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Texas Administrative Code

[TITLE 34](#)

PUBLIC FINANCE

[PART 1](#)

COMPTROLLER OF PUBLIC ACCOUNTS

[CHAPTER 3](#)

TAX ADMINISTRATION

[SUBCHAPTER O](#)

STATE AND LOCAL SALES AND USE TAXES

RULE §3.291

Contractors

(E) A ready mix concrete contractor must separate the charge for the concrete from other charges associated with the contract, and invoice the customer for each yard of concrete produced and consumed for the improvement of real property. The ready mix concrete contractor may issue a resale certificate in lieu of paying sales tax on taxable items (e.g., processed materials) incorporated into the concrete. The ready mix concrete contractor must collect and remit the tax due on the concrete produced and consumed. The tax rate in effect at the job site location is applied to the greater of the actual invoice price of the component materials or the fair market value of the concrete incorporated into the project. For the purposes of this subparagraph, fair market value is the amount that a purchaser would pay on the open market for concrete. The fair market value will be determined on a case by case basis, taking into consideration relevant factors such as cost of component materials, location of job site, volume, and prices charged by other concrete contractors in the area. Contracts entered into prior to September 1, 2007, are excluded from the requirements of this subparagraph provided the contract terms do not allow for the pass-through of taxes by the ready mix concrete contractor to the purchaser for the duration of the contract period. This subparagraph does not apply to ready mix concrete contractors providing concrete for a public works project.

(4) Separated contracts.

(A) Except as otherwise provided in this section, a contractor who performs a separated contract is a retailer of all materials that are physically incorporated into the realty that is being improved. As a retailer, the contractor must collect tax from the customer based upon the agreed contract price of the incorporated materials. The tax rate must be applied to the agreed contract price of materials, or to the price of the materials to the contractor, whichever is greater. A contractor who performs a separated contract is also a retailer of taxable services that are sold under the provisions of subparagraph (D) of this paragraph, and of consumable items that are sold under the provisions of paragraph (2)(B) of this subsection. The contractor may accept a properly completed resale or exemption certificate from a customer who claims an exemption.

(B) A contractor who performs a separated contract must hold a sales tax permit and collect, report, and remit the tax as required by §3.286 of this title (relating to Seller's and Purchaser's Responsibilities). A contractor who purchases taxable items for resale as part of a separated contract may issue resale certificates to suppliers in lieu of tax. See §3.285 of this title (relating to Resale Certificate; Sales for Resale). A contractor may not issue a resale certificate and must pay tax on the purchase, rental, or lease of equipment that is intended for use in the performance of a contract.

(C) A contractor may maintain a tax-paid inventory of materials. If the contractor incorporates tax-paid materials into realty under a separated contract or sells them at retail or transfers the materials to a customer as part of a taxable service, then the contractor must collect tax from the customer based upon the agreed contract price of the materials or upon the sales price of the taxable service. The contractor may claim a credit for tax paid on materials resold to customers. The contractor must remit tax to the comptroller on any difference that exists between the price that the customer paid and the price that the contractor paid.

(D) A contractor who performs separated contracts may issue properly completed resale certificates in lieu of tax on taxable services that the contractor resells to its customers. Examples include landscaping, surveying, security services (alarm systems), that are incorporated into the customer's realty, and the final clean-up

(janitorial services) of the construction site. The charges for taxable services that are resold to the customer must be separated from the charges for incorporated materials and other charges, and the contractor must collect tax from the customer on charges for the taxable services and incorporated materials. A contractor who performs a separated contract may not issue a resale certificate for a taxable service that the contractor uses or consumes, such as a security service to secure the job site, telecommunication service, and daily clean-up (janitorial service or garbage collection and removal) of the construction site. A contractor who performs residential new construction should refer to paragraph (7) of this subsection.

(E) A contractor who improves realty for a direct payment permit holder may accept a properly completed direct payment exemption certificate in lieu of tax on all tangible personal property that is incorporated into the direct payment permit holder's realty. The contractor owes tax on equipment the contractor purchases, rents, or leases for use in the performance of the contract with a direct payment permit holder. See §3.288 of this title (relating to Direct Payment Procedures and Qualifications). A contractor who performs a separated contract may not accept a direct payment exemption certificate in lieu of tax on consumable items unless paragraph (2) (B) of this subsection applies. A contractor who performs a separated contract may accept a direct payment exemption certificate in lieu of tax on taxable services only under the circumstances set out in paragraph (4)(D) of this subsection.

(5) Contracts versus bids and change orders. For tax purposes, the terms of a contract control over the terms of a bid. For example, if the bid is lump-sum but the written contract is separated, then the contract determines the tax responsibilities of the parties, and the customer is liable for tax on incorporated materials. The terms of a contract also control change orders. If the contract is lump-sum, then change orders will be treated as lump-sum even if the change orders show charges for incorporated materials separate from other charges. If the contract is separated and change orders are for lump-sum amounts, then the lump-sum amounts will be treated as charges for incorporated materials unless the contractor can reasonably demonstrate the portion attributable to labor.

