

Opinion No. 71-55

April 16, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Frank C.H. Livingston, Chief Property Management Control Division Bataan Memorial Building Santa Fe, New Mexico 87501

QUESTIONS

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Does the Construction Industries Licensing Act apply to state agencies?

CONCLUSION

Not insofar as licensing is concerned.

OPINION

{*78} ANALYSIS

As used in the Construction Industries Licensing Act (Section 67-35-1 through 67-35-63, N.M.S.A., 1953 Comp. (P.S.)) the word "person" includes "an individual, firm, partnership, corporation, association, or other organization, or any combination thereof." Section 67-35-2(D), **supra**. It is obvious that the State, the sovereign if you will, does not fit comfortably, if at all, within this definition.

Recognizing that the State and its agencies are not **specifically** included or excluded from the Act, you mention Section 67-35-3(11), **supra**, and inferentially inquire whether it could be construed as having the effect of bringing the State or agencies thereof within the Act.

Section 67-35-3, **supra**, provides in part as follows:

"As used in the Construction Industries Licensing Act, 'contrator': . . .

C. Does **not** include: . . .

(11) a person who acts on his own account to build or improve a structure for his personal use or for resale; Provided he does not, during any calendar year, construct more than one residential unit, or does not, in any one calendar year, engage in commercial construction having a market value in excess of ten thousand dollars (\$ 10,000); Provided that such construction or improvement is required to be done in

conformity with all other provisions of the Construction Industries Licensing Act and with the orders, rules, regulations, standards and codes adopted pursuant thereto . . ."

Assuming for the moment that the State comes within the statutory definition of "person" in the Construction Industries Licensing Act, still the State itself does not "**engage in commercial construction having a market value in excess of ten thousand dollars [\$ 10,000].**" It does not build public structures to be sold -- on the open market or otherwise.

In the context of another problem, but with principles applicable here, 43 Am. Jur., **Public Works and Contracts**, § 32 states:

"The fact that contracts for public works and public improvements can be let only upon competitive bidding pursuant to advertisement or notice giving plans, specifications, and estimates does not preclude the state, a municipal corporation, or other political subdivision from constructing public works under direction of its own engineers and officers, by means of labor employed by the public body." See **Home Building and Conveyance**, Va., 20 S.E. 895.

The fact is that not all state public work projects are contracted. Sometimes the state agency will do such work with its own forces and there is no legislative declaration requiring that such agency obtain a contractor's license.

However, keeping in mind that the legislatively expressed purpose of the Construction Industries Licensing Act is "to promote the general welfare of {*79} the people of New Mexico by providing for the protection of their lives, property and economic well-being against substandard or hazardous construction, alteration, installation, connection, demolition or repair work . . .", it seems reasonable to assume a legislative intent that all construction including public works projects done with state employees be subject to state building code standards. Section 67-35-3(11), last proviso; See Section 67-35-52(C), (D), (E), **supra**. Licensed contractors should not be held to a higher standard of due care and safety than should the state itself in the comparatively few instances of construction, etc. by state personnel.

In view of what has been said herein, the other questions presented do not call for an answer.

By: Oliver E. Payne

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