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The Tennessee Contractors Licensing Act And Why Your City's Building Inspector Could Go To Jail

By Leslie Shechter and Randy Williams

If you're a local building permit official, you could be *personally* liable if you issue a building permit to an unlicensed contractor. That's how the state attorney general interprets the Tennessee Contractors Licensing Act of 1976 (*Tennessee Code Annotated* 62-6-101 et seq.). The act is complicated, and this bulletin is published to help clarify its provisions.

On Oct. 4, 1989, the attorney general (in opinion number 89-130) concluded that a county assessor was personally liable for fines and penalties in violation of the act. The opinion was based on two factors:

- the wording of the act itself. The act specifically says the penalty is imposed on the violating *official* and not the official's office or agency.
- the sovereign immunity protection afforded governmental entities¹. The act doesn't include any language that removes this protection.

In an earlier opinion (number 88-64), the attorney general concluded that penalties under the Contractors Licensing Act are criminal in nature. Based on a 1989 sentencing reform law, violations of the act are classified as Class C misdemeanors. Therefore, the penalty for issuing a permit in violation of the act is a fine of not less than \$50 and/or a prison sentence of up to 30 days.

The act also allows the State Board for Licensing Contractors to file an injunction against any local government that accepts a bid from a contractor that doesn't have a license.

Local officials who issue permits or contract work orders should become familiar with the act's provisions, especially the definitions of contracting and contractor (*TCA* 62-6-102), the license requirements (*TCA* 62-6-103), and the penalties (*TCA* 62-6-120).

Common Questions About The Act

1. How does the act define *contracting* and *contractor*?

Under the act, contracting means "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." Payment of some kind must be received. The cost of the completed work, or different projects under a single contract, must equal or exceed \$25,000.

A contractor is a person, firm, or corporation that "engages or offers to engage in contracting."

2. Is there an exception to these definitions?

Yes, there's one. It applies to smaller counties

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with populations of 60,000 or less. Speculative homebuilding for the purpose of resale in these small counties is exempt from the requirements of the act if the homebuilding occurs in the county where the contractor lives.

The state board restricts this exception to homebuilding on land owned by the contractor. Therefore, an owner/developer of a subdivision is exempt.

3. The definition of contracting refers to *the cost of completed work*. Does the cost include land, grading, labor, materials, and fixtures?

When computing costs to determine whether the contract will exceed \$25,000, include grading and labor but not land. Only if the contractor (and not the owner) provides the materials and fixtures should those costs be included.

4. When a homeowner verbally agrees to pay someone to construct or remodel his or her residence, and the cost of the construction will be \$25,000 or more, is such an agreement subject to the provisions of the act?

Generally, yes. Whether written or verbal, any agreement to pay a contractor \$25,000 or more to build or remodel one's home falls within the licensing requirements of the act. Further, if the total construction costs are \$25,000 or more, a licensed contractor must be hired even though the contractor's fee or commission is less than \$25,000.

There are, however, some exemptions. The act says that, notwithstanding other provisions, "any person, firm, or church that owns property and constructs thereon single residences, farm buildings or other buildings for individual use, and not for resale, lease, rent or other similar purpose, is exempt from the requirements of this chapter." This section is difficult to interpret. The State Board for Licensing Contractors says the following factors must be satisfied before the exemption applies.

- The owner must actually perform the construction or remodeling or act as the general contractor on a project.

- To the extent the owner acts as a general contractor and subcontracts different portions of the project, none of these subcontracts can equal or exceed \$25,000.

- The building(s) must be used exclusively by the person, firm, or church and not by the general public. For example, a city may construct a storage facility -- but not a city hall-- without hiring licensed contractors. Similarly, a church may construct a parish dwelling, but not a day care or assembly hall.

- The construction or remodeling must not be for the purposes of resale, lease, or rental. Therefore, only one permit to build a home may be issued every two years. Shelby and Knox counties are exempted from this restriction.

