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February 11, 1993

OPINION NO. 93-12

Monetary Limitations in Tennessee Contractors' Licensing Act

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QUESTIONS

1. May a general contractor in Tennessee legally contract with an owner to do the work on a single project, the full value of which work substantially exceeds the monetary limitations on the contractor's license, by dividing up the work into a series of smaller contracts with that one contractor, each of which is within the monetary limitations of the contractor's license?

2. Where the owner directly contracts with an electrical or plumbing contractor for their particular specialities, is the monetary value of these specialty contracts included in, or excluded from, the calculation of the monetary limitations of the "general" contractor's work on the same project?

OPINIONS

1. A general contractor may not legally contract with the owner to do the work on a single project, the full value of which work substantially exceeds the monetary limitations on the contractor's license, by dividing up the work into a series of smaller contracts with that one contractor, each of which is

within the monetary limitations of the contractor's license. Such a division of work for purposes of avoiding the application of the law would place both the contractor and the owner in violation of the Tennessee Contractors Licensing Act, making each of them guilty of a Class A Misdemeanor. Additionally, the contractor would be considered to be contracting without a license, subjecting him to civil penalty and the possibility of temporarily losing his license. An unlicensed contractor suing on his contract in a court of equity is also precluded from recovering anything but his actual documented expenses.

2. When the owner directly contracts with more than one contractor, the pertinent monetary value for purposes of the contractor licensing statutes is the monetary value of each contractor's individual undertaking, not the value of the entire project.

#### ANALYSIS

##### 1. Operation of monetary limitations

The act which governs the licensing of building contractors and subcontractors is the Tennessee Contractors Licensing Act, T.C.A. § 62-6-101, et seq. There is no statute or regulation within the Tennessee Contractors Licensing Act which is explicitly directed at your first question about whether a general contractor can get around a \$1,000,000 monetary limit on his license to do a \$5,000,000 project by entering five separate contracts for five phases of work. Although there have been a number of Tennessee Supreme Court decisions over the years construing this act, none has addressed precisely this question. In order to answer your first question we need to look at the statutory system as a whole and the general purpose it was enacted to serve. The meaning of a statute is ordinarily derived from the general purpose sought to be achieved by the legislature. City of Lenoir City v. State ex. rel. City of Loudon, 571 S.W.2d 297 (Tenn. 1978). Statutes forming a system should be construed so as to make that system consistent in all its parts and uniform in operation. Davis v. Beller, 185 Tenn 638, 207 S.W.2d 343 (1947), app. dismissed 333 U.S. 859, 68 S.Ct. 745, 92 L.Ed.2d 1138 (1948).

Tennessee Code Annotated § 62-6-101, et seq. requires anyone "engaged in contracting" in Tennessee to submit evidence to the Board of Licensing Contractors that he is qualified to engage in contracting. "Contracting" and "contractor" are defined as follows at T.C.A. § 62-6-102:

(1)(A) "Contracting" means undertaking, for a fixed price, fee, commission, or gain of whatever nature, to construct, erect, alter, repair, supervise, superintend, oversee, direct, or in any manner assume charge of the construction, erection, alteration, or repair of part or all of any structure, or private work or utility of any nature or character whatsoever, including railroads, municipal works, water supply systems, sewerage and drainage systems, levies, locks and dams, canals, industrial works, or any highway, road, bridge, or similar structure or project, where the cost of the completed work, or of different projects under a single contract, equals or exceeds twenty-five thousand dollars (\$25,000). This definition does not include architects or engineers duly licensed by the state board of examiners for architects and engineers and land surveyors duly licensed by the state board of examiners for land surveyors whose only financial interest in the project shall be the professional fee for preparing plans and specifications, supervision, and normal and ordinary engineering services, that is, usual architectural or engineering services, or both, and they shall not be liable for any other fees, licenses, or assessments other than those provided by the laws of the state of Tennessee. When an architect, engineer or land surveyor receives an additional fee for employment or direction of labor, such person shall be considered as a contractor within the purview of this chapter. Solely the purchase of materials or subletting of separate contracts for various phases or aspects of the construction by the architect or engineer on behalf of the owner shall be considered normal architectural and engineering services; however, the supervision, superintendence, overseeing, directing or in any manner assuming charge of such purchase or subletting shall be considered "contracting," whether provided by a contractor or a construction manager;

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(B) "Contracting" does not include:

(i) Subcontracting, unless a subcontract involves:

(a) Twenty-five thousand dollars (\$25,000) or more of electrical work;

(b) Twenty-five thousand dollars (\$25,000) or more of plumbing work; or

(c) Twenty-five thousand dollars (\$25,000) or more of heating, ventilating or air conditioning work;

(ii) Undertaking in one's county of residence solely to construct residences or dwellings on private property for the purpose of resale, if such county has a population of not less than \_\_\_\_\_ nor more than \_\_\_\_\_ [53 population categories/counties are listed] according to the 1990 federal census or any subsequent federal census, or is a county of the eighth class as provided in § 8-24-101; or

(iii) Any undertaking, as described above, for the department of transportation; and

(2) "Contractor" means any person, firm or corporation who engages or offers to engage in contracting.

In order to obtain a license an applicant must: a) make written application to the board; b) Furnish the board with an affidavit stating he is not currently performing any construction work where the amount of his contract exceeds \$25,000; c) Perform satisfactorily on an examination given by the board; d) Submit a letter of reference from a past client or employer; e) Submit a financial statement; f) pay the licensing fee set by the board. T.C.A. §§ 62-6-103 - 62-6-111.

When the applicant has performed all these requirements satisfactorily to the board, showing that he is qualified to engage in contracting, the board grants a license which states the construction classifications in which the applicant is qualified, and for each classification the license lists monetary limitations for work to be performed by the

contractor. T.C.A. § 62-6-111(a)(3). The issuance of such a license may not authorize the licensee to engage in \$25,000 or more of electrical, plumbing, heating, ventilating, or air-conditioning work unless he is additionally licensed in such specialty classification.

The regulations for the Tennessee Board for Licensing General Contractors provide that in order to determine the specialty classification(s) in which the licensee is qualified to engage the Board is to consider whether or not the applicant:

- (1) has adequate experience in the classifications requested;
- (2) has an established plant (office; warehouse; equipment areas) from which his business is conducted;
- and (3) has (or has the ability to acquire) the necessary equipment for the classifications requested, and the experience to operate such equipment . . . .

Official Compilation, Rules and Regulations of the State of Tennessee, 0680-1-.12. (Hereinafter cited as "Rules and Regulations"). The regulations further provide that in order to determine the monetary limitations to be placed on a license the Board is to consider the applicant's years of experience and a given multiple of the applicant's net worth or his working capital. Rules and Regulations 0680-1-.13(1). There is a tolerance of ten percent (10%) allowed by the regulations on the monetary limitation placed on any classification of any license. Rules and Regulations at 0680-1-.13(3).

The act makes it unlawful for anyone to engage in or offer to engage in contracting as defined by the statute unless such person has been duly licensed as provided by law. T.C.A. § 62-6-103(a)(1). The regulations provide:

Subject to [the 10% tolerance] no contractor shall engage, or offer to engage, in any project of which the cost (including all material and labor furnished by or through another source other than the owner) would exceed the monetary limitation (or, if licensed in more than one classification, the highest monetary limitation) placed on his license.

Rules and Regulations, 0680-1-.13(4).

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