JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2014-10-09-24 / NON-PRECEDENTIAL**
ID: **JM-14-002-K**
DATE: **OCTOBER 9, 2014**
DISPOSITION: **DENIED**
TAX TYPE: **NON RESIDENT CONTRACTOR'S BOND**
APPEAL: **NO APPEAL TAKEN**

ORDER

The COMPANY ("Complainant") is represented by PRESIDENT, President and MANAGER, Office Manager. The Taxpayer Assistance Division of the Oklahoma Tax Commission ("Respondent") is represented by OTC ATTORNEY 1, Assistant General Counsel and OTC ATTORNEY 2, Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

An *Application to the Oklahoma Tax Commission for Waiver of Filing Nonresident Contractor's Bond* ("*Application*"), Form BT-163-A was filed by the Complainant on October 23, 2013. By letter dated January 24, 2014, Respondent denied the *Application*. An appeal of the denial was timely filed.

The appeal of the denial was filed with the Office of the Administrative Law Judges on February 14, 2014. The appeal was docketed as Case No. JM-14-002-K and assigned to the undersigned. Respondent's file was referred to this office on March 10, 2014.

A pre-hearing conference was scheduled for April 22, 2014, by *Prehearing Teleconference Notice* issued March 6, 2014. The conference was cancelled and rescheduled for May 1, 2014, upon Complainant's e-mail request.

The conference was held as rescheduled. Pursuant to the conference, a *Scheduling Order* was issued setting forth the procedure by which the appeal was to be submitted for decision.

A *Joint Stipulation of Issue and Facts* ("*Joint Stipulation*") and Exhibits A through G attached thereto were filed June 11, 2014. Neither a brief in chief nor response brief was filed by Complainant. The *Brief of the Taxpayer Assistance Division* was filed July 8, 2014. On August 8, 2014, the record was closed and the appeal was submitted for decision.[1]

FINDINGS OF FACT

Upon review of the file and records, including the *Joint Stipulation*, Exhibits and

[1] Rule 710:1-5-39 of the *Oklahoma Administrative Code* ("*OAC*").

Respondent's brief, the undersigned finds:

A. The *Joint Stipulation* at Part III, Facts provides:

1. On October 22, 2013, [Complainant] filed an Application with the Oklahoma Tax Commission for Waiver of Filing Nonresident Contractor's Bond. Exhibit (Ex.) A. The Waiver Application included a request letter and an attachment of [Complainant's] financial statements. *Id*.

2. On January 24, 2014, [Respondent] mailed a letter to [Complainant] denying the request for waiver of filing nonresident contractor's bond. Ex. B.

3. On or about February 13, 2014, [Complainant] timely protested [Respondent's] denial of [Complainant's] request for waiver of filing of nonresident contractor's bond. Ex. C.

4. [Complainant's] only place of business is located in Fort Smith, Arkansas. *Id*.

5. [Complainant] has not previously, and does not currently, own, store or otherwise maintain, any property located in the state [sic] of Oklahoma. *Id*.

6. [Complainant] conducts 93-95% of its business in the state of Arkansas. *Id*.

7. [Complainant] has no employees located or stationed in Oklahoma. *Id*.

8. [Complainant] is registered to do business in the State of Oklahoma and is currently in good standing with the Oklahoma Secretary of State's office. Ex. D.

9. [Complainant] holds a current Oklahoma Roofing Contractor Registration through the Construction Industries Board. Ex. E.

10. [Complainant] holds an 'unlimited' Contractor's License in the State of Arkansas for roofing, roof decks, and concrete. Ex. F.

11. [Complainant] was incorporated in the State of Arkansas in 1964, and remains in good standing with the State of Arkansas. Ex. G.

12. [Complainant] has a withholding account with the Oklahoma Tax Commission which, as of June 1, 2014, reflects no liability.

13. [Complainant] has a franchise tax account with the Oklahoma Tax Commission which, as of June 1, 2014, reflects no liability.

