

contract, including those contracting for the part performance of the work to any remote degree.

If an owner has contracted directly with an electrical or plumbing contractor for part of the project then there is no "general" contractor on the same project because there is no one who has contracted with the owner for the entire project. The person who was the general contractor in your first hypothetical situation would be simply a "contractor" in your second hypothetical, because he would be continuing to deal directly with the owner but he would no longer be responsible for 100% of the work. For purposes of clarity we will hereafter refer to this person as the "principal contractor".

Under old Tennessee law the answer to your question would have probably been that the owner's direct contract with a plumbing or electrical contractor would have had no effect on the monetary limitations "counted against" the principal contractor. The Tennessee courts used to look at the value of the entire project to assess whether or not an individual contractor was adequately licensed, regardless of the value of that contractor's individual and direct dealings with the owner. The major case representing old law was Santi v. Crabb, 574 S.W.2d 732 (Tenn. 1978): Where the owner of a \$105,000.00 project did not use a general contractor and instead dealt directly with various different persons whose services were required for various separate portions of the project, the court held that an unlicensed contractor who did sheetrock work at a cost of \$4,000 could not recover from the owner, because the cost of the entire project exceeded the statutory limit. Santi v. Crabb, supra. At that time the licensing statute provided that if the cost of the entire project exceeded \$20,000 then any person, etc. engaged in any part of the construction such as plumbing, heating, and so forth, and contracting with the owner, "shall be treated as a general contractor in his line of work and shall be required to have a license hereunder". T.C.A. § 62-601 (1976).

The act was amended in 1980 to drop the language which required any person dealing directly with the owner to have a license, regardless of the value of his own specialty work, whenever the value of the entire project exceeded \$20,000. The General Assembly in 1980 rewrote the definition of "contracting" to provide essentially as it does today at § 62-6-102(1)(A) (quoted above), and the General Assembly rewrote § 62-6-102(1)(B) to provide:

(B) "Contracting" does not include;

(i) Subcontracting, unless a subcontract involves:

(a) Fifty thousand dollars (\$50,000) or more of electrical work;

(b) Fifty thousand dollars (\$50,000) or more of plumbing work; or

(c) Fifty thousand dollars (\$50,000) or more of heating, ventilating or air conditioning work.

Tenn. Pub. Acts 1980, Ch. 652. The act was amended again in 1991 (effective 1/1/92) to substitute \$25,000 for \$50,000 in T.C.A. §§ 62-6-102(B)(i)(a)-(c). Tenn. Pub. Acts 1991, Ch. 173.

The Tennessee Supreme Court heard a second case under the same facts as in Santi except that this second case arose under the 1980 act. The Court reversed its holding in Santi and held that those who have contracts to perform portions of larger projects, which portions do not exceed \$50,000 (now \$25,000), are not required by this act to have a license even when the total cost of construction exceeds \$50,000 (now \$25,000). Dewberry v. Curtis, 701 S.W.2d 612 (Tenn. 1985). What this means is that the pertinent monetary value for purposes of the contractor licensing statutes is the monetary value of each contractor's (or subcontractor's) individual undertaking, not the value of the entire project.

In your hypothetical, if the project owner contracted individually with an electrical and/or plumbing contractor, and the principal contractor had no responsibility for supervising or otherwise directing these specialty contractors, then the value of the owner's contract(s) with the specialty contractor(s) would be deducted from the value of the entire project for purposes of assessing whether the principal contractor was adequately licensed. For example, let us assume again that this is a \$5,000,000 project and that the principal contractor has a \$1,000,000 limitation on his license. However, this time let us assume that the electrical work is valued at \$2,100,000, the plumbing work is valued at \$2,100,000, that the owner has contracted directly with an electrical contractor and a plumbing contractor for their specialties (each of whom are adequately licensed), and that the owner has contracted with the principal contractor for the remainder of the work. If the principal contractor has no

responsibilities in connection with the electrical or plumbing work, then the value of each of their contracts would not be "counted against" the principal contractor when examining his license. The two \$2,100,000 contracts would be subtracted from the \$5,000,000 value of the entire project and only \$800,000 would be considered when assessing the monetary limitations of the principal contractor. Because the principal contractor has a monetary limitation of \$1,000,000, there would be no problem with his license under this hypothetical.

However, the answer to your question would be different if the principal contractor in your hypothetical will in fact "supervise, superintend, oversee, direct, or in any manner assume charge of" the work of the electrical and/or plumbing contractor. If the owner is signing contracts with the electrical and plumbing contractors just to get around the financial limitations in the principal contractor's license, it is the opinion of this Office that the licensing board and the county would likely "count against" the principal contractor's license the value of the specialty contractors' work that the principal contractor is in fact directing.

