

**STATE BOARD OF EQUALIZATION**

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September 19, 1990

Mr. R--- L. F---
U--- Corporation
1201 West 5th Street
P.O. Box 7600
Los Angeles, CA 90051

Re: F--- W--- U--- Corporation
SS --- XX-XXXXXX

Dear Mr. F---n:

In a letter dated June 22, 1990, you asked for our opinion regarding the application of sales or use tax to a contract between U--- and F--- W--- U--- Corporation (FW). I provided you with general information in my response, but was unable to provide you with definitive answers because we lacked sufficient information regarding the transaction to do so. With letters dated August 17 and August 29, 1990, you have now sent us copies of the contract between U--- and FW along with exhibits A through D to that contract.

U--- is having an NOx reduction/control facility constructed at its Los Angeles refinery. U--- has apportioned the work for this project between FW and an engineer/constructor. The constructor will provide certain engineering, design, procurement, and cost estimates as well as performing all field construction. FW will provide certain engineering, design, and procurement and will furnish necessary drawings, specifications, maintenance manuals, and technical support for proper construction, operations, and maintenance of the modified equipment. FW will also provide technical and pricing information to allow the constructor to prepare the cost estimate.

For purposes of this opinion, we assume that all drawings, specifications, and other written materials provided by FW are created by FW based on engineering and technical expertise. We also assume that FW does not supply extra copies of these items (e.g., FW does not furnish a maintenance manual for each of U---'s and constructor's personnel).

FW will be procuring property for U---. As discussed in my previous letter, in order to qualify as an agent for U--- in purchasing that property and not as a seller of property to U---, FW must have written evidence of agency status with U---, FW must clearly disclose to the supplier that it acts as an agent for U--- when making the purchases, and the price billed to U---, exclusive of any

agency fee, must be the same amount paid to the supplier. Section 2.2(f) of the contract provides that FW will purchase all machinery, equipment, materials, and supplies agreed to by U--- as being required for the work as an agent for U---. Exhibit B to the contract sets forth the compensation U--- will pay to FW. That exhibit does not provide for a fixed price to be paid by U--- to FW for the property irrespective of the price paid by FW. Rather, section 2.0(c) provides that U--- will pay the actual costs of such property procured by FW. The other charges paid by U--- attributable to such procurement would be regarded as agency fees. Assuming FW discloses to the suppliers that it acts as an agent for U--- when purchasing the property, we conclude that FW purchases the property as an agent for U---. Since U--- is the consumer of the property, sales tax applies to the supplier's sale of that property to U---, through FW as U---'s agent, or use tax applies to U---'s use of the property.

My understanding of the contract is that the only property provided by FW is the property it procures as agent for U--- and property incidentally transferred in providing engineering and related services (such as original maintenance manuals, specifications, and pricing information). Based upon this understanding and the assumptions set forth above, we conclude that FW makes no sales of tangible personal property to U--- and no sales or use tax applies to FW's charges. However, engineering, design, fabrication, construction, and workmanship performed/furnished by Contractor [FW] and its subcontractors, [is guaranteed]." It appears that this may merely be a catch-all provision. If, however, FW does actually provide fabrication of tangible personal property, that fabrication would be regarded as a sale. (Rev. & Tax. Code § 6006(b).) FW's gross receipts attributable to that sale would be subject to sales tax. (Rev. & Tax. Code § 6051.)

If you have further questions, please contact me.

Sincerely,

David H. Levine
Senior Tax Counsel

DHL: wak