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Honorable Albert Gore
United States Senator
Carthage, Tennessee

OCT 11

Dear Senator Gore:

Further reference is made to your letter of September 19, 1955, acknowledged September 22, concerning the award of Government contracts in Tennessee to contractors who are not licensed in that state.

Under the laws of Tennessee (section 7182.25, et seq., Williams Tennessee Code Annotated, 1934) all contractors performing work directly for the owner on a project costing over $10,000 are required to secure a license as a general contractor from the State Board for Licensing General Contractors. The validity of such a license is conditional upon the contractor's payment of his State privilege tax. Criminal penalties are imposed against contractors who operate under invalid licenses and against property owners or others who accept bids from unlicensed contractors.

It is alleged by the attorney for the Memphis Chapter, Painting and Decorating Contractors of America, that the Department of the Navy has accepted bids from painting contractors who were not licensed by the State of Tennessee in connection with work on Government projects in Shelby County, and it appears to be the position of the Chapter that non-licensed contractors should not be permitted to bid on Government work in Tennessee.

In reply to inquiries, you have received letters from the Department of the Navy and from the Public Buildings Service, General Services Administration, concerning the matter. The Department of the Navy takes the position, in effect, that it is not authorized to deviate from the contract forms prescribed by the General Services Administration, and that those forms place the responsibility for obtaining all required licenses upon prospective contractors. The Public Buildings Service, on the other hand, takes the position that the standard forms now in use do require a successful bidder on a project in Tennessee to obtain a general contractor's license. The particular language in question is the following sentence from Article 11 of Standard Form 23A, General Provisions (Construction Contracts):

> "The Contractor shall, without additional expense to the Government, obtain all licenses and permits required for the prosecution of the work."

We do not agree with the interpretation placed on this language by the Public Buildings Service. For one thing, such an interpretation appears to ignore the possibility that work may be performed entirely in an area over which the State has ceded exclusive jurisdiction to the United States. The Tennessee statute is by its terms applicable only to work "to be contracted in the State of Tennessee" (Public Acts 1945, ch. 135, sec. 17; 7182.41 Williams Tennessee Code Annotated, 1934). It would be conceded, we assume, that the license requirements of the statute would not apply to work performed entirely within a Federal enclave. See Pacific Coast Dairy, Inc. v. California, 318 U.S. 285; United States v. City of Chester, 144 F. 2d 415; Oklahoma City v. Sanders, 94 F. 2d 323; Thompson v. City of Birmingham, 200 F. 2d 505; cf. Sellit & Sons v. Virginia, 172 S.E. 290.

The question involved in areas other than Federal enclaves is whether or not compliance with the requirements of the State law would impose an undue burden upon the performance of Federal functions. The general rule was stated by Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 436, as follows:

> "The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be. Attention may be invited in this connection to the following language in the case of Penn Dairies v. Milk Control Comm., 318 U.S. 261, 276-77, 278, referring to an Army regulation:

> "* * * the regulation itself is at most a direction to contracting officers not to assume by their specifications for bids any responsibility for requiring compliance with local price regulations before it is judicially determined whether such regulations are applicable to government contracts. * * *
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> "* * * the Secretary * * * has left the question of its applicability to be settled by this Court's determination of the scope of the government's immunity under the

laws and Constitution of the United States. In the meantime he has adopted a specific policy of not including, in government contracts, terms requiring the contractor's compliance with state price-fixing legislation, thus avoiding any action which could be construed as an assent to the application of such legislation to government contractors in circumstances, if any, where it would without affirmative assent be inapplicable."

Determination of the applicability of a particular state statute to the activities of Government contractors is at best a difficult task, and one which has had to be resolved many times by the Supreme Court. See, for example, Jones v. Bravo Contracting Co., 302 U.S. 134; Collins v. Yosemite Park & Curry Co., 304 U.S. 518; Alabama v. King & Boozer, 314 U.S. 1; Sadrakula v. Stewart, 309 U.S. 94; Mayo v. United States, 319 U.S. 441; see, also, annotations at 91 A.L.R. 774; 115 A.L.R. 371. Your attention is also invited to decision of our Office, 19 Comp. Gen. 735, wherein reference is made to a letter from the then Attorney General of the United States to the effect that the Department of Justice probably would take the position that a New Mexico licensing statute similar to the Tennessee statute would be inapplicable to contractors engaged on work for the United States.

Under Article 11 of Standard Form 23A the contractor must secure at his own expense all licenses and permits required for the work. No Government contracting officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor. No statute has been brought to our attention which would authorize the inclusion of a condition in Federal contracts or bid invitations that local permits or licenses must be obtained, regardless of their necessity as applied to the work to be done. Accordingly, we are of the opinion that the obtaining of a general contractor's license for performing Government work in Tennessee is a matter which must be settled between the local authorities and the contractors, either by agreement or by judicial determination.

Sincerely yours,

JOSEPH CAMPBELL

Comptroller General
of the United States