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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

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agreed contract price of materials incorporated into the realty--The price specified in the contract for the incorporated materials, i.e., tangible personal property that becomes a part of the real property, plus any additional charges directly attributable to the incorporated materials. For example, profit that is calculated as a percentage of the cost of materials, cost of transportation of the materials, and markup or handling charges that relate directly to the materials charge are included in the agreed contract price. A charge that is calculated as a percentage of the total contract cost is not considered a part of the agreed contract price of materials incorporated into realty. The agreed contract price of incorporated materials cannot be less than the price that the contractor paid for the materials.

(2) Consumable item--Nondurable tangible personal property that is used to improve realty and, after being used once for its intended purpose, is completely used up or destroyed. Examples of consumable items are nonreusable concrete forms, nonreusable drop cloths, barricade tape, natural gas, and electricity. The term "consumable item" does not include machinery, equipment, accessories to machinery or equipment, repair or replacement parts for machinery or equipment, or any rented or leased item.

(3) Contractor--Any person who builds new improvements to residential or nonresidential real property, completes any part of an uncompleted new structure that is an improvement to residential or nonresidential real property, makes improvements to real property as part of periodic and scheduled maintenance of nonresidential real property, or repairs, restores, maintains, or remodels residential real property, and who, in making the improvement, incorporates tangible personal property into the real property that is improved. The term includes subcontractors but does not include material men, suppliers, or persons who provide taxable real property services. Persons who provide real property services should refer to §3.356 of this title (relating to Real Property Service). Persons who repair, restore, or remodel nonresidential real property are providing taxable services and should refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance). Persons who repair, restore, or remodel chemical plants or petrochemical refineries should refer to §3.362 of this title (relating to Labor Relating to Increasing Capacity in a Production Unit in a Petrochemical Refinery or Chemical Plant).

(4) Equipment--Tangible personal property that a contractor uses that is not a consumable item or an incorporated material. Examples include tools, machinery, implements, and accessories and repair or replacement parts for the equipment.

(5) Exempt contract--A contract for the improvement of real property with an entity that is exempted under Tax Code, §151.309 or §151.310. An example of an exempt contract is a contract with a nonexempt entity to improve real property for the primary use and benefit of an organization exempted under Tax Code, §151.309 or §151.310, provided that the improvements relate to the exempt purpose of an organization that is exempted under Tax Code, §151.310(a)(1) or (a)(2). Another example is a contract for development work covered under subsection (d) of this section. See §3.322 of this title (relating to Exempt Organizations).

(6) Improvements to realty--See §3.347 of this title (relating to Improvements to Realty).

(7) Incorporated materials--Tangible personal property that becomes a part of any building or other structure, project, development, or other permanent improvement on or to such real property including tangible personal property that, after installation, becomes real property by virtue of being embedded in or permanently affixed to the land or structure constituting realty and which property after installation is necessary to the intended usefulness of the building or other structure.

(8) Lump-sum contract--A contract in which the agreed contract price is one lump-sum amount and in which the charges for incorporated materials are not separate from any charges for skill and labor, including fabrication, installation, and other labor that the contractor performs. For example, guaranteed-maximum contracts are considered lump-sum contracts when the charges for incorporated materials and the charges for skill and all labor are not separately stated. Contracts to improve realty that do not break out all charges for labor, including fabrication labor, are considered lump-sum contracts. For example, a contractor who fabricates and incorporates cabinets into realty under a contract that includes the fabrication labor in the agreed contract price of materials is a lump-sum contractor. Contracts to improve realty that have a zero charge for materials or for labor are considered lump-sum contracts. Separated invoices issued to the customer will not change a lump-sum contract into a separated contract unless the terms of the contract require separated invoices.

(9) New construction--All new improvements to real property, including initial finish-out work to the interior or exterior of the improvement. An example is a multiple story building that has had only its first floor finished and occupied. The initial finish-out of each additional floor before initial occupancy or use is new construction. New construction also includes the addition of new usable square footage to an existing building. Examples include the addition of a new wing onto an existing building. Reallocation of existing square footage inside a building is remodeling and does not constitute the addition of new square footage. For example, the removal or relocation of interior walls to expand the size of a room or the finish out of an office space that was previously used for storage is remodeling. Raising the ceiling of a room or the roof of a building is not new construction if new usable square footage is not created.

