ALAN WILSON
ATTORNEY GENERAL

April 3, 2018

The Honorable Robert M. Hitt III
Secretary
South Carolina Department of Commerce
1201 Main Street, Suite 1600
Columbia, SC 29201

Dear Mr. Hitt:

You seek our advice regarding a situation "involving one of the most important industrial projects underway in our State. . . ." Your concern is the possible need for a general contractor's license and whether the "Vendor [in this project] is in compliance with state licensing statutes."

By way of background, you note that you "have personal experience with the Vendor and can attest that the Vendor is performing the same work that it has performed in South Carolina for other customers in the same industry for more than two decades, but because of a change in contract structure (which has been determined by the industry to be the best structure)," you raise the question of the need now for a contractor's license. Thus, you ask "whether a Vendor that supplies and installs specialized systems and equipment for surface finishing (painting), as well as conveying and air treatment, is in violation of South Carolina's contractor licensing laws under the following circumstances [quoting from your letter]:

> 1. The Vendor does not possess a South Carolina general contractor's license.
> 2. The actual work performed by the Vendor is to supply and install its specialized equipment into the building constructed to house its equipment which constitutes the "paint shop" as part of a larger assembly plant being constructed by the Customer.
> 3. All other construction work associated with the "paint shop" is being performed by various licensed contractors (including general contractors, electrical contractors and mechanical contractors), including building the structure and the necessary electrical and mechanical work associated with installing and hooking-up the Vendor's equipment.
> 4. However, the Customer/Owner chose to execute a so-called "Turnkey Paint Shop" contract with the Vendor which required the Vendor to hire and coordinate the various licensed general, electrical and mechanical contractors who actually built the building and performed the entire construction project of the paint shop.

By way of additional history and information:

a. Vendor has been, and remains the preferred vendor to many customers in the same industry as the above-referenced Customer and has supplied and installed its equipment and processes into numerous other paint shops. However, in the prior cases, the customer contracted separately with Vendor only to supply and install its equipment while the customer contracted separately with all other licensed contractors to construct the building to house the paint shop and to perform all other construction for the entire paint shop project. Vendor typically had no contractual relationship with the various other contractors.
b. The Customer referenced above was the first customer to utilize a contracting model which purchased a "Turnkey Paint Shop" from the Vendor, with the Vendor having responsibility to hire and coordinate the separate licensed general, electrical and mechanical contractors who would construct the building and perform the work to complete the balance of the entire "paint shop" project.
c. The building permit for the "Paint Shop" building was obtained by the licensed general contractor contracted to construct the building.
d. Mindful of the express intent of the contractor licensing statutes – "to protect the health, safety, and welfare of the public" – Vendor unqualifiedly assures that it did not engage in any work involving construction, modification, improvement, or repairs to a building or structure, and all such work was actually performed by qualified and licensed general contractors.

My understanding is that the Vendor intends prospectively to seek a general contractor's license for future contracts with customers who desire a "Turnkey Paint Shop" in order to eliminate any question concerning technical compliance with South Carolina licensing requirements. But, my view is that the contracting model does not alter the substance of the Vendor's performance as a provider and installer of equipment into a building constructed by another party, who is a licensed general contractor and to whom the building permit was issued.

Our analysis follows below. Again, however, we caution that the answer is contingent upon the facts as presented.

Law/Analysis

We note several caveats at the outset of our analysis. First and foremost, this Office is unable to make any factual determinations in advising you. As was stated in Op. S.C. Att'y Gen., 1989 WL 406130, Op. No. 89-40 (April 3, 1989),

> [b]ecause this Office does not have the authority of a court or other fact-finding body we are not able in a legal opinion, to adjudicate or investigate factual questions. . . .
>
> This policy is particularly appropriate in contractual matters because oftentimes the facts involved will be controlling. Thus, we may only assume facts as presented

> to us and we make no comment upon or attempt to resolve any factual disputes which may be present here.

In short, we are able to comment only upon a hypothetical set of facts as presented to us. Moreover, as we have often recognized,

> . . . [i]t is this Office's longstanding policy (as it is the courts') to defer to the administrative agency charged with the regulation concerning the subject matter. As this Office stated in a previous opinion, "as a general matter, it is well recognized that administrative agencies possess discretion in the area of effectuating the poly established by the Legislature in the agency's governing law. As our Supreme Court has recognized, 'construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons.' Op. S.C. Att'y Gen. October 20, 1997, quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986).

Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013). Thus, typically, we defer to the construction of the administrative agency in question, in this instance, the Contractors' Licensing Board. Our analysis herein in no way seeks to supersede that Board's authority.

