



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

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900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Christopher K. Peace
Member, House of Delegates
P.O. Box 819
Mechanicsville, Virginia 23111

Dear Delegate Peace:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire about several aspects of Virginia law governing home service contract providers. Specifically, you ask whether a consumer who contracts with a home service contract provider has any recourse with the State Corporation Commission related to such contract in light of the exemptions found in current § 38.2-2618, and as amended in 2010.¹ You further ask whether such providers are contractors required to be licensed pursuant to Chapter 11 of Title 54.1, §§ 54.1-1100 through 54.1-1143 ("Chapter 11"). Finally, you ask whether home service contract providers must comply with Chapter 11 when hiring contractors and subcontractors to perform work under the home service contracts they administer.

Response

It is my opinion that when one of the exemptions to § 38.2-2618 applies to a home service contract provider, including the exemption added in 2010,² the State Corporation Commission would not have the authority to bring an enforcement action under § 38.2-2627. It further is my opinion that the terms of the home service contract dictate whether a home service contract provider is considered to be a contractor. Should a provider be considered to be a contractor, he must be licensed as a contractor pursuant to Chapter 11 of Title 54.1. Finally, it is my opinion that when home service contract providers are considered to be contractors, they must comply with Chapter 11 when they manage and superintend contractors and subcontractors to perform work under the home service contracts they administer. They are not required to comply with Chapter 11 merely by hiring a contractor or subcontractor.

¹See 2010 Va. Acts ch. 235, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+CHAP0235> (amending and reenacting § 38.2-2618). The amendments to § 38.2-2618 will become effective on July 1, 2010. See VA. CODE ANN. § 1-214 (requiring that "laws enacted at a regular session of the General Assembly ... shall take effect on the first day of July following the adjournment of the regular session").

²See 2010 Va. Acts., *supra* note 1 (amending § 38.2-2618 to add new subsection C).

Applicable Law and Discussion

You first inquire whether a consumer who contracts with a home service contract provider (“HSC provider”) has any recourse with the State Corporation Commission (“Commission”) regarding such contract. Article 2, Chapter 26 of Title 38.2, §§ 38.2-2617 through 38.2-2628 (“Article 2”), regulates home service contracts and HSC providers. The Commission may enforce the law through an administrative action.³ The current version of § 38.2-2618 contains specific exemptions from Article 2. The 2010 Session of the General Assembly amended this provision to add an exemption for “[a]ny home service contract provider that has a net worth in excess of \$100 million.”⁴ Under the plain language of this amendment, an HSC provider with a net worth in excess of \$100 million would be exempt from the statute. Furthermore, warranties and maintenance agreements are likewise specifically excluded from the scope of Article 2.⁵ Therefore, the Commission would not be authorized to bring an enforcement action pursuant to § 38.2-2627.

You next ask whether HSC providers may, depending on the terms of such contracts, be considered contractors. If so, you ask whether such providers would be required to be licensed as contractors pursuant to Chapter 11. Section 38.2-2617 currently defines a “home service contract,” in pertinent part, as

a contract or agreement for a separately stated consideration for a specific duration to perform the repair, replacement, or maintenance of property or indemnification for repair, replacement, or maintenance, for the operational failure of any components, parts, appliances, or systems of any covered residential dwelling due to a defect in materials, workmanship, inherent defect, or normal wear and tear, with or without additional provisions for incidental payment of indemnity under limited circumstances. Home service contracts may provide for the repair, replacement, or maintenance of property for damage resulting from power surges or interruption and accidental damage from handling and may provide roof leak coverage.^[6]

Section 54.1 – 1100 of Article 11 defines a “contractor” as

any person, that for a fixed price, commission, fee, or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing, managing, or superintending in whole or in part, the construction, removal, repair or improvement of any building or structure permanently annexed to real property owned, controlled, or leased by him or another person or any other improvements to such real property.

³ See VA. CODE ANN. § 38.2-2627 (2007).

⁴ See 2010 Va. Acts., *supra* note 1 (amending § 38.2-2618 to add new subsection C).

⁵ See § 38.2-2618 (2007); 2010 Va. Acts, *supra* note 1 (amending § 38.2-2618).

⁶ I note that Chapter 235 of the 2010 Virginia Acts of Assembly did not alter this definition.

Further, I note that

[t]he classification “any person” is comprehensive, broad, unlimited, unrestricted, and indiscriminative of whatever kind. It includes a person, whether he be an architect, an engineer, an agent, a servant, a superintendent, a supervisor, or a contractor, independent or dependent, who undertakes to do the things specified by the statute. It makes no difference what a person calls himself. If he does what is specified by the statute, then the statute fixes his classification.^{7]}

Contractors are required to obtain a license.⁸ The act of “[c]ontracting for, or bidding upon the construction, removal, repair or improvements to or upon real property owned, controlled or leased by another person without a license” is prohibited, and a violation thereof would constitute a Class 1 misdemeanor.⁹

It is my opinion that HSC providers would meet the definition of a contractor under home service contracts that are agreements to perform repairs, replacement, or maintenance of property for consideration. Such HSC providers, however, would not meet the definition of a contractor when the agreements at issue are agreements to indemnify for such repairs, replacement, or maintenance of property. Consequently, whether an HSC provider also is a contractor would depend on the exact terms of the individual home service contracts, and each contract must be examined on a case-by-case basis.

Section 54.1-1101 of Chapter 11 contains exemptions to the licensure requirement for contractors, but it does not appear that an HSC provider would qualify for any of these exemptions. Should an HSC provider be considered a contractor based on the terms of a home service contract, such provider would be required to be licensed as a contractor.

Finally, when the terms of a home service contract are such that the HSC provider is considered to be a contractor, you ask whether that provider would be compelled to comply with the requirements of Chapter 11 when hiring contractors and subcontractors to perform work under such contract. The definition of “contractor” is not limited to persons who directly perform construction. It also includes those who “manag[e]” and “superintend[.]”¹⁰ the contracting work.¹¹ If an HSC provider is hiring subcontractors during the course of managing or superintending a construction contract, the HSC provider would need to be licensed as a contractor. However, merely hiring another person to carry out the work based on an indemnity agreement does not make an HSC a “contractor.”

Conclusion

⁷Bacigalupo v. Fleming, 199 Va. 827, 833, 102 S.E.2d 321, 325 (1958) (interpreting, among others, § 54-113(2), predecessor to § 54.1-1100).

⁸See VA. CODE ANN. § 54.1-1103(A) (2009).

⁹See § 54.1-1115(A)(1) (2009).

¹⁰See § 54.1-1100 (2009).

¹¹See *Bacigalupo*, 199 Va. at 833, 102 S.E.2d at 325.

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Accordingly, it is my opinion that when one of the exemptions to § 38.2-2618 applies to a home service contract provider, including the exemption added in 2010,¹² the State Corporation Commission would not have the authority to bring an enforcement action under § 38.2-2627. It further is my opinion that the terms of the home service contract dictate whether a home service contract provider is considered to be a contractor. Should a provider be considered to be a contractor, he must be licensed as a contractor pursuant to Chapter 11 of Title 54.1. Finally, it is my opinion that when home service contract providers are considered to be contractors, they must comply with Chapter 11 when they manage and superintend contractors and subcontractors to perform work under the home service contracts they administer. They are not required to comply with Chapter 11 merely by hiring a contractor or subcontractor.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

1:1341; 1:941/10-027

¹²See 2010 Va. Acts., *supra* note 1 (amending § 38.2-2618 to add new subsection C).