previously discussed, a project for the UCCSN is only a “public work” if it involves “[a] building for the University and Community College System of Nevada of which 25 percent or more of the costs of the building as a whole are paid from money appropriated by this state or from federal money.” NRS 338.010. Therefore, for any energy retrofit projects for buildings that did not meet the definition of a “public work,” UNR and UNLV were not required pursuant to NRS 338.020 to ensure that the terms of the contract expressly set forth rates of wages which are not less than the applicable prevailing rates determined for each such class of mechanics and workmen. For any energy retrofit projects for buildings that did meet the definition of a “public work,” UNR and UNLV were required pursuant to NRS 338.020 to ensure that the terms of the contract expressly set forth rates of wages which are not less than the applicable prevailing rates determined for each such class of mechanics and workmen only for those

Paul Townsend
April 21, 2004
Page 7

projects that exceeded \$100,000 in cost. As the information provided to this office did not identify the buildings on which the energy retrofit projects were conducted or the cost of those energy retrofit projects, this office is unable to conclude whether UNR and UNLV were required pursuant to the provisions of NRS 338.020 to ensure that the terms of the contract expressly set forth rates of wages which were not less than the applicable prevailing rates determined for each such class of mechanics and workmen for a particular energy retrofit project. However, as in the case of the previous question, we believe that we have provided the appropriate test to be applied to make this determination upon the discovery of the relevant facts for each building and energy retrofit project.

II. Questions Relating to the Provisions of NRS 338.1905 and 338.1906.

You have asked this office several questions relating to the application of the provisions of NRS 338.1905 and 338.1906 to energy retrofit projects conducted by UNR and UNLV. Specifically, you have asked this office whether UNR and UNLV had the authority to enter into energy retrofit projects without soliciting bids and without obtaining the approval of the energy retrofit coordinator and the State Board of Examiners after the effective date of NRS 338.1905 and 338.1906, whether the financing agreements for the energy retrofit projects executed by UNR and UNLV are subject to the \$15,000,000 limit on the total amount of contracts for energy retrofit projects provided by subsection 9 of NRS 338.1906, whether UNR had the authority to amend the contracts for the energy retrofit projects to avoid the \$15,000,000 limit provided pursuant to subsection 9 of NRS 338.1906 and whether UNLV had the authority to execute a lease-purchase agreement for energy retrofit projects that provided for payments beyond May 1, 2013.

A. General Applicability of NRS 338.1905 and 338.1906 to Energy Retrofit Projects Conducted by UNR and UNLV.

Before we address your specific questions that relate to the provisions of NRS 338.1905 and 338.1906 and the energy retrofit projects conducted by UNR and UNLV, we believe that it is necessary to discuss the general applicability of the provisions of NRS 338.1905 and 338.1906 to energy retrofit projects. NRS 338.1905 provides that the Governor "shall" designate one or more energy retrofit coordinators for the Executive Branch including the UCCSN. NRS 338.1906 provides for the duties and powers of the energy retrofit coordinators and the State Board of Examiners when energy retrofit projects are brought before each of them. For example, subsection 1 of NRS 338.1906 provides that:

Upon request by or consultation with an officer or employee of the State who is responsible for the budget of a department, board, commission, agency or other entity of the State, the appropriate energy retrofit coordinator **may** request the approval of the State Board of

Paul Townsend
April 21, 2004
Page 8

Examiners to advertise a request for proposals to retrofit a building, or any portion thereof, that is occupied by the department, board, commission, agency or other entity, to make the use of energy in the building, or portion thereof, more efficient.

