

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-5550

January 7, 1985

Mr. D--- J. R---
Attorney At Law
P.O. Box XXX
---, CA XXXXX

Dear Mr. R---:

Your letter of October 25, 1984 to Mr. Glenn Bystrom of our staff, has been forwarded to the undersigned for reply.

We understand that you represent the N--- C--- I--- Housing Authority (Housing Authority) which is a housing authority jointly chartered by several Indian Rancherias in Northern California. The Housing Authority is sanctioned by the Department of Housing and Urban Development (HUD) and is established as a joint powers agency for its member Rancherias. As such, it is a branch of the member Rancherias' tribal governments. The Housing Authority constructs low-income housing and administers the housing program for its member tribes.

Currently, the Housing Authority is constructing housing on the L--- Rancheria in --- County. The construction contract pursuant to which that project is being constructed includes a section 00700 which provides in pertinent part:

“Title to all materials to be used in this project shall transfer to owner prior to the time the materials are installed by the contractor or any subcontractor.

In submitting invoices or other statements to support partial payment under this Agreement contractor and subcontractors shall separately state the sales price of all materials, exclusive of the charge for installation.

As used in this addendum the term ‘materials’ has the meaning provided in 18 California Administrative Code (CAC), section 1521(a)(4).

* * *

It is the intent of the parties that contractor and subcontractors by (sic) “sellers” of materials as provided in 18 CAC 1521.”

You wondered whether the foregoing language operates to make the construction contractor a “seller” of materials pursuant to Regulation 1521(b)(2)(A)2. The language of the regulation, germane to this discussion, provided:

“When Contractor is seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale prior of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials.”

In the case of a time and material contract, if the contractor bills his customer an amount for “sales tax” computed upon his marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he is the retailer of the materials.”

(Reg. 1521(b)(2)(A)2, emphasis added.)

In our opinion, the above cited language from section 00700 of the contract in question, while satisfying the regulation’s requirement that the contract explicitly provide for the transfer of title prior to installation, does not satisfy the requirement that the contract separately state the sale price of the materials. Accordingly, the language in question does not operate to make the contractor a “seller”, rather, he is deemed a “consumer” and tax applies as indicated in Regulation 1521(b)(2)(A)1.

Anticipating the foregoing conclusion, you asked what language, if any, could be included in future contracts which would have the effect of making the contractor the seller of materials. You suggested the following language might have the desired effect:

“In submitting invoices or other statements to support partial payment under this agreement and as an express condition precedent to such payment contractor and subcontractor shall separately state the sales price of all materials, exclusive of the charge for installation, and at the conclusion of the project the parties shall execute an addendum which incorporates the total sales price of all materials exclusive of the charge for installation.”

While we have not been given the entire contract to review, it appears clear from the information in our possession that the contract in issue herein is a “lump sum contract” as defined in the regulation [Reg. 1521(a)(8)]. As indicated in that definition, a “lump sum contract” does not become a “time and material contract” [see Reg. 1521(a)(7)] when amounts attributable to materials are separately stated in the invoice. Assuming future contracts are, likewise, “lump sum contracts,” neither the language you suggest nor any

other language we can think of would operate to make the contractor a seller within the terms of the regulation. The so-called addendum which you suggest operates as nothing more than a final billing or accounting. The contract, when entered into, is lump sum in nature and, as indicated above, cannot be changed into a "time and material contract" through subsequent itemization or categorization. It follows, in our view, lump sum construction contractors are consumers, not sellers, of materials furnished and installed in performance of their contracts.

Very truly yours,

E. Leslie Sorensen, Jr.
Tax Counsel

ESL:rar

cc: Mr. Glenn Bystrom
--- --- - District Administrator