

N.D.A.G. Letter to Meier (May 7, 1985)

May 7, 1985

Honorable Ben Meier
Secretary of State
State Capitol
Bismarck, North Dakota 58505

Dear Secretary Meier:

Thank you for your letter of April 3, 1985, requesting my review of information pertaining to an individual allegedly acting as a contractor without the appropriate license and a determination of whether legal action is warranted.

Contractor licensing is governed by the provisions of N.D.C.C. Ch. 43-07. A "contractor" is defined in N.D.C.C. §43-07-01(3) as follows:

43-07-01. DEFINITIONS. In this chapter, unless the context or subject matter otherwise requires:

* * *

3. A "contractor" is any person, as hereinbefore defined, engaged in the business of construction, repair, alteration, dismantling, or demolition of bridges, highways, roads, streets, buildings, airports, dams, drainage or irrigation ditches, sewers, water or gas mains, water filters, tanks, towers, oil, gas, or water pipelines, and every other type of structure, project, development, or improvement coming within the definition of real or personal property, including the construction, alteration, or repair of property to be held either for sale or rental, and shall include subcontractor, public contractor, and nonresident contractor.

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[Emphasis supplied.]

N.D.C.C. §43-07-02 further provides as follows:

43-07-02. LICENSE REQUIRED -- ENJOINING OPERATION WITHOUT LICENSE. No person shall engage in the business nor act in the capacity of a contractor within this state when the original contract or subcontract cost, value, or price exceeds the sum of five hundred dollars without first having a license as provided in this chapter. . . .

According to the information provided by your office, the alleged contractor, Ronald Mootz, was hired by Midwest Management Company to landscape several properties. Landscaping would be considered contracting work since it falls into the broad category of an improvement to real property under N.D.C.C. §43-07-01(3).

In a November 26, 1984, letter from Bradley K. Holm, Vice President of Midwest Management Company, it is stated that Ronald Mootz was paid on an hourly wage basis. Moreover, there was no contract between Mr. Mootz and Midwest Management Company.

The topic of contractor work done on an hourly wage basis was the subject of a 1975 Attorney General's Opinion. In this opinion (1975 N.D. Op. Att'y. Gen. 91), a copy of which is enclosed, it is stated that a person who acts as a hired employee of another on an hourly wage basis and subject to the constant direction and supervision of the employer is not subject to the contractor licensing provisions of N.D.C.C. Ch. 43-07.

Since the opinion was issued, no attempt has been made to change the law to include those persons hired on an hourly wage basis and subject to the constant direction and supervision of the employer as a contractor. Therefore, it is my opinion that when one is hired to perform a task on an hourly wage basis and is subject to the constant direction and supervision of an employer, a contractor's license is not required. Furthermore, whether an individual is subject to the contractor licensing provisions is a question of fact and the contractor licensing provisions of N.D.C.C. Ch. 43-07 must be applied on a case-by-case basis.

However, an employer, such as Midwest Management company, hiring an individual on an hourly wage basis may be subject to the contractor licensing laws if the employer has a contract to repair or improve real property that is for rent or sale. See, N.D.C.C. §43-07-01(3). Moreover, pursuant to N.D.C.C. §43-07-02, the contractor licensing provisions applies only when the contract price exceeds \$500 and the contractor does not fall into one of the three licensing exemptions set forth in N.D.C.C. §43-07-08.

Sincerely,

Nicholas J. Spaeth

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Enclosure