(Emphasis added.) Although, because of the use of the term “shall” in NRS 338.1905, the Governor has a duty to designate an energy retrofit coordinator, and in subsection 1 of NRS 338.1906, the term “may” was used to create a discretionary right rather than a duty. See NRS 0.025. Therefore, use of the program established by NRS 338.1905 and 338.1906 is discretionary rather than mandatory. If a department, board, commission, agency or other entity of the state chooses to conduct an energy retrofit project pursuant to the provisions of NRS 338.1905 and 338.1906, then that entity has the authority to commit the state to make payments beyond the biennium in which the contract is signed. NRS 338.1906. Upon a careful examination of the provisions of NRS 338.1905 and 338.1906, we are unable to find a requirement that a department, board, commission, agency or other entity of the state follow the procedures set forth in NRS 338.1906 when conducting an energy retrofit project. Therefore, it is the opinion of this office that these entities are not required to conduct an energy retrofit project pursuant to the provisions of NRS 338.1906 but may do so if they wish to use a portion of the \$15,000,000 authorized for these projects by NRS 338.1906.

B. Did UNR and UNLV Have the Authority to Enter Into Energy Retrofit Projects Without Advertising for Bids After the Effective Date of NRS 338.1905 and 338.1906?

Subsection 3 of NRS 338.1906 provides that a “request for proposals [for an energy retrofit project] must be published in at least one newspaper of general circulation in the State.” As previously discussed, no requirement exists for UNR and UNLV to conduct an energy retrofit project pursuant to the provisions of NRS 338.1906. Additionally, according to the information provided to this office, UNR and UNLV did not conduct the respective energy retrofit projects pursuant to the provisions of NRS 338.1906, therefore, they were not required to advertise for the projects pursuant to the provisions of subsection 3 of NRS 338.1906.

However, even though UNR and UNLV did not pursue the energy retrofit projects pursuant to the provisions of NRS 338.1906, the provisions of chapter 338 of NRS may have required that they advertise for bids for the projects. As previously discussed, the UCCSN is subject to the provisions of chapter 338 of NRS for any project that involves “[a] building for the University and Community College System of Nevada of which 25 percent or more of the costs of the building as a whole are paid from money appropriated by this state or from federal money.” NRS 338.010. For a “public work” conducted before October 1, 1999, the provisions of NRS 338.143 at that time governed whether advertisements for bids were required. At the time, NRS 338.143 provided that:

Paul Townsend
April 21, 2004
Page 9

[A]n agency or political subdivision of the state, or a public officer, public employee or other person responsible for awarding a contract for the construction, alteration or repair of a public work, shall not:

(a) Commence such a project, for which the estimated cost exceeds \$100,000, unless it advertises in a newspaper of general circulation in the state for bids for the project; or

(b) Divide such a project into separate portions to avoid the requirements of paragraph (a).

(Emphasis added.) For a “public work” conducted after October 1, 1999, the provisions of NRS 338.1385 govern whether advertisements for bids are required. NRS 338.1385 provides that:

[T]his state . . . shall not:

(a) Commence a public work for which the estimated cost exceeds \$100,000 unless it advertises in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed for bids for the public work. If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and has a general circulation in the county.

(Emphasis added.) The provisions of NRS 338.143 before October 1, 1999, and NRS 338.1385 after October 1, 1999, provide the same requirement for advertising for bids on a project. An agency is required to advertise for bids on a project only if two conditions are met: first, the project must be for a “public work”; second, the estimated cost of the project must exceed \$100,000. Therefore, pursuant to the provisions of NRS 338.1385, UNR and UNLV were required to advertise for bids on energy retrofit projects that met the definition of a public work and had an estimated cost exceeding \$100,000. As the information provided to this office did not identify the buildings on which the energy retrofit projects were conducted or the estimated cost of those energy retrofit projects, this office is unable to conclude whether UNR and UNLV were required pursuant to the provisions of NRS 338.1385 to advertise for bids on a particular energy retrofit project. However, as in the case of previous questions, we believe that we have provided the appropriate test to be applied to make this determination upon the discovery of the relevant facts for each building and energy retrofit project.

C. Did UNR and UNLV Have the Authority to Enter Into Energy Retrofit Projects Without Obtaining the Approval of the Energy Retrofit Coordinator and the Board of Examiners After the Effective Date of NRS 338.1905 and 338.1906?

