

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-85(51)S
Sales Tax
November 8, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840627A

On June 27, 1984, a Petition for Advisory Opinion was received from Kilby Brothers, Inc., 9 Norman Drive, P.O. Box 12003, Albany, New York 12212.

The issue raised is whether Petitioner is required to pay New York State sales tax on material, equipment and supplies purchased for use in the performance of a contract for excavation and site development at a construction project which is funded by an Industrial Development Agency (IDA).

Section 1105(a) of the Tax Law imposes a sales tax upon the receipts from every retail sale of tangible personal property unless otherwise excluded or exempt.

Section 1101(b)(4) of the Tax Law which defines the term "retail sale" states, in part: "A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land... is deemed to be a retail sale regardless of whether the tangible personal property is to be sold as such before it is so used or consumed."

Section 1115(a)(15) and section 1115(a)(16) of the Tax Law provide exemptions from the sales tax for property sold to contractors, subcontractors or repairman for use or consumption as described in section 1101(b)(4) the Tax Law, if such property is to become an integral component part of the structure, building or real property of an organization described in section 1116(a) of the Tax Law.

Section 1116(a)(1) of the Tax Law allows the State of New York, or any of its agencies, instrumentalities, public corporations or political subdivisions to purchase tangible personal property or services without the payment of sales tax.

New York State Sales and Use Tax Regulations state in relevant part: "A public corporation as used in this section means any corporation created by an act of the Legislature for a public purpose or pursuant to an agreement or compact with another State or Canada.

Example: Urban Development Corporations and Industrial Development Agencies are public corporations and may purchase tangible personal property exempt from the sales and use taxes.

New York State governmental entities as purchasers... must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document." (20 NYCRR 529.2(a)(2)(b)(2)).

In the case of contracts involving governmental entities, the contract signed by the governmental representative and the prime contractor is sufficient proof of the exempt status of the purchases made for such contract. The existence of a signed contract document between the prime contractor and the subcontractor which identifies the project, location, and exempt owner will form the basis for exemption (provided in Tax Law 1115(a)(15) and 1115(a)(16), supra) of tangible personal property purchased for incorporation into the exempt project. When purchasing the qualifying property from a supplier, the contractor or subcontractor must issue a Contractors Exempt Purchase Certificate (Form ST-120.1) to the supplier. (20 NYCRR 541.3(d)(2)(v); See also: Technical Service Bureau Memorandum TSB-M-82(2)S).

Hereinafter the terms "IDA" and "exempt organization" will be used interchangeably.

Sales and Use Tax Regulations pertaining to contracts with exempt organizations further state: "Except for agency contracts, contractors' purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable service, such as electricity used by the contractor, are subject to the tax.

The following types of property and services are representative, but not intended to be all-inclusive, of contractor's purchases which are subject to tax, irrespective of whether the contractor has a time and material, lump sum, or other type of contract (except agency contract), with an exempt organization:

- (a) construction machinery and equipment, including rentals and repair parts;
- (b) contractor's office supplies;
- (c) contractors' supplies, tools, and miscellaneous equipment, whether purchased or rented, including materials to make forms and scaffolding; and
- (d) any other items purchased or rented by a contractor for his use in performing the contract and not incorporated into the realty.

Example 7: Lumber and other materials which are used to build forms are not exempt since they do not become a component part of the structure.

Example 8: Equipment rentals under the dominion and control of the contractor, such as rentals of cranes, bulldozers, backhoes, etc. for use in building a structure for an exempt organization are subject to tax." (20 NYCRR 541.3(d)(2)(iv)).

When an IDA enters into an agency contract with the prime contractor and all subcontractors, all purchases for such contract are exempt if the property and services are purchased by the contractor or subcontractor as agent for the exempt organization. To create a principal/agent relationship all of the following conditions must be met:

(a) purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor specifying that the contractor is acting as agent for the exempt organization (e.g., X contractor, as agent for Y, name of exempt organization) and identify the place of delivery;

(b) payment must be made by the exempt organization or by the contractor, acting as agent, directly to the vendor from a special fund created by the exempt organization for this specific purpose;

(c) deliveries must be made to the job site; or under certain circumstances (such as where the materials require additional fabrication before installation on the job site or for storage to protect the materials from theft or vandalism prior to installation at the job site) deliveries may be made to a site, other than the job site, providing the ultimate delivery of the materials is made to the job site. Where delivery is made to a site, other than the job site, the purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor as agent, identify the place of delivery, the exempt organization's full name and address and the job site location where the materials will ultimately be delivered for installation. (20 NYCRR 541.3(d)(4)(i)).

If the proposed agency contract differs from the requirements of this subparagraph, copies of the proposed contract and procedures may be submitted for an opinion to the Instructions and Interpretations Unit, Sales Tax Section, Technical Services Bureau, State Campus, Albany, N.Y. 12227.

To establish that all purchases are made by the IDA, the IDA and the prime contractor must enter into a written agency contract and the IDA must also issue letters designating the prime contractor and the subcontractors as its agents for a particular project. The contractors then may purchase material tax exempt as follows:

1. Present the supplier with a properly completed Contractors' Exempt Purchase Certificate and a statement from the IDA designating the purchaser as their agent with each purchase order.
2. Each purchase order must identify the purchaser as agent of the IDA and indicate the project for which the purchase is made.
3. All invoices and bills are to be addressed to the purchaser as agent of the IDA and must also identify the project.

In consequence, unless Petitioner is appointed an agent of the IDA, it can purchase exempt only tangible personal property which is actually transferred to the IDA and becomes an integral component part of the building or the real property.

However, if Petitioner is designated an agent of an IDA, it can purchase tax exempt all material incorporated in the capital construction, and it can also buy or rent equipment, tools and supplies necessary for the performance of the contract without paying the sales tax by following the procedures outlined in paragraphs 1, 2 and 3, above.

TSB-A-85(51)S
Sales Tax
November 8, 1985

With respect to the latter purchases, Sales and Use Tax Regulations Section 541.3(d)(4)(iii) provides as follows: "A contractor is liable for the tax due on purchases or rentals of equipment, tools and supplies made under a purported exempt organization agency contract if subsequently it is determined the contract does not qualify as an agency contract.

Example 9: A contractor enters into a purported agency contract with an exempt organization for the construction of a capital improvement to real property. The exempt organization or the contractor, acting as agent for the exempt organization, makes tax free purchases or rentals of materials, tools and/or equipment and supplies. Subsequently, it is determined the contract does not qualify as an agency contract. The contractor is liable for the tax due on the purchases or rentals of tools and/or equipment and supplies. The purchase of materials incorporated into the capital improvement to real property owned by the exempt organization is exempt from the tax, providing proper exempt documentation is given to the vendor of the materials."

Finally, should any equipment, tools or supplies purchased by Petitioner as an agent become the property of Petitioner after completion of an IDA agency contract, such acquisition would constitute a retail sale subject to the sales tax imposed by Tax Law 1105(a).

DATED: August 29, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth herein.