

Opinion No. 61-69

August 4, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S. Thayer, Assistant Attorney General

TO: Mr. Rufus C. Little, Acting Board Manager, Contractors' License Board, P. O. Box 1179, Santa Fe, New Mexico

QUESTION

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Are highway contractors included within the definition of the term "contractor" as used in the Contractors' License Law?

CONCLUSION

Yes.

OPINION

ANALYSIS

Section 67-16-2, N.M.S.A., 1953 Compilation Chapter 222, Laws of 1961, defines "contractor" as follows:

"A contractor, within the meaning of the Contractors' License Law, is a person, firm, co-partnership, corporation, association, or other organization, or any combination of any thereof, who for either a price, fee, or percentage, undertakes or offers to undertake, or purports to have the capacity to undertake to construct, alter, repair, add to or improve any building, excavation, or other structure, project, development or improvement or any part thereof; provided, the term contractor shall include subcontractor, but shall not include any one who merely furnishes materials, or supplies without fabricating the same into, or consuming the same in the performance of the work of the contractor as herein defined; provided, further, nothing herein shall be construed to apply to a public utility in the construction, reconstruction, operation or maintenance of its plant other than construction of buildings; or to the drilling, testing, abandoning or other operation of any petroleum or gas well or to geophysical or similar exploration for oil or gas; and, provided, further, no railroad company shall be construed to be a contractor."

Section 67-16-3, N.M.S.A., Compilation, being Section 4, Laws of 1961, provides:

"It is unlawful for any person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, to engage in the business or act or

offer to act in the capacity or purport to have the capacity of contractor within the state without having a license therefor as provided in the Contractors' License Law, unless such person, firm, copartnership, corporation, association or other organization is particularly exempt from the provisions of the Contractors' License Law. Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project shall be accepted in any court as prima facie evidence of the existence of a contract."

It is clear that there is no particular exemption for highway contractors. Therefore, all we have to determine is whether the legislature intended to include within the term "contractor" one who constructs, alters, repairs, adds to, or improves a highway.

The use of the broad term "project" in Section 67-16-2, would in the commonly accepted meaning of the term, include a highway project. Certainly, bridges, culverts, overpasses, underpasses, and the like, are "structures" and "improvements."

If it be thought that the statute is ambiguous, however, a comparison with the statute as it previously existed is instructive. The old Section 67-16-3, contained the following proviso:

"Provided nothing herein shall be construed to apply to any construction or operation incidental to the construction and repair of any highway . . ."

The 1961 law omits the proviso exempting highway contracting. Some effect must be given to this legislative act. In our opinion the effect was to bring highway contracting within the Contractors' License Law.

A more express indication of legislative intent is contained in Section 67-16-4 N.M.S.A., 1953 Compilation being Section 4, Chapter 222, Laws of 1961. That section provides for the appointment of the Contractors' License Board. Among other things, it provides:

"The board shall consist of one building contractor, one **highway contractor and one contractor from some other classification of contractors covered by the Contractors' License Law.**" (Emphasis supplied).

This is an express indication that the legislature considered highway contractors as being covered by the Contractors' License Law.

Therefore, in our opinion, a person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, who, for either a price, fee, or percentage, undertakes, or offers to undertake, or purports to have capacity to undertake, to construct, alter, repair, add to, or improve a highway or any part thereof is a "contractor" as that term is defined in the Contractors' License Law, and is subject to the jurisdiction of the Contractors' License Board.