14. [Complainant] has filed Oklahoma Corporate Income Tax Returns for the past five tax years which, as of June 1, 2014, reflect no liability.

ISSUE AND CONTENTIONS

The *Joint Stipulation* at Part II, Statement of the Issue provides:

> The parties agree and hereby stipulate that the issue to be decided in this matter is whether [Complainant] meets the qualifications of 68 O.S. § 1703(3) to receive a waiver of filing a non-resident contractor's surety bond on contracts performed in Oklahoma, as required under 68 O.S. § 1703.

Complainant contends that the denial of the waiver is erroneous. In support of this contention, Complainant asserts that their exposure to any tax liability in Oklahoma on future contracts is "very limited", Exhibit A, pp. 3, ¶ 3; or "minimal", Exhibit C, pp. 2, ¶ 2; and they are otherwise compliant with the tax laws of Oklahoma. Complainant argues that the majority of their projects in Oklahoma are sales tax exempt, that they are not subject to the withholding tax or employment security laws of Oklahoma and that they are a well-respected historically significant company. Complainant further argues that the bond requirements of Article 17 penalize nonresident contractors.

Respondent contends that the denial of the waiver is appropriate under the law. In support of this contention, Respondent argues that Complainant cannot sustain its burden of proof because Complainant cannot show it meets the waiver requirements. Specifically, Respondent argues that Complainant admits it does not own property within Oklahoma, the first

requirement to obtain a waiver. Respondent further argues that because Complainant does not own property within Oklahoma, Complainant's financial stability and longevity are irrelevant.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

1. Jurisdiction of the parties and subject matter of these proceedings are vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 207.

2. A "nonresident contractor"[2] is required to post a surety bond or other security with the Oklahoma Tax Commission on any contract to be performed within Oklahoma in excess of One Hundred Thousand Dollars ($100,000.00). 68 O.S. 2011, § 1703. The bond or other security shall be in the "penal sum of not less than three times the tax liability incurred or to be incurred under the contract" and may be increased or decreased in accordance with the requirements of § 1703(1) and (2). 68 O.S. 2011, § 1703.[3]

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[2] A nonresident contractor includes subcontractors, 68 O.S. 2011, § 1703; and is defined as "a contractor who maintains his principal place of business outside this state or a multistate employer who does not maintain a permanent work force of three or more employees in this state." 68 O.S. 2011, § 1701(3). A "contractor" is defined by the act to mean and include "all prime and general contractors, subcontractors, independent contractors and persons engaged in contract labor who through negotiations or competitive bidding enter into contracts to furnish labor, materials or both and the required equipment to perform the contract for a fixed price and who in pursuit of independent business undertake a job in whole or in part retaining substantial control of the method and manner of accomplishing the desired result and means any person, firm, joint venture, partnership, copartnership [sic], association, corporation, or other organization engaged in the business of the construction, alteration, repairing, dismantling, or demolition of roads, bridges, viaducts, sewers, water and gas mains, streets, disposal plants, water filters, tanks, towers, airports, buildings, dams, levees, canals, railways and rail facilities, oil and gas wells, water wells, pipelines, refineries, industrial or processing plants, chemical plants, power plants, electric or telephone or any other type of energy or message transmission lines or equipment, or any other type of construction excluding family farm operations. The term contractor shall not include the state or any agency, institution, or political subdivision of the state or any duly constituted authority of a political subdivision". 68 O.S. 2011, § 1701(1). As originally enacted, the definition of contractor included the all-encompassing provision, "[p]rovided, however, this definition shall not be limited to those named but shall include all other types of construction." Laws 1965, c. 30, § 2. Amended by Laws 1984, c. 213, § 1, to add the definitions of "resident contractor" and "nonresident contractor".

