



STATE BOARD OF EQUALIZATION

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March 9, 1990

State sales tax increase – fixed price construction contract

Dear Mr. ---:

In your January 22, 1990 letter to the Board’s legal staff, you request our advice on the following situation:

“I have been trying to obtain a decision regarding the new sales tax of 7-1/4%. It is my understanding that if I entered into a contract prior to November 7, 1989, that the sales tax on materials purchased for that contract would be taxed at the then existing rate of 7%.

“According to one of your representatives at the local office, this reduction is only for materials that were quoted by our suppliers as a lump sum for the project. However, they were not sure of the miscellaneous material items that were to be supplied at any time during the project, but that were estimated by our firm and then the 7% sales tax was included in our proposal.”

Opinion

The 1/4% state sales tax increase was enacted by Senate Bill 33, Chapter 14, Statutes 1989, First Extraordinary Session. As part of that legislation, Revenue and Taxation Code Section 6376 was also adopted. Subdivisions (a) and (c) of that section provide:

“(a) From December 1, 1989 to December 31, 1990, there are exempted from 5 percent of the taxes imposed by this part, the gross receipts from the sale of and the storage, use, or other consumption in this state of material, fixtures, and supplies if the sale, storage, use or other consumption in this state of the material, fixtures, or supplies are obligated pursuant to an engineering construction project contract or a building construction contract entered into for a fixed price prior to the effective date of this section.

* * * *

“(c) For the purposes of this section, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the right to terminate the contract or lease upon notice, whether or not that right is exercised.”

We cannot tell from the facts related in your letter whether your construction contract would qualify as a fixed-price construction contract within the meaning of Section 6376. If your contract with the owner of the real property requires you to furnish and install specified materials at fixed unit prices for each item of material, and the fixed unit prices are either tax-included prices or separately state the tax rate of 7% (assuming your job site is in a county in which the total combined sales and use tax rate was 7%), then you would be entitled to purchase from your suppliers the materials required for your construction contract at the 7% rate, not at the 7-1/4% rate. However, if your construction contract merely estimated the prices of materials to be furnished by you pursuant to the contract, that contract would not be a fixed price construction contract which qualifies for the exemption under Section 6376. In addition, your contract will not qualify for the exemption from the tax increase if either you or the owner may unconditionally terminate the contract. If you wish to have a definite opinion on this issue, please write again with additional details or include a copy of the contract.

Sincerely,

John Abbott
Senior Tax Counsel

JA:jb