Opinion No. 42-4174

October 24, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Mel A. Hagman City Inspector Santa Fe, New Mexico

*{*268}* You have requested an official opinion of this office concerning whether a contractor who has contracted to erect a structure for the United States Government at a fixed price is subject to the building permit fees which are required to be paid on all similar projects, and certain other taxes which are likewise required to be paid by contractors. Under this fact situation, I am treating all such fees and taxes under the same general principle. The only question involved is whether or not such contractors are exempt from fees and taxes as a result of contracting to construct for the Federal Government. Otherwise, there is no question but what such contractors would have to pay the fees.

Ordinarily we are not authorized to render opinions to others than state departments and public officials. However, due to the fact that similar cases are arising all over the state, and also due to the fact that your City Attorney, Mr. Hamilton, as well as your Acting District Attorney, Mr. Arthur Livingston, have felt that a uniform ruling in the state is desirable, we are giving an opinion on this question.

Under the facts which you have given me, it is noted that not one penny of any fees or taxes which these contractors are required to pay by the ordinances of the City of Santa Fe will be passed on to the Federal Government.

The Supreme Court of the United States on November 10, 1941, in the case of State of Alabama vs. King and Boozer, held that a contractor must pay taxes levied by a state. In legal effect, there is no distinction in liability for taxes levied by a state or by a municipality.

In the above case the contract was on a cost plus basis and it was admitted that the cost to the Government would be increased by holding the contractors subject to the tax. Therefore, the result reached in this opinion of holding the contractors liable to the payment of fees and taxes is supported to an even greater extent by the rule applied by the Supreme Court of the United States in the above case.

In the case of Trinity farm Construction Co. vs. Grosjean, 291 U.S. 466, the Court held under the following fact situation.

"Petitioner entered into a contract with the Federal Government for the construction of levees, in aid of navigation of the Mississippi *{*269}* River, in the performance of which gasoline was used to supply power for machinery. Held that a state excise tax on the

gasoline so used was **not** invalid, as a tax on a means or instrumentality of the Federal Government, its effect, if any, upon that Government being consequential and remote."

It was also held in the case of James vs. Dravo Contracting Company, 302 U.S. 134, that:

"An independent contractor, engaged under his contract with the Government in the construction of locks and dams for the improvement of navigation, is not an instrumentality of the Government.

"As applied to such a contractor, a non-discriminatory state tax on his gross receipts under the contract is not unconstitutional as a tax laid on the contract itself or as otherwise directly burdening the Government."

In view of the authority contained in these three cases and the numerous cases cited by these cases, we hold that the contractors whom you have mentioned are subject to all non-discriminatory building permit fees, occupation taxes, etc., which are levied on all contractors generally for the building of various structures.

By HARRY L. BIGBEE,

Asst. Atty. General