[3] As originally enacted, § 1703 required the surety bond or other security be posted

3. The Oklahoma Tax Commission is authorized to waive the making and filing of the surety bond. 68 O.S. 2011, § 1703(3). Section 1703(3) specifically provides:

> If the Tax Commission, after making an investigation at the request of a nonresident contractor, finds that such nonresident contractor has and will continue to have property within Oklahoma, and has regularly engaged in business in this state and will continue to do so, and the Tax Commission, for said reason, determines in writing that such nonresident contractor's financial responsibility is sufficient to cover its tax liability and the other obligations covered by this article, such nonresident contractor shall not be required to make and file the surety bond required in this section or to give the notices required by this article, and the Tax Commission shall notify the nonresident contractor of its findings.

4. The fundamental rule and governing principle of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the legislature as expressed in a statute. ***Samson Hydrocarbons Co. v. Oklahoma Tax Commission***, 1998 OK 82, 976 P.2d 532; ***State ex rel. Dept. of Public Safety v. 1985 GMC Pickup, Serial No. 1GTBS14EOF2525894, OK Tag No. ZPE852***, 1995 OK 75, 898 P.2d 1280. Legislative intent must be ascertained from the whole act, ***Walls v. American Tobacco Co.***, 2000 OK 66, 11 P.3d 626; based on its general purpose and objective, ***Comer v. Preferred Risk Mutual Ins. Co.***, 1999 OK 86, 991 P.2d 1006. Statutes must be read to render every part operative, and to avoid rendering any part superfluous or useless. ***Bryant v. Commissioner of the Dept. of Public Safety, State of Okla***., 1996 OK 134, 937 P.2d 496. The Legislature will not be presumed to have intended an absurd result, ***In re Holt***, 1997 OK 12, 932 P.2d 1130; nor to have done a vain or useless act in the promulgation of a statute, ***Comer,*** *supra*.; or when creating law, ***Purcell v. Santa Fe Minerals, Inc.***, 1988 OK 45, 961 P.2d 188. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and no further construction is required or permitted. ***Sullins v. American Medical Response of Oklahoma, Inc.***, 2001 OK 20, 23 P.3d 259.

5. Every statute is deemed constitutionally valid until a court of competent jurisdiction declares otherwise. ***State ex rel. York v. Turpen***, 1984 OK 26, 681 P.2d 763, 767. The Oklahoma Tax Commission is not empowered to decide the constitutional validity of a taxing statute. ***Dow Jones & Company, Inc. v. Oklahoma Tax Commission***, 1990 OK 6, 787 P.2d 843, 845.

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by "every contractor subject to the provisions of this Article" on "any such contract" in the "penal sum of not less than ten percent (10%) of the amount of the contract price". Laws 1965, c. 30, § 2. The current required amount of the bond or other security was introduced in 1994. Laws 1994, c. 278, § 18, eff. Sept. 1, 1994. The delineation of the contracts subject to the posting of a bond was introduced in 2004. Laws 2004, c. 535, § 13, eff. Nov. 1, 2004.

ANALYSIS

The language and meaning of § 1703 in general and the waiver provision in particular are clear and unambiguous. The surety bond required to be filed by a nonresident contractor on contracts exceeding $100,000.00 for work to be performed in Oklahoma may not be waived unless the contractor has and will continue to have property in Oklahoma, has regularly engaged in and will continue to engage in business within Oklahoma and the contractor's financial responsibility is sufficient to cover its tax liability resulting from said contractual obligations. The Oklahoma Tax Commission must apply the law as written.

Here, Complainant stipulated that it "has not previously, and does not currently, own, store or otherwise maintain, any property located in the state [sic] of Oklahoma". Accordingly, the Oklahoma Tax Commission may not waive the requirement of making and filing a surety bond or other security on any future contracts in excess of $100,000.00 Complainant may undertake within the State of Oklahoma.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the appeal of the Complainant, COMPANY to the denial of the application for waiver of the nonresident contractor's bond, be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."