Paul Townsend
April 21, 2004
Page 10

NRS 338.1906 provides for a system of approvals for energy retrofit projects conducted pursuant to the provisions of that section. Subsection 1 of NRS 338.1906 provides that:

Upon request by or consultation with an officer or employee of the State who is responsible for the budget of a department, board, commission, agency or other entity of the State, the appropriate energy retrofit coordinator may request the approval of the State Board of Examiners to advertise a request for proposals to retrofit a building. . .

Subsection 2 of NRS 338.1906 provides that “[u]pon approval of the State Board of Examiners, the [energy retrofit] coordinator shall prepare a request for proposals for the retrofitting of one or more buildings.” Subsection 6 of NRS 338.1906 provides that “[a]fter reviewing the [energy retrofit project] proposals, if the [energy retrofit] coordinator determines that sufficient energy could be saved to justify retrofitting the building or buildings, or portion thereof, the coordinator shall select the best proposal and request the approval of the State Board of Examiners to award the contract.” Subsection 8 of NRS 338.1906 provides that “[u]pon approval of the State Board of Examiners, the [energy retrofit] coordinator shall execute the contract.”

However, as previously discussed, an agency conducting an energy retrofit project is not required to conduct the energy retrofit project pursuant to the provisions of NRS 338.1905 and 338.1906. An agency is required to comply with those provisions only for those energy retrofit projects that are conducted pursuant to the provisions of those sections. According to the information provided to this office, UNR and UNLV did not conduct their respective energy retrofit projects pursuant to the provisions of NRS 338.1905 and 338.1906. Therefore, they were not required to obtain the various approvals by an energy retrofit coordinator and the Board of Examiners for the energy retrofit projects.

D. Were the Contracts Executed by UNR and UNLV Subject to the \$15,000,000 Limit Provided for in Subsection 9 of NRS 338.1906?

Subsection 9 of NRS 338.1906 provides that “[t]he total amount of money committed beyond the biennium for all [energy retrofit project] contracts executed pursuant to this section must not exceed \$15,000,000 at any one time.” (Emphasis added.) Pursuant to the plain language of subsection 9 of NRS 338.1906, the debt limitation provided for in that subsection 9 only to contracts executed pursuant to the provisions of NRS 338.1906. Conversely, the debt limitation provided for in subsection 9 of NRS 338.1906 does not apply to contracts that were not executed pursuant to the provisions of NRS 338.1906.

As previously discussed, UNR and UNLV were not required to conduct energy retrofit projects pursuant to the provisions of NRS 338.1906. According to the

Paul Townsend
April 21, 2004
Page 11

information provided to this office, the energy retrofit projects conducted by UNR and UNLV were not conducted pursuant to the provisions of NRS 338.1906. It follows that because the energy retrofit projects conducted by UNR and UNLV were not conducted pursuant to the provisions of NRS 339.1906, the contracts executed by UNR and UNLV were not executed pursuant to the provisions of that section. Therefore, pursuant to the provisions of subsection 9 of NRS 338.1906, the contracts executed by UNR and UNLV do not apply to the debt limitation provided for in that subsection because the contracts were not executed pursuant to the provisions of NRS 338.1906. However, the analysis of this question would not be complete without a discussion of the implications of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution to energy retrofit projects.

Section 3 of Article 9 of the Nevada Constitution restricts the authority of the state to enter into contracts of indebtedness. *See Business Computer Rentals v. State Treasurer*, 114 Nev. 63 (1998). Under paragraph one of that constitutional provision, the state may not enter into a contract of indebtedness unless the indebtedness is authorized by law for a distinct purpose, the law contains provisions levying an annual tax that is dedicated to repayment of the indebtedness, and the indebtedness is repaid within 20 years. Nev. Const. Art. 9, § 3, para. 1; *see State ex rel. State Gen. Obligation Bond Comm'n v. Koontz*, 84 Nev. 130 (1968). NRS 353.260 makes it unlawful for "any state officer, commissioner, head of any state department or other employee" to bind the state in excess of the specific amount provided by law. Accordingly, it would be unlawful for a state officer to expend more than the amount that has been appropriated for a specific project or to enter into a contract for an energy retrofit project for which the financing of the contract binds the state beyond a biennium without specific legislative authority.