(10) Ready mix concrete contractor--A contractor who manufactures or produces concrete for construction purposes and incorporates the concrete into the property improved.

(11) Sale and installation of tangible personal property--Includes a contract to furnish and install machinery, equipment, or other tangible property that is not essential to the building or structure, nor adapted or intended to become a part of the realty, but which incidentally may, on account of its nature, be temporarily attached to the realty without loss of its identity as a particular piece of machinery, equipment, or property and, if attached, is readily removable without substantial damage to the unit or realty or without destruction of the intended usefulness of the realty.

(12) Residence or residential property--Property that is used as a family dwelling, a multifamily apartment or housing complex, nursing home, condominium, or retirement home. The term includes homeowners association-owned and apartment-owned swimming pools that are for the use of the homeowners or tenants, laundry rooms for tenants' use, and other common areas for tenants' use. The term does not include hotels or any other facilities that are subject to the hotel occupancy tax.

(13) Separated contract--A contract in which the agreed contract price is divided into a separately stated agreed contract price for incorporated materials and a separately stated amount for all skill and labor that includes fabrication, installation, and other labor that is performed by the contractor. If prices of incorporated materials and labor are separately stated in any part of the contract or in a document that becomes part of the contract according to the terms of the contract, adding the charges together to give a sum total does not change the contract into a lump-sum contract. For example, a contract that requires separated invoices is a separated contract. Cost-plus contracts are considered separated contracts if the cost of labor is separately stated from the cost for incorporated materials.

(b) Tax responsibilities of contractors who improve real property of nonexempt customers.

(1) Equipment. A contractor must pay sales tax at the time of purchase, lease, or rental on the sales price of equipment used to perform a contract. A contractor must accrue and remit use tax on the sales price of equipment purchased, leased, or rented for use in Texas from an out-of-state seller unless the out-of-state seller collected Texas use tax. See §3.346 of this title (relating to Use Tax). Texas allows a credit against Texas use tax when the same property is subject to a legally imposed sales or use tax of another state. See §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(2) Consumable item. Except as provided by subparagraph (B) of this paragraph, a contractor must pay tax at the time of purchase on consumable items that are not physically incorporated into the customer's property.

(A) A contractor may not collect tax from the customer on a charge for consumable items except as provided by subparagraph (B) of this paragraph.

(B) A contractor who has a separated contract may issue a properly completed resale certificate to a supplier in lieu of tax for consumable items if title to the consumable items transfers to the contractor's customer at or before the time that the contractor takes possession of the consumable items, and further if the consumable items are immediately marked, labeled, or otherwise physically identified as the customer's property, when practicable. The contractor must separately state the charge for these consumable items to the customer and must collect sales tax from the customer, unless the customer qualifies for exemption under Tax Code, §151.309 or §151.310, or under other provisions that grant the customer exemption from sales tax on its purchases. See §3.322 of this title (relating to Exempt Organizations).

### (3) Lump-sum contracts.

(A) A contractor who performs lump-sum contracts owes tax on all materials, consumable items, equipment, taxable services, and other taxable items that are used by the contractor or incorporated into a customer's property. The contractor must pay tax to suppliers when the contractor purchases, leases, or rents the taxable items. The contractor must accrue and remit use tax on taxable items that are purchased, leased, or rented from an out-of-state seller unless the out-of-state seller collected and gave the contractor a receipt for Texas use tax. The contractor shall not collect from a customer any amount represented to be tax on a lump-sum charge or on any portion of the charge except as provided under subparagraph (E) of this paragraph. A lump-sum contractor must refund to the customer any tax that is collected in error or the contractor must remit the tax to the state. The contractor may not retain such tax.

(B) A contractor who, in addition to performing lump-sum contracts, sells, leases, or rents taxable items at retail or performs separated contracts may maintain a tax-free inventory of items that are held for resale. A contractor who, in addition to performing lump-sum contracts, performs nonresidential real property repair, restoration, and remodeling services and resells taxable items as part of those taxable services may also maintain a tax-free inventory of items that are held for resale. See §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance). A contractor may issue a properly completed resale certificate instead of paying tax on items that are purchased for a tax-free inventory when the contractor does not know at the time of purchase whether the item will be resold or used in the performance of a lump-sum contract. A contractor must hold a sales tax permit to issue a resale certificate, and must collect, report, and remit tax to the