

## Opinion No. 55-6106

February 17, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. C. C. Chase, Jr., District Attorney, Third Judicial District Second Floor Court House, Las Cruces, New Mexico

Your request for an opinion dated February 11, 1955, has been received. Your inquiry: Is it necessary for an individual engaged in the practice of levelling land for farmers, under contract, to secure a contractor's license under § 67-16-1, N.M.S.A., 1953, et seq. § 67-16-1 reads as follows:

"It shall be unlawful for any person, firm, co-partnership, corporation, association or other organization, or any combination of any thereof, to engage in the business or act or offer to act in the capacity or purport to have the capacity of contractor within this state without having a license therefor as herein provided, unless such person, firm, copartnership, corporation, association or other organization is particularly exempt as provided in this act (67-16-1 to 67-16-9, 67-16-12 to 67-16-16). Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project shall be accepted in any court as prima facie evidence of the existence of a contract."

Section 67-16-2, reads as follows:

"This act shall not apply to farming, dairying, agriculture, viticulture, horticulture or stock or poultry raising."

A very similar question was presented to the Supreme Court of New Mexico in the case of B & R Drilling Co., vs. Gardner, 55 N.M. 118. There, as you know, the question was whether or not a person who contracted to drill a well to be used for agricultural purposes was required to secure a contractor's license in view of the exemption above. It was held that such a person did not need a license since he came within that group of contractors embraced by the exemption. The test adopted in that case is a very broad and general one. At page 120 it is said:

"The exceptions should be given a reasonable construction and should be held to embrace compensation arising under contracts for the performance of **any work fairly incidental to carrying on the named pursuits**, ordinarily considered a part thereof, and helpful or essential to their prosecution." (Emphasis mine)

You mention that the rules and regulations of the Contractors' Licensing Board include a classification for persons doing land-levelling or landscaping. It is our view that the existence of such rules and regulations is immaterial. That Board has no more power than is given to it by statute.

You further suggest that possibly the contractor in this case should be licensed since land-levelling "comes close to the engineering profession or the construction business." I would agree with you were it not for the rule laid down in the above case. The test seems to be not whether it is work similar to work done by contractors or engineers, but rather whether or not the work is "incidental" to any of the pursuits named in the exemption provision.

Viewed thus, land-levelling, if actually done to prepare land for farming or agriculture is more than a mere incident to farming. It is an essential function without which farming or other forms of agriculture could not properly be carried on.

It is, therefore, the opinion of this office that an individual engaged in the business of land-levelling, where such land-levelling is done for farmers and actually to prepare the land for farming, comes within the exemptions cited in § 67-16-2, and therefore is not required to secure a contractor's license.

I trust this answers your inquiry satisfactorily.

By: Santiago E. Campos

Assistant Attorney General