The information provided to this office did not identify the length of the financing arrangements for each of the energy retrofit projects conducted by UNR and UNLV, therefore, this office is unable to determine whether UNR or UNLV attempted to bind the state to successive appropriations beyond the biennium. For any contract for energy retrofit projects entered into by UNR and UNLV that did not provide for financing beyond the biennium in which the contract was entered, the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution are not implicated. Additionally, for any contract for energy retrofit projects that did not bind the Legislature to subsequent appropriations for the financing of the energy retrofit projects, the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution are not implicated. For example, if the financing for the energy retrofit project was to be paid through self-generated revenue of UNR or UNLV, the Legislature would not be bound to provide for subsequent appropriation. *See Morris v. Board of Regents*, 97 Nev. 112 (1981). However, for any contract for energy retrofit projects entered into by UNR and UNLV that provided for financing beyond the biennium in which the contract was signed and did not provide a source of funding other than legislatively appropriated revenues, we must determine whether the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution are implicated by that contract.

In analyzing whether a particular agreement implicates the public debt provisions of Section 3 of Article 9, the Nevada Supreme Court held that a public debt is not created “[a]s a general rule . . . where the lease (1) contains a nonappropriation clause; (2) limits recourse to the leased property; and (3) does not create a long term obligation binding on future legislatures.” EICON v. State Bd. of Exam’rs, 117 Nev. 249, 258 (2001). Therefore, if the contracts entered into by UNR and UNLV contained a nonappropriation clause and limited the recourse to the property that was the subject of the contract, the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution would not be violated. However, if the contracts entered into by UNR and UNLV did not contain a nonappropriation clause or did not limit the recourse to the property, the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution would be violated.

E. Did UNR Have the Authority to Modify the Original Contracts for the Energy Retrofit Projects to Avoid the \$15,000,000 Limit Provided for in Subsection 9 of NRS 338.1906?

As previously discussed, UNR was not required to conduct energy retrofit projects pursuant to the provisions of NRS 338.1905 and 338.1906 and that only contracts conducted pursuant to those sections apply toward the \$15,000,000 limit set forth in subsection 9 of NRS 338.1906. Therefore, the original contracts entered into by UNR were not applicable to the \$15,000,000 limit and modification was not necessary to avoid being subject to that limit. However, the analysis of this question would not be complete without a discussion of the implications of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution and to the contracts entered into by UNR.

As previously discussed, UNR was prohibited pursuant to the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution from binding state appropriated revenue to pay for energy retrofit projects beyond the biennium in which the contract for the energy retrofit project was signed. The Nevada Supreme Court held that a contract funded using state appropriated revenue beyond the biennium in which the contract is signed requires a nonappropriation clause and must limit the recourse to the property that was the subject of the contract to avoid violating the provisions of Section 3 of Article 9 of the Nevada Constitution. EICON, 117 Nev. at 258. According to the information provided to this office, the original contracts for the energy retrofit projects conducted by UNR did not contain a nonappropriation clause and were paid for using state appropriated revenue. Because the original contracts were paid for using state appropriated revenue and did not contain the required provisions to prevent the state from being bound to provide appropriations for the contracts beyond the biennium in which they were signed, the contracts were most likely in violation of the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution. Without modification, the contracts would be void pursuant to the provisions of NRS 353.260.

Paul Townsend
April 21, 2004
Page 13

The Nevada Supreme Court has held that “[p]arties to an existing contract may subsequently enter into a valid agreement to extinguish, rescind, or modify the former contract.” Holland v. Crummer Corp., 78 Nev. 1, 7 (1962). This principle extends to contracts to which public entities are a party. *See* Clark County Sports Enters. v. City of Las Vegas, 96 Nev. 167, 172 (1980). Therefore, it is the opinion of this office that UNR had the authority to modify the original contracts to include a nonappropriation clause and that modification was needed to prevent the contracts from becoming void pursuant to the provisions of NRS 353.260.