(6) Different types of contracts between contractors and subcontractors. For tax purposes, subcontractors are not required to use the same type of contract as the general contractor. For example, a general or prime contract may be lump-sum, while some or all subcontracts may be separated. Each subcontractor's individual contract governs the subcontractor's tax responsibilities. In the example given, the subcontractors with separated contracts must collect sales tax from the general contractor. The general contractor must not collect any tax from the general contractor's customer. When the general or prime contract separately states labor and incorporated materials but some of the subcontracts are lump-sum, the prime or general contractor should treat the lump-sum charges as part of its separately stated labor charge and should not collect tax from the prime contractor's customer on those charges from lump-sum subcontractors.

(7) Real property services. A contractor is not required to pay tax on real property services that are purchased as part of the construction of a new residential structure or as part of an improvement that is located immediately adjacent to the new structure and that is used in the residential occupancy of the structure. The contractor must issue a properly completed exemption certificate or other acceptable documentation to the service provider. If the comptroller subsequently determines that the work is taxable, then the contractor will be liable for all taxes, penalties, and interest that accrue upon such purchases. For the purposes of this paragraph, "contractor" includes a builder, developer, speculative builder, or other person who acts as a builder to improve residential real property.

(8) Materials that customers provide. A contract may specify that a customer will provide materials and that the person who performs improvements will provide the skill and labor that are necessary to incorporate the materials into realty. Under this type of contract, the person who provides the skill and labor will not incur tax liability on the materials. The customer is liable for the tax on the materials and must pay tax at the time of purchase of the materials.

(9) Noninstalled items. A person who manufactures an item for sale but who is not responsible for the incorporation of the item into realty is a manufacturer who is subject to the provisions of §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing). For example, cabinet makers who do not affix the cabinets to realty are manufacturers and not contractors.

(10) Local tax. A contractor's responsibility for local sales and use taxes depends on the type of contract entered into with the customer.

(A) A contractor who has entered into a separated contract with the customer must collect local taxes on the charge for materials based on the location of the job site.

(B) A contractor who has entered into a lump-sum contract with the customer is the consumer of all materials used to perform a lump-sum contract.

(i) The lump-sum contractor should pay tax to suppliers on all materials at the time of purchase, unless the contractor maintains a valid tax-free inventory or holds a direct pay permit.

(ii) When the local sales taxes collected by the supplier are less than the 2.0% local tax cap, additional local use taxes are due based on the location where the goods are first stored or used. Local use tax is not due if the supplier collected a local sales tax for the same type of taxing jurisdiction.

(iii) When a lump-sum contractor has items shipped to the jobsite from outside of Texas, the contractor is responsible for accruing local taxes based on the location of the jobsite.

(iv) The lump-sum contractor must accrue local use tax based on the purchase price of the taxable item. The local use tax is due in the reporting period in which the item was first stored, used, or otherwise consumed in a local taxing entity.

(11) Enterprise projects and defense readjustment projects. In order for an enterprise project or a defense readjustment project to avail itself of certain sales tax refunds, the project must enter into a separated contract, and the charges for items that qualify for enterprise project or defense readjustment project refunds must be separately stated. A contractor who performs a separated contract must collect sales tax from the project on the sales price of the incorporated materials. See §3.329 of this title (relating to Enterprise Projects, Enterprise Zones, and Defense Readjustment Zones).

(12) Manufacturing facilities. For a manufacturer to qualify for sales tax exemptions on manufacturing equipment that is installed under a contract to improve real property, the manufacturer must enter into a separated contract. Additionally, the contract must separately state the charge for the qualifying manufacturing equipment. See §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing).

(c) Tax responsibilities of contractors who perform lump-sum and separated contracts for exempt organizations.

(1) Exemption certificates and other required proof of exemption. A contractor must obtain properly completed exemption certificates to document exempt contracts. Written contracts or written purchase orders that are issued by governmental entities exempted under Tax Code, §151.309, are acceptable documentation of exempt contracts.

(2) Contractor liability.

(A) A contractor may claim an exemption under Tax Code, §151.311, on a purchase of a taxable item for use under a contract to improve realty for an organization that is exempt under Tax Code, §151.309 or §151.310. If the comptroller subsequently determines that the organization is not exempt, then the contractor is liable for all taxes, penalties, and interest that accrue upon such purchase. If the validity of a claimed exemption or the exempt status of the customer is unclear, then the contractor may not accept the exemption certificate in good faith and should request additional evidence of the exempt status of the contract. If the customer claims to be an exempt organization, then a letter of sales and use tax exemption from the comptroller that is addressed to the customer relieves the contractor from further inquiry regarding the exempt status of the customer. See §3.287 of this title (relating to Exemption Certificates).

(B) A contract with a private party to improve real property owned by an exempt entity, other than a governmental entity described in Tax Code, §151.309, is not an exempt contract if the improvement to real property is for the primary use and benefit of the private party. However, a contractor in a non-exempt contract may purchase tax free tangible personal property that is used to improve real property owned by a governmental entity described in Tax Code, §151.309, if that tangible personal property is donated to the governmental entity and if the following conditions are satisfied:

(i) the contract between the contractor and the private party is a separated contract. See subsection (b) of this section for a discussion of lump-sum and separated contracts;

(ii) the contract provides that title to the materials used to perform the contract passes to the private party when the materials are delivered to the job site but before they are incorporated into the realty or used by either the contractor or the private party; and

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