If more than one permit to construct a home is applied for, or if more than one home is built within a two-year period, there is a rebuttable presumption that the extra home(s) was built to sell, lease, or rent. A rebuttable presumption means that the owner/contractor must prove that the extra home(s) was built for individual use.

5. What if a project is estimated to cost less than \$25,000, but ends up costing \$25,000 or more? Will the building official who issued the permit to an unlicensed contractor then be held liable?

Generally no, if the official issued the permit in good faith. Legislative amendments to the act, as well as recent case law, indicate a willingness to overlook technical violations of the act where there was a good faith effort to comply with its provisions.

According to 1980 amendments to the act, bid envelopes shouldn't be opened unless the contractor's license number and expiration date appear on the envelope. Yet, the attorney general ruled that bid envelopes without licensing information may be opened if there is a good faith belief by the public agency that the project will be less than \$25,000 (opinion number 89-19).

The 1980 amendments also specifically permit an unlicensed contractor to recover substantiated actual expenses. Before 1980, the Tennessee courts almost uniformly denied a right of recovery to unlicensed contractors, even for substantiated costs of labor and materials². However, in 1981³, the court allowed a contractor who had made application for a license -- but was told by officials that a license was not necessary -- to recover his contractual fees. The contractor had followed bad advice in good faith. The court also allowed a good faith defense in another case⁴, when a project -- through no fault of the contractor -- exceeded the monetary limits of the contractor's license. The court recognized the cost overrun was out of the contractor's control, and granted him recovery.

While the penalty provisions of the act don't include a good faith defense, it looks like penalties would not be imposed if the local official had no reason to believe the completed costs would exceed \$25,000 and there was no intentional decision to avoid the requirements of the statute.

6. What is the punishment for violation of the act?

The act says an *official* issuing a permit to an unlicensed contractor in violation of the act is guilty of a Class C misdemeanor. The penalty is a fine of not less than \$50 and/or a prison sentence of up to 30 days.

7. What about out-of-state contractors/owners?

The act makes no distinction between in-state and out-of-state contractors and owners. The statute simply reads: "Any person, firm or corporation engaged in contracting in this state shall be required to submit evidence that he is qualified to engage in contracting, and shall be licensed..." The attorney general ruled that, as long as the contracting occurs in the state of Tennessee, the licensing statute applies.

8. When must a license be renewed?

A contractor's license is valid for a year -- up to the last day of the 12th month following issuance or renewal. A contractor has a 12-month

grace period to apply for license renewal. However, during the grace period, the license is considered expired and no permit may be issued until it is renewed.

9. Where does a local government get a list and updates of licensed contractors? Who should be contacted with questions about the act?

The act requires the executive director of the State Board for Licensing Contractors to prepare a roster of licensed contractors. The roster includes the name, place of business, residence, and license issuance and expiration date of every licensed contractor. The board will mail a copy of the roster to any municipality, and an update is available on computer disk. The board suggests municipalities check the licensing information provided by contractors.

The board's legal representative will respond to questions and help interpret the act's provisions. Contractor information and copies of the act may be obtained by writing or calling the board.

State Board for Licensing Contractors
500 James Robertson Parkway, Suite 110
Nashville, Tennessee 37219
(615) 741-2121 or 1-800-544-7693

For Further Information

For further information on the Tennessee Contractor Licensing Act, contact your MTAS legal consultant in Knoxville at (615) 974-0411; Nashville at (615) 256-8141; or Jackson at (901) 423-3710.

¹ TCA 29-20-201; also see *Griffin v. Davidson County*, 194 Tenn. 335, 250 S.W.2d 554 (Tenn. 1952).

² *Farmer v. Farmer*, 528 S.W.2d 539 (Tenn. 1975); *Santi v. Crabb*, 574 S.W.2d 732 (Tenn. 1978).

³ *Coleman v. Anderson*, 620 S.W.2d 77 (Tenn. 1981).

⁴ *Helgon v. Angelopoulos*, 629 S.W.2d 15 (Tenn. 1982).

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