**565.1300**

# Memorandum

To:     Mr. Mike Hilbert                          Date:    April 21, 1992
        Aerospace Coordinator
        Audit Review and Refunds


From:   John L. Waid
        Tax Counsel

Subject:   Aerospace Title Clauses


        I am answering your memorandum to me dated March 10, 1992. You asked for advice as to whether or not a progress payments clauses operated to accelerate passage of title to overhead materials to the United States prior to their use by the purchasing contractor so as to avoid sale tax under the <u>Aerospace</u> case.

        You attached to your memorandum one that you received from Mr. C. Brothers of Van Nuys District Auditing. He attached to his memo a copy of a progress payments clause apparently from a contract involved in an audit. The title clauses are set forth in pertinent part below:

> "(d)
>
> "(1)     Title to the property described in this paragraph (d) <u>shall vest in the Government and/or the Buyer</u>. (emphasis in original)
>
> \* \* \*
>
> "(2)     'Property' as used in this clause, includes all of the below-described items acquired or produced by the seller that are or should be allocable or properly chargeable to this Subcontract/Purchase Order under sound and generally accepted accounting principles and practices.
>
> \* \* \*
>
> "(3)     Although title to property is in the Government and/or the Buyer under this clause, other applicable clauses of this Subcontract/Purchase Order…shall determine the handling and disposition of the property.

"(4)     The Seller may sell any scrap resulting from production under this Subcontract/Purchase Order…

"(5)     To acquire for its own use or dispose of property to which title is vested in the Government and/or the Buyer under this clause, the Seller must obtain the Buyer's advance approval of the action and the terms.  The Seller shall (i) exclude the allocable costs of the property from the costs of Subcontract/Purchase Order performance, and (ii) repay to the Buyer any amount of unliquideated progress payments allocable to the property…

"(6)     When the Seller completes all of the obligations under this Subcontract/Purchase Order …, title shall vest in the Seller for all property (or the proceeds thereof not [delivered to and accepted by the Buyer or incorporated in supplies delivered to and accepted by the Buyer].

"(7)     The terms of this Subcontract/Purchase Order concerning liability for Government-furnished or Buyer-furnished property shall not apply to property to which the Government or the Buyer acquired title solely under this clause."

OPINION

        As you know, the Aerospace court approved the title-passage clauses found in the progress payments clause of the contract before it as accelerating passage of title of overhead materials to the contract prior to use.  The clause at issue in Aerospace is now contained in FAR Section 52.232-16(d).  Although substantially similar to the passages quoted above, there are significant differences.  Where the above passages refer to the "Government and/or the Buyer," in paragraphs (1), (3), and (5), the FAR refers only to "the Government."  In paragraphs (2), (4), (5), and (6), where the above passages refer to "the Seller," the FAR refers to "the Contractor."  The FAR refers only to "the Government" in paragraph (7) where the above passages refer to the Government "or" the Buyer.

        The above title-passage clauses are ambiguous and show no clear intent that title to overhead materials purchased for use in the contract at issue in the audit pass to the Government prior to their use by the contractor.  The purchase clauses refer to both the Government and the Contractor, and the disposition clauses refer not to either purchaser but to the Seller only.  The title-passage clauses contained in FAR 52.232-16(d) are written from the point of view of the Contractor as the Buyer.  The above passages are written from the point of view of the Seller.

We thus conclude that the passages cited by Mr. Brothers do not operate to accelerate title to overhead materials to the United States.  Tax thus applies to their sale to the purchasing contractor.

JLW:es