

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE

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SYLLABUS:

[*1]

Constitutionality of House Bill 835 (S.B. 1027)

REQUESTBY:

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OPINION:

QUESTION

Is House Bill 835 (S.B. 1027) constitutional?

OPINION

It is the opinion of this office that House Bill 835 (S.B. 1027) appears to be unconstitutional because the state apparently has not reserved legislative jurisdiction to require licensure of contractors on federal property, and such licensure may interfere with the use for which the federal government acquired the property as well as conflict with federal law.

ANALYSIS

Construction contracting is regulated in this state pursuant to the "Contractor's Licensing Act of 1976," *T.C.A. § 62-6-101*, et seq. House Bill 835 (S.B. 1027) would add a new section to the law providing that:

Notwithstanding any provision of law to the contrary, any person who performs work which is subject to the provisions of this chapter on land titled to and operated by the federal government shall not be required to be licensed pursuant to Section 62-6-103 at the time of bidding for such work, but shall be required to be licensed pursuant to Section 62-6-103 at [*2] the time of beginning such work. Failure to comply with the provisions of this section shall be punishable as otherwise provided by this chapter.

The Supremacy Clause of the United States Constitution, Article I, Section 8, Clause 17, grants to Congress the exclusive legislative power over all places purchased within a state by the consent of the legislature of the state for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. Since 1940, Congress has required the United States to accept the transfer of jurisdiction n1 over the property, despite the manner of acquisition. Unless and until the United States' acceptance is filed, it is conclusively presumed that exclusive legislative jurisdiction does not exist. n2

n1 A federal site may be subject to partial jurisdiction which applies when different types of jurisdiction govern various portions of the enclave depending on how it was deeded and accepted by the federal government. Proprietary jurisdiction, as discussed in Paul cited infra, applies to property acquired by the federal government without the benefit of the State's consent through cession or legislative approval. When property is so acquired, the United States owns the land as an ordinary proprietor subject to state jurisdiction consistent with the governmental purpose for which the property is acquired.

[*3]

n2 See 40 U.S.C.A. § 255 which sets forth the procedure for acceptance on the part of the United States.

A state may reserve jurisdiction over land acquired by the federal government, regardless of the method of acquisition or the type of jurisdiction accepted, so long as the jurisdiction reserved by the state does not interfere with the governmental use for which the property is acquired. *James v. Dravo Contracting Co.*, 302 U.S. 134, 149, 58 S.Ct. 208, 216, 82 L.Ed. 155 (1937).

If the federal government acquires and accepts exclusive jurisdiction over property, then subsequent to the acquisition, the state in which the property is situated may only exercise legislative jurisdiction over the enclave if the state reserved jurisdiction over that subject, and the jurisdiction so reserved does not interfere with the governmental use for which the land was acquired. *Paul v. United States*, 371 U.S. 245, 268, 83 S.Ct. 426, 440, 9 L.Ed.2d 292 (1963). The Supreme Court applied that principle in *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285, 63 S.Ct. 628, 87 L.Ed. 761 (1943), [*4] and prohibited state regulation of contracts to be performed in a federal enclave. The Comptroller General has applied the analysis used in that case to resolve challenges based on the contractor's lack of a state license when the contract was to be performed on a federal enclave. See Comp. Gen. Dec. B-161723 (1 Aug. 1967). However, state laws in existence at the time of the acquisition remain enforceable, even if the state does not reserve jurisdiction in that area, so long as they are consistent with the laws of the United States and the governmental use for which the property was acquired. *Pacific Coast Dairy*, 318 U.S. at 294.

A state may also retain jurisdiction over a federal enclave concurrent with that acquired by the federal government. Under concurrent jurisdiction, the state may legislate with respect to the federal enclave, but any state legislative action must be consistent with the laws of the United States, and not interfere with the use for which the property was acquired. *James v. Dravo Contracting Co.*, 302 U.S. 134, 149, 58 S.Ct. 208, 216, 82 L.Ed. 155 (1937).

