Opinion No. 66-88

July 11, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General George Richard Schmitt, Assistant Attorney General

TO: Mr. David McNeill, Registrar, Contractors' License Board, P. O. Box 580, Santa Fe, New Mexico, Honorable C. Fincher Neal, State Senator, Eddy County, Drawer N, Carlsbad, New Mexico

QUESTION

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1. Is a dealer who sells and installs bar stools, customer booths, tables and stove hoods in hotels and restaurants required to have a contractors' license before he may lawfully engage in such business?

2. Is a dealer in inlaid linoleum required to have a contractors' license before he may lawfully engage in such business when the sale of the linoleum might or might not include the installation thereof?

3. When does the "installation" of the above-described items become "contracting" as defined under the Contractors' License Law?

CONCLUSIONS

1. No.

2. No.

3. A) When the item installed becomes a permanent improvement to the premises, and B) when the business responsible for the installation is engaged in the sale of "services" which are more than merely incidental to its sale of goods.

OPINION

*{*116}* ANALYSIS

The law bearing on the issues presented and which is to be interpreted is Section 67-16-2 of the Contractors' License Law, N.M.S.A., 1953 Compilation, as amended, and is set forth for your examination as follows:

"CONTRACTOR DEFINED. -- A. A contractor within the meaning of the Contractors' License Law is a person, firm, copartnership, corporation, association or other

organization, or any combination thereof, who, for either a price, fee, percentage, or any compensation other than wages, undertakes, or offers **to undertake, or purports to have the capacity to undertake to construct, alter, repair, add to or improve any building, excavation, water well, or other structure, project development or improvement, or any part thereof.**

B. **The term contractor shall include sub-contractor, but shall not include any person 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.**

C. 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 apply to the drilling, testing, abandoning or operation of any petroleum or gas well, or to geophysical or similar exploration for oil or gas.

D. No railroad company shall *{*117}* be construed to be a contractor." (Emphasis added.)

The businesses described in the questions are not subject to licensure by your Board because of the exception underscored above in Paragraph B of Section 67-16-2. Such businesses properly fall within the above-quoted exception which excludes persons who furnish materials or supplies. In addition, it is not our view that such "exception" is limited to dealers in "building" materials or supplies, which we believe would be an unjustifiably limited construction, **B & R Drilling Company v. Gardner,** 55 N.M. 118, 227 P.2d 627 (1959). Under the above-styled case our Supreme Court held that exceptions to the Contractors' License Law are not to be given a strict construction but rather a "reasonable construction". It was further held that work "incidental" to the carrying on of the excepted occupations under the Contractors' law is also exempt from regulation or license by the Contractors License Board.

Furthermore, the inlaid linoleum as well as the specific items you mention: bar stools, customer booths, tables and stove hoods are, in all probability, not fabricated into or consumed in the actual performance of installation so as to make this statutory exception inapplicable. This conclusion, we believe, is supported by a most recent decision of the New Mexico Supreme Court, which involved a similar question. The case is **Raby Floor Covering v. Westphall Homes, Inc., et al.,** No. 7708 Advance Sheet Vol. 4 No. 49 issued May 9, 1966. The Court decided a wall-to-wall carpeter was not within the purview of Section 67-16-2 of the Contractors' License Law. In its decision the Court expressly noted the statutory exception concerning the furnishing of materials and supplies, as we have above, and at least impliedly used such exception as a partial basis for its determination. The Court found that though the carpet in issue was "attached to the floor" it was not "fabricated" nor did it constitute such an "improvement" so as to make the statutory exception inapplicable.

Actually, this office for years has been handling questions in this area of the law in a similar manner. We have interpreted Section 67-16-2 as involving a contract of construction or alteration of premises that "contemplates a state or condition of permanency" **A. G. Opn. No. 57-96** (1957). In that opinion, we said a carpet company which installs wall-to-wall carpeting in a home did not "come within the terms and definitions of a contractor". In addition, we note **A. G. Opn. No. 4065** (1942) and **No. 5653** (1953) where it was held that "minor and incidental" alterations required in a contract of moving an entire house from one place to another was not contemplated by the legislature as being a proper subject for contractors' licensing.

However, our examination of this question also discloses various types of work which have been considered "contracting" and subject to licensure under Section 67-16-2, supra. In **Fischer v. Rakagis,** 59 N.M. 463, 286 P.2d 312 (1955) (also cited and examined by the Court in the **Raby Floor Covering** case, supra), an unlicensed contractor was barred from recovering on his construction contract which involved the installation of a "bar" at the defendant's place of business. The contractor contended he was not subject to the Contractors' License Law because he merely installed personal (movable) property and did not construct a permanent improvement. The Court dismissed his argument, saying the bar was fabricated into the building and became a part of the realty. Subsequent to this case and according to the decision of same, our office held that bowling alley construction was subject to license and regulation under the Contractors' Law, **A. G. Opn. No. 58-155** (1958). However, the facts leading to the conclusions in **Fischer v. Rakagis** and **A. G. Opn. No. 58-155** cited above are entirely distinguishable from the facts involved in both your questions. The contractor in the **Fischer** case installed a bar, some shelving, a partition, an accordion door, three other doors, built liquor storage, made a door opening, and cut down show windows at the defendant's place of business. The equipment supplier, the subject of **Opinion 58-155,** built bowling alley *{*118}* beds and installed related machinery thereon. The work was similar to the actual laying of a hardwood floor. The construction of a bowling alley, a bar, and related fixtures, in buildings designed for those specific purposes, we think, are true examples of fabrication and, therefore, permanent improvements, as distinguished from the "attachment" to the premises of the food service equipment and floor covering described in your questions.