F. Did UNLV Have the Authority to Execute a Lease-Purchase Agreement That Provided for Payments After May 1, 2013?

The provisions of subsection 6 of NRS 338.1906 provide that:

[A] contract [for an energy retrofit project executed pursuant to the provisions of NRS 338.1906] may commit the State to make payments beyond the biennium in which the contract is executed, but the interest due on any debt created pursuant to this section must be paid at least semiannually, payments must be made on the principal at least annually and the debt must be fully repaid on or before May 1, 2013.

(Emphasis added.) Pursuant to the plain language of subsection 6 of NRS 338.1906, any contract for an energy retrofit project executed pursuant to the provisions of NRS 338.1906 that commits the state to make payments beyond the biennium in which the contract is executed must provide that the debt is fully repaid on or before May 1, 2013. As previously discussed, UNLV was not required to conduct an energy retrofit project pursuant to the provisions of NRS 338.1906 and, according to the information provided to this office, the energy retrofit projects conducted by UNLV were not conducted pursuant to the provisions of NRS 338.1906. Therefore, the provisions of subsection 6 of NRS 338.1906 that require the debt to be fully repaid on or before May 1, 2013, do not apply to the energy retrofit contracts executed by UNLV.

However, as previously discussed, UNLV was prohibited pursuant to the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution from binding public money beyond the biennium for the financing of the energy retrofit project. The information provided to this office indicates that three of the energy retrofit projects entered into by UNLV are financed through self-generated revenues and two of the energy retrofit projects are financed through state appropriated revenues. For the three energy retrofit projects financed through self-generated revenues, the contracts entered into by UNLV do not appear to implicate the provisions of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution because state appropriated revenues are not pledged to pay for the obligations related to the energy retrofit projects. Therefore, for these three energy retrofit project contracts there is no limitation as to when the debt is required to be fully repaid. For the two energy retrofit projects financed with state appropriated revenue,

unless the contracts contain non-appropriation clauses, limit recourse to the leased property and do not create a long-term obligation binding on future Legislatures, UNLV would be required by NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution to fully repay the debt within the biennium in which the contract was signed. The information provided to this office did not indicate whether the two contracts for energy retrofit projects funded through state appropriated revenue contained the required contract provisions, therefore, this office is unable to determine whether those contracts are in violation of NRS 353.260 and Section 3 of Article 9 of the Nevada Constitution.

III. Applicability of Chapter 341 of NRS to Energy Retrofit Projects Conducted by UNR and UNLV.

You have asked this office whether the provisions of chapter 341 of NRS apply to the energy retrofit projects conducted by UNR and UNLV. The Nevada Legislature has declared as the public policy of the state that "all construction of buildings upon property of the State . . . be supervised by, and final authority for its completion and acceptance vested in, the Board as provided in NRS 341.141 to 341.148, inclusive." NRS 341.153. In furtherance of this policy, NRS 341.145 provides that:

The [State Public Works] Board:

1. Has final authority to approve the architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping.
.....
3. Shall solicit bids for and let all contracts for new construction or major repairs.

Based on the plain language of NRS 338.145, the State Public Works Board has, in furtherance of the public policy of the state, the authority to approve and solicit bids for major repairs of all buildings located upon the property of the state. Additionally, based on the plain language of NRS 351.153, the provisions of chapter 341 of NRS are not limited to public works projects which are funded in whole or in part with public money but apply to all buildings located upon the property of the state without regard to the source of funding. Therefore, if the energy retrofit projects are major repairs, the provisions of chapter 341 of NRS apply to the projects.