Under Tennessee law, the Governor is authorized, upon application by the United States, [*5] to cede jurisdiction over federally owned lands as well as reserve to the "state such concurrent or partial jurisdiction as he may deem proper." *T.C.A. § 4-1-106(a)*. n3 However, the General Assembly, has reserved its legislative authority over land ceded to the United States with respect to certain matters as well as concurrent legislative jurisdiction in other areas. *T.C.A. § 4-1-107* provides:

Notwithstanding any other provision of law, there are reserved over any lands as to which any legislative jurisdiction may be ceded to the United States pursuant to § 4-1-106 -- 4-1-109, the state's entire legislative jurisdiction with respect to taxation and that of each state agency, county, city, political subdivision, and public district of the state; the state's entire legislative jurisdiction with respect to marriage, divorce, annulment, adoption, commitment of the mentally incompetent, and descent and distribution of property; concurrent power to enforce the criminal law; and the power to execute any process, civil or criminal, issued under the authority of the state; nor shall any persons residing on such lands be deprived of any civil or political rights, including the right of [*6] suffrage, by reason of the cession of such jurisdiction to the United States.

n3 *T.C.A. 4-1-106(a)* provides:

Whenever the United States shall desire to acquire legislative jurisdiction over any lands within this state and shall make application for that purpose, the governor is authorized to cede to the United States such measure of jurisdiction, not exceeding that requested by the United States, as he may deem proper over all or any part of the lands as to which a cession of legislative jurisdiction is requested, reserving to the state such concurrent or partial jurisdiction as he may deem proper.

If the federal government has accepted exclusive jurisdiction over any property located in Tennessee, the state has reserved its jurisdiction to legislate on those subjects mentioned in the above statute. The state has also reserved concurrent power to enforce the criminal law and issue process on such property. Apparently, the state has not reserved legislative jurisdiction to require licensure of contractors working [*7] on such property. Of course, the governor may retain such jurisdiction under *T.C.A. 4-1-106(a)* if he deems it proper, but unless it is so reserved, the state has given up the jurisdiction altogether. Therefore, with respect to existing federal enclaves in Tennessee, the proposed bill may be

unconstitutional since the state may have failed to reserve its legislative jurisdiction in the licensure area before ceding the property to the federal government.

Even if the state had reserved its jurisdiction with respect to licensure of contractors on government property, the proposed bill may be unconstitutional on the ground that it interferes with the use for which the property was acquired. *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285, 294, 63 S.Ct. 628, 630, 87 L.Ed. 761 (1943); *James v. Dravo Contracting Co.*, 302 U.S. 134, 149, 58 S.Ct. 208, 216, 82 L.Ed. 155 (1937). Any state legislative action affecting federal enclaves must not interfere with the use for which the property was acquired regardless of whether concurrent or exclusive jurisdiction applies in the particular federal enclave. *Id.*

In *Leslie Miller, Inc., v. Arkansas*, 352 U.S. 187, 77 [*8] S.Ct. 257, 1 L.Ed.2d 231 (1956), a federal government contractor had been found guilty and fined under Arkansas law for commencing work on federal property without a license from the state licensing board. At the time of the suit, the federal government had not accepted jurisdiction over the property pursuant to 40 U.S.C.A. § 255. However, the Court overturned the judgement of the state courts on the grounds that requiring state licensure of federal contractors interfered with the federal government's power to select contractors and schedule construction. In addition, the licensing requirement was found to conflict with federal law regulating procurement. *Id.* at 188. Specifically, the licensing requirement was held to be in conflict with federal law in that the requirement afforded the state licensing board "a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." *Id.* at 190. There has been no change in the federal laws regarding "responsibility" which would render the case inapplicable. n4

n4 41 U.S.C.A. § 253b provides in pertinent part that the "executive agency . . . shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation."

[*9]

Because Tennessee has apparently failed to reserve legislative jurisdiction to require licensure of contractors on federal property, and because any such requirement may be inconsistent with federal law and interfere with the use for which the property was acquired, House Bill 835 appears to be unconstitutional.

Requested by: Honorable Tommy Head, State Representative, 33 Legislative Plaza, Nashville, TN 37243

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