Here, assuming the facts as you have presented them, we have located a previous opinion of this Office which appears to be on point in advising you. In Op. S.C. Att'y Gen., 1978 WL 22553, Op. No. 78-72 (April 12, 1978), we construed the Contractors' Licensing statute in what appears to be a similar situation to that presented. In the situation involved in the 1978 Opinion, it was indicated that "the type of work questioned did not involve any construction, modification, improvement or repairs to a building or structure." Instead, the work involved

> . . . unloading . . . machinery from rail cars, or trucks by utilizing cranes, lift trucks, rollers, jacks, hoists, etc.; then moving the machinery into place within a building; and subsequently bolting or securing the machinery to its foundation and hooking up the machine supply lines (such as air, water, and vacuum, but no electrical) to main lines already established with the building.

The question we addressed in that opinion was thus "whether this type of activity constitutes contracting within the definition of Section 40-11-10. . . ."

In the 1978 Opinion, we noted that a "general contractor" is defined by § 40-11-10 as follows:

> [o]ne who for a fixed price, commission, fee, or wage undertakes or offers to undertake the construction or superintending of construction of any building, highway, sewer, grading, improvement, reimprovement, structure or part thereof, when the cost of the undertaking is thirty thousand dollars or more.

We further advised that "as to the work involved in unloading, moving and securing the machinery, the pertinent parts of the section [40-10] would be: . . . one who . . . undertakes . . .

the construction . . . of any . . . improvement. . ." Based upon these issues, our analysis in that Opinion was as follows:

> An earlier opinion of this Office, a letter from Mr. J.C. Colcman to Mr. L.P. Hamilton dated December 5, 1973, indicated as to a situation prompting the request that the above definition was two-pronged in its applicability, viz:
>
> 1. the item under consideration must be an 'improvement' to the structure;
> 2. the item under consideration must be 'constructed'.
>
> In this earlier opinion, the question involved whether the supplier of manufactured seating equipment which cost thirty thousand dollars or more must be licensed as a general contractor in this State to install such equipment. In that instance, the work involved securing the seating equipment to a building and this Office was of the opinion that the attachment of this manufactured seating equipment to the building was not construction within the above referenced definition of a general contractor.
>
> Arguably, the machinery involved in the particular situation prompting this Opinion may come within the definition of an 'improvement'. However, it does not appear that the work done in unloading the machinery, moving it into place, and bolting or securing it to the foundation of a building would be 'construction'.
>
> The earlier-referenced Opinion indicated that 'construct' has been defined as 'to make or form by fitting the parts together'. In Muirhead v. Pilot Properties, 258 So.2d 232 (1972), the Mississippi Supreme Court defined 'construction' as to build or erect something which theretofore did not exist'. Similarly, in Olnev v. Hutt, 105 N.W.2d 515 (1960), the Iowa Supreme Court defined 'construct' as 'to put together the constituent parts in their proper place and order; to build; form; make'.
>
> Based on the description of the work involved in unloading, moving, and securing machinery to a particular foundation, it does not appear that this work would present a situation requiring a licensed general contractor inasmuch as no actual construction is involved. However, you indicated that it was necessary that the machine supply lines, such as air, water, and vacuum, be hooked up to main lines established within the building. It would appear that this would involve activity within the requirements of either the general or mechanical contracting laws of this State. Arguably such work could be construed to be construction within the previous definitions referenced so as to bring it within the definition of general contracting. Also the nature of certain aspects of the work, which admittedly is somewhat vague to someone not totally informed in such processes, may be such as to bring it within the scope of mechanical contracting. By definition, a mechanical contractor is
>
> > one who for a fixed price commission, fee or wage undertakes or offers to undertake any plumbing, heating, air conditioning or electrical work when the cost of the undertaking is ten thousand dollars or more.
>
> Of course, the cost requirements would have to be met in order for it to be necessary that a licensed general or mechanical contractor complete the work

CONCLUSION:

(1) A company engaged in unloading, moving, and securing certain machinery to the foundation of a building previously constructed to house such machinery is not required to have a South Carolina general contractor's license to do such work.
(2) It would appear, however, that the work involved in hooking up certain machinery supply lines, such as water, air, and vacuum, necessitates that it be performed by a licensed contractor assuming that the financial requirements of the statutes regulating contractors in this State are met.

Accordingly, it would appear from the facts which you have presented, that the 1978 Opinion answers your question. As we concluded in the 1978 Opinion, a "company engaged in unloading, moving and securing certain machinery to the foundation of a building previously constructed to house such machinery is not required to have a South Carolina general contractor's license to do such work." We cautioned, however, that "[i]it would appear . . . that the work involved in hooking up certain machinery supply lines, such as water, air, and vacuum, necessitates that it be performed by a licensed contractor assuming that the financial requirements of the statutes regulating contractors in the State are met."