An agency is given deference in its interpretation of the statutes that the agency is charged with administering or enforcing. *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293 (2000) (citing *State v. State Eng'r*, 104 Nev. 709, 713 (1988)); *see also Truckee Meadows Fire Prot. Dist. v. International Ass'n of Fire Fighters*, 109 Nev. 367, 369 (1993) (citing *Clark County Sch. Dist. v. Local Gov't Employee-Mgmt. Relations Bd.*, 90 Nev. 442, 446 (1974)) ("An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action."). The State Administrative Manual "presents to all

Paul Townsend
April 21, 2004
Page 15

State agencies a single reference source for policies, procedures, regulations and information issued by the Legislature, the Board of Examiners, the Department of Administration and other contributing agencies.” State Admin. Manual § 0002.0 (23rd ed. 2004). Section 1908.0 of the State Administrative Manual (23rd ed. 2004) provides that:

Minor remodeling, repairs and maintenance work of a non-structural nature financed with agency operating funds and estimated to cost less than \$25,000 do not need the project management services of the Public Works Board and may be made by the agency controlling the building. However, all remodeling projects, on State land or land held in trust for any division of the State government, must be reviewed by the Public Works Board to ensure code compliance through plan check and inspection services. Non-structural alterations mean such alterations that do not affect the safety of the building and do not change, in any manner, its structural elements.

Pursuant to the plain language of section 1908.0 of the State Administrative Manual (23rd ed. 2004), the approval of the State Public Works Board is required for any remodeling or repair of a building on state land with a cost in excess of \$25,000 or if the remodeling affects the structural elements of the building.

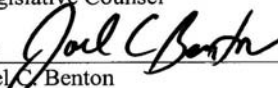
The information provided to this office did not include the cost of each of the energy retrofit projects or whether each of the energy retrofit projects affected the structural elements of the building on which the retrofit was conducted, therefore, this office is unable to determine whether a particular energy retrofit project was within the jurisdiction of the State Public Works Board. Based on the provisions of section 1908.0 of the State Administrative Manual (23rd ed. 2004), the State Public Works Board had jurisdiction and the provisions of chapter 341 of NRS apply to any energy retrofit project with a cost in excess of \$25,000 and any energy retrofit project that affected the structural elements of the building on which the retrofit was conducted regardless of cost.

Paul Townsend
April 21, 2004
Page 16

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By 
Joel C. Benton
Deputy Legislative Counsel

JCB:dtm
Ref No. 0403221658
File No. OP_Townsend040329155544

Appendix G

University and Community College System of Nevada's Response

University and Community College System of Nevada

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Las Vegas, Nevada 89103
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October 18, 2004

State of Nevada
Legislative Counsel Bureau
Paul Townsend, Legislative Auditor
401 S. Carson St.
Carson City, Nevada 89701-4747

Dear Mr. Townsend:

Attached is the University and Community College System of Nevada response to the Capital Construction Projects and Contracting and Bidding Procedures Audit Report prepared by the Legislative Counsel Bureau audit staff.

We would like to thank the LCB staff for the courtesy extended to all UCCSN employees during this review.

Please contact me if you have any questions on the items provided.

Very truly yours,

A handwritten signature in cursive script that reads "Buster Neel, Jr." with a flourish at the end.

Harry E. Neel, Jr.
Vice Chancellor for Finance and Administration

Attachment

Below is the UCCSN response to the Legislative Counsel Bureau (LCB) preliminary audit report of Capital Construction Projects and Contracting and Bidding Procedures.

Recommendation 1: *Develop policies and procedures for conducting energy retrofit projects that:*

- a) *help ensure projects comply with procurement, prevailing wage, and measurement and verification requirements; and*
- b) *identify acceptable energy savings levels.*

UCCSN agrees that written internal policies/procedures would enhance the existing energy retrofit project process and will develop these policies/procedures by December 31, 2004.

Recommendation 2: *Request legislation to clarify the definition of a public work contained in NRS 338.010 as it relates to UCCSN.*

UCCSN Assistant Chief Counsel, in collaboration with the institutions, will draft clarifying language by November 30, 2004.

Recommendation 3: *Revise UCCSN policies and procedures to ensure:*

- a) *construction documents exceeding \$400,000 are properly approved and key clauses are included in construction contracts;*
- b) *change orders are properly approved;*
- c) *facility management sections are sufficiently involved in project management; and*
- d) *institutions collect and report reliable project information.*

While UCCSN has developed written purchasing procedures to assure conformance with Nevada Revised Statutes, Board of Regents policies, and Chancellor's Memorandum #02-04, we recognize the need to strengthen these procedures including the proper linking of the purchase order and a written construction contract, which includes all terms, conditions, and key construction clauses. These contracts and related purchase orders will include appropriate campus and system office signatures. We will work with Purchasing Departments to clarify and strengthen specific issues mentioned in Legislative Counsel Bureau recommendations.