So far in this opinion we have been assuming that the property owner is not a "contractor" within the meaning of the Act. However, a property owner can be considered to be engaged in "contracting", bringing the owner/contractor within the purview of the licensing requirements, if he is undertaking the construction "for a fixed price, fee, commission, or gain of whatever nature." T.C.A. § 62-6-102(1)(A), and the Act states:

. . . Any person, firm or corporation engaged in contracting, including such person, firm or corporation that engages in the construction of residences or dwellings constructed on private property for the purpose of resale, lease, rent, or any other similar purpose shall be required to submit evidence that he is qualified to engage in contracting and/or building, and shall be licensed. . . .

T.C.A. § 62-6-103(a)(1).

There are some exceptions in the Act addressed to the owner/contractor situation. Any person, firm, or church that owns property and builds on it for individual use and not resale, lease, rent, etc. is exempt from the licensing requirements. T.C.A. § 62-6-103(a)(2)(A). In a large number of counties (as defined by population), the licensing

13 8 15

requirements do not apply to undertaking in one's county of residence to construct residences on private property for purpose of resale. T.C.A. § 62-6-102(1)(B)(ii).

If the owner is undertaking the construction for resale or rental of the property and the owner does not come within the exceptions set out in T.C.A. § 62-6-102 as amended, then the owner is a "contractor" for purposes of T.C.A. § 62-6-101, et seq. and the owner is required to have a license and otherwise comply with the Act if the cost of the completed project exceeds \$25,000. In such a case it is the potential buyer of the property on resale, as well as vendors and others dealing with the owner/contractor, that the statute is trying to protect.

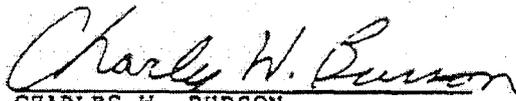
Where there is an owner/contractor then the question arises - are the specialty firms or individuals who contract directly with the owner/contractor for a portion of the project "subcontracting" or "contracting" within the meaning of the subcontractor exemptions in T.C.A. § 62-6-102(1)(B) of the contractor licensing Statutes? It is the opinion of this office that such a firm or individual would be "subcontracting" within the meaning of the present licensing statutes, even though this firm or individual is dealing directly with the owner. In light of the 1980 and subsequent revisions to T.C.A. § 62-6-103, the critical factor for determining who is "subcontracting" is whether the person or firm is engaged to perform a limited aspect of a larger project. Dewberry v. Curtis, supra., 701 S.W.2d at 614.¹ Consequently the specialty contractors (electrician, plumber, etc.) in your hypothetical would only be required to be licensed if the value of the limited aspect for which each is responsible exceeds \$25,000. T.C.A. § 62-6-102(1)(B). The principal contractor in your hypothetical who is undertaking responsibility for everything except the electrical and plumbing work is also deemed a subcontractor if this principal contractor's responsibilities encompass only a portion of the project. The principal contractor would only have to obtain a license if the value of the portion of the project for which he is responsible exceeds \$25,000. On the other hand, the owner/contractor would be required to have a license and otherwise comply with the act if the value of the entire project exceeds \$25,000.

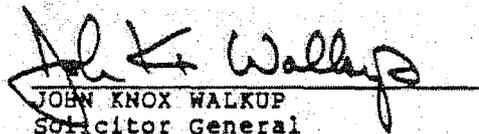
¹Although the Tennessee Supreme Court stated in Santi v. Crabb, 574 S.W.2d 732 (Tenn. 1978) that an "owner" could not be a "contractor," the Court held in Dewberry that Santi is no longer good law due to the 1980 statutory amendments.

14 of 15

Where the owner contracts directly with the electrical and/or plumbing contractor, and a "principal contractor" who is responsible for the rest, it is our opinion the result will be the same as discussed above even if the owner is deemed to be a "contractor," e.g., because the project is being constructed for resale. The principal contractor is deemed to be a "subcontractor" and the value of the portions of the job for which he has no responsibility are deducted from the value of the entire project in order to determine whether the principal contractor would or would not be exceeding the financial limitations of the principal contractor's license. On the other hand, the owner/contractor would be required to have a license and the value of the entire project could not exceed the monetary limitations of the owner/contractor's license.

It is important to keep in mind that this opinion addresses the meaning of the terms "owner," "contractor," and "subcontractor" in the context of the Tennessee Contractors' Licensing Act, T.C.A. §§ 62-6-101, et seq. and only in that context. One should not assume that the same definitions apply to legal questions outside licensing issues. Different statutes have different objects, and sometimes the same term used by the General Assembly will have different meanings in different statutes. For example, the terms "owner," "contractor," "subcontractor," and "general contractor" have somewhat different definitions in the lien statutes, where the main consideration is who is dealing directly with the owner and who is a remote contractor. See Tenn. Atty. Gen. Op. 91-14 (February 4, 1991).


CHARLES W. BURSON
Attorney General and Reporter


JOHN KNOX WALKUP
Solicitor General


RACHEL L. STEELE
Special Assistant Attorney
General

15 of 15