We further note that the definitions contained in the contractor licensing statute have changed dramatically since the 1978 Opinion was issued. However, the definition of "general contractor" remains fairly similar to then: "an entity which performs or supervises or offers to perform or supervise general construction." See § 40-11-20(9). The term "general construction" is defined by § 40-11-20(8) as "the installation, replacement, or repair of a building, structure, highway, sewer, grading asphalt or concrete paving or improvement of any kind to real property." This definition is also similar to that contained in the law at the time of the Opinion. Given the several caveats set forth herein, we believe the 1978 Opinion is thus controlling.

Conclusion

The 1978 Opinion, referenced above, is based upon very narrow facts. That Opinion assumed facts based upon the premise that the person in question was not performing "construction" as that term is commonly understood. It was there stated that "[b]ased on the description of the work involved in unloading, moving, and securing machinery to a particular foundation, it does not appear that this work would present a situation requiring a licensed general contractor inasmuch as no actual construction is involved." Assuming the facts as you present them, we believe a court would likely follow the 1978 Opinion, referenced above, with respect to the requirement of a general contractor's license. Case law in jurisdictions having similar statutes support the analysis contained in the 1978 Opinion. See e.g. Florence Concrete Products, Inc. v. N.C. Licensing Bd. for General Contractors, 459 S.E.2d 201, 204 (N.C. 1995) [". . . under the facts in the present case, petitioner does not undertake to bid upon or construct 'any building, highway . . . or structure.' Petitioner constructs and installs prestressed concrete components for highway bridges."]. Thus, the 1978 Opinion appears to be well-reasoned and supported by existing law and serves to resolve your issue.

We hasten to add, however, that this conclusion – that the 1978 Opinion is controlling – is, of course, dependent upon an assumption that "[t]he actual work performed by the Vendor is to supply and install its specialized equipment into the building constructed to house its equipment which constitutes the 'paint shop' of a larger assembly plant being constructed by the Customer." It is also assumed, as your letter states, that "[a]ll other work associated with the 'paint shop' is being performed by licensed contractors." Moreover, you note that the Vendor "unqualifiedly assures that it did not engage in any work involving construction, modification, improvement, or repairs to a building or structure, and all such work was actually performed by qualified and licensed contractors." Finally, we assume that the "Turnkey Paint Shop" contract is the only issue involved. Any variation from these factual assumptions could produce a different conclusion and mandate licensure as a general contractor.

Important to note also is that any determination as to whether a person is engaging in the unauthorized practice of a particular profession involves an intensely factual inquiry. See Boone v. Quicken Loans, Inc., 420 S.C. 452, 465-66, 803 S.E.2d 707, 714 (2017) [". . . in evaluating whether challenged conduct constitutes the unauthorized practice of law, this Court carefully considers the constellation of facts presented and the legal rights implicated to determine whether the degree of attorney involvement appropriately protects the public. . . ."]. Courts look to the "character of the services rendered" as opposed to particular nomenclature. See State ex rel. Daniel v. Wells, 191 S.C. 488, 5 S.E.2d 181, 185 (1939). Thus, unauthorized practice turns on the peculiar facts of each case. Doe v. McMaster, 355 S.C. 306, 585 S.E. 773 (2003).

In addition, courts have cautioned that an unlicensed person "walk[s] a fine line between their proper function and . . . unauthorized practice . . . [of a profession]." Dawson v. Fulton-DeKalb Hosp. Auth., 490 S.E.2d 142, 147 (Ga. App. 1997), vacated on other grounds, 511 S.E.2d 199 (Ga. 1999). See also Reliable Properties, Inc. v. McAllister, III, 336 S.E.2d 108, 110 (N.C. App. 1985) ["In the present case, plaintiff argues that it was not a general contractor within the meaning of G.S. 87-1. We disagree. The evidence offered at trial established that the renovation included the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of all apartment interiors; including new paint, wallpaper and carpet. . . . . Clearly, the renovation improved already existing buildings and constituted construction within the meaning of the statute."]. The 1978 Opinion recognized that any variation in facts could mean the need for licensure in that we noted that the work involved in hooking up certain machinery supply lines, such as water, air and vacuum, "necessitates that it be performed by a licensed contractor. . . ." Any role by the Vendor in the construction of the building itself could lead to the same result.

The purpose of the contractors' licensure statute and regulations is the protection of the public from irresponsible contractors. See Watson v. Harmon, 280 S.C. 214, 312 S.E.2d 8 (1994) [purpose of statute regulating residential homebuilders is protection of the public from irresponsible homebuilders]. As seen in Reliable Properties, supra, and in our 1978 Opinion, the relevant facts can create the performance of "construction" sufficient to require licensure. Accordingly, we strongly agree with your plan immediately to seek licensure as a general

contractor as a precaution. Such a course of action is prudent regardless of whether licensure is or is not required in the present factual scenario. For the moment, assuming the facts as you present them, and with the other caveats discussed, the 1978 Opinion appears to be on point in resolving your question.

Sincerely,

Robert D. Cook
Solicitor General