The Vice Chancellor for Finance and Administration will communicate to each institution President that all construction projects must be conducted under the oversight of the institution facilities department.

UCCSN will direct each institution to maintain construction project data so that project costs and revenue sources are more easily determined. Quarterly reports will be submitted to the Chancellor's Office and Board of Regents as recommended.

Recommendation 4: *Continue to work with the State Public Works Board to finalize an agreement regarding project management and inspection responsibilities.*

The UCCSN and the State Public Works Board have had a written agreement since 1972 that outlines the project management responsibilities for state appropriated and non-appropriated capital projects. On January 21, 2003 the SPWB Manager, Deputy Manager and the Assistant AG assigned to the SPWB met with the UCCSN Chancellor, Vice Chancellor for Finance and Administration, Assistant General Counsel, and Director of Facilities Planning to discuss the future of this agreement. At that time it was agreed that the SPWB would draft amendments to the agreement to clarify the duties and responsibilities of both parties and bring the amended draft to both boards for approval. The SPWB discussed the agreement at their meeting February 27, 2003 and charged their staff to draft the updates to the agreement. The amended agreement has not yet been completed. The SPWB reiterated their desire for their staff to complete the draft of the amended agreement at their last meeting on September 21, 2004. The Deputy Manager indicated in a phone conversation last week that the SPWB is committed to finalizing and implementing the amendment to the current agreement by June 30, 2005.

Until the current agreement is amended, the UCCSN will continue to abide by the terms of the agreement. The UCCSN institutions will provide the SPWB with notification of all non-appropriated capital projects for their review, comment and certifications as the state building official in accordance with NRS 341.100.4(h) and 341.145.10.

Recommendation 5: Ensure purchases are in compliance with UCCSN's competitive bidding requirements.

The three Purchasing Departments will improve the process relating to procurement of goods and services so that all quoting and bidding required by UCCSN policies takes place. We will ensure that all purchases of contracted items agree with the prices as stated in the current contract and that the files properly document the use of the contract.

Recommendation 6: Develop written policies and procedures for the procurement of personal and consultant services as required by the Board of Regents' Handbook.

The three UCCSN purchasing departments will jointly develop specific policies and procedures which define personal and consultant services and the process designed to select these services. Further, they will develop specific policies for the selection of architects and engineering services for construction projects. These policies and procedures will be published in a Chancellor's Memorandum or the UCCSN Procedures Manual.

UCCSN's Response to Audit Recommendations

<u>Recommendation Number</u>		<u>Accepted</u>	<u>Rejected</u>
1	Develop policies and procedures for conducting energy retrofit projects that: a) help ensure projects comply with procurement, prevailing wage, and measurement and verification requirements; and b) identify acceptable energy savings levels	<u> X </u>	<u> </u>
2	Request legislation to clarify the definition of a public work contained in NRS 338.010 as it relates to UCCSN.....	<u> X </u>	<u> </u>
3	Revise UCCSN policies and procedures to ensure: a) construction documents exceeding \$400,000 are properly approved and key clauses are included in construction contracts; b) change orders are properly approved; c) facility management sections are sufficiently involved in project management; and d) institutions collect and report reliable project information	<u> X </u>	<u> </u>
4	Continue to work with the State Public Works Board to finalize an agreement regarding project management and inspection responsibilities	<u> X </u>	<u> </u>
5	Ensure purchases are in compliance with UCCSN's competitive bidding requirements	<u> X </u>	<u> </u>
6	Develop written policies and procedures for the procurement of personal and consultant services as required by the Board of Regents' Handbook.....	<u> X </u>	<u> </u>
	TOTALS	<u> 6 </u>	<u> 0 </u>