Of course, the argument can be raised that inlaid linoleum and installation of such equipment are permanent improvements because in many instances the removal of such items from the premises would cause some damage to the premises as well as the items themselves (particularly the linoleum). As a result, it is often agreed between landlord and tenant that items such as these shall remain on the premises. Indeed, many law suits have come about because of this problem and decisions calling these items "fixtures" and a part of the realty are not too difficult to find. However, we are not concerned here with the intent of the parties, or necessarily whether such items fall under the law of fixtures. As the Court in the **Raby Floor Covering** case above expressly pointed out, ". . . here, we are concerned with the intent of the legislature . . ." under Section 67-16-2 of the statutes.[1]

However, even if dealers in such food service equipment and inlaid linoleum were not considered to fall within the statutory exception explained above, we nevertheless hold that such dealers are not subject to licensing, because they are not "contractors", within the meaning of subsection A of Section 67-16-2 of the Contractors' License Law, set forth in the beginning of this opinion. It should be remembered that the Contractors' License Law, as well as the Plumbing and Electrical Administrative Laws, are solely concerned with the **building trades,** namely plumbing, electrical and general construction contracting. Thus, it can be logically presumed that the legislature intended "contractor" as defined under the law cited above to be used in connection with the building trades. And, the Kentucky Supreme Court in **Miller v. Batten,** 273 S.W.2d 383, 385 (1954) held that when the word "contractor" is used in this connection, it means a person who contracts directly with an owner of property to erect or construct a building or other structure or improvement belonging to the owner. In arriving at this decision the court stated the following:

". . . A peculiar meaning is given to the word 'contractor,' when used in connection with the building trades. Such a contractor is the person who contracts directly with the owner of the property to erect or construct a building or other structure or improvement belonging to the owner. It is true that every person engaged in commerce, under the generic classification of the word, may be called a contractor because all business is transacted under contract, express or implied. But in construing a statute, the general contents of which deal with construction of 'in whole or in part, any turnpike, bridge, railway, lock, dam, or other public work,' the word 'contractor' means the construction contractor and not every person who is connected with the project who may be operating under an agreement which may also be termed a contract."

We also call attention to the fact that a construction "contractor" is normally thought of as a business which supplies services as distinguished from a "dealer" who is engaged in the sale of commodities or goods, **Attorney General Opinion 59 - 74** (1959). When all of the above is taken into consideration, it then appears that the nature of the business itself also determines whether such business is subject to regulation and *{*119}* license by the Contractors' License Board. It follows that if the business is primarily engaged in the sale of goods as distinguished from services, then it is not a contractor within the meaning of the Contractors' License Law. And the work involved in the installation of such goods is not contracting work subject to the jurisdiction of your Board. Certainly, we are aware that in some instances the installation is considered a separate and distinct part of the contract of sale and a charge and profit are made accordingly. If such work and the resulting charges are more than incidental, that is, if they constitute a substantial portion of the contract price, then such business could properly be called a contracting business within the meaning of the law in question.

Our office is also expressly aware that this interpretation can in rare instances expose the public to possible dangerous and defective contracting work, which the law is designed to prevent. Unfortunately, there is little we can do about this, except to say that such exposure can be corrected by the next session of the legislature with an appropriate amendment to the Contractors' License Law.

Thus, the above analysis reveals that two conditions must be met before your Board may properly license a merchant who deals in the sale and installation of inlaid linoleum and the food service equipment described above. First, the installation thereof must be something more than just an "attachment" to the customer's premises. The item to be installed must be so well "fabricated" or "consumed" into the structure that it constitutes a permanent improvement to the premises. Second, such merchant or dealer, must also be engaged in the sale of his "services" as well as the sale of his "goods".

It is our opinion (under the facts that have been furnished to us) that the businesses described in the questions do not meet both criterion set forth above and therefore are not subject to licensing or regulation by your Board; but only as to the installation of the items set forth in your questions. We are not passing on the question of the installation of any other equipment or supplies which the businesses in question offer for sale.

In conclusion, we expressly call attention to the fact that this opinion is not concerned with plumbing or electrical contracting which has a distinct and separate definition under New Mexico law. If any of the sales or installations involve electrical or plumbing work, such work should be properly directed to the attention of the Plumbing or Electrical Administrative Boards of this State for their consideration.

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n1 For this reason, at this time, we must overrule A. G. Opn. No. 58-226. This was another and later situation involving "bowling alley construction" where we said because the parties intended the alleys to remain personal property, that the construction did not involve a permanent improvement and therefore was not subject to licensing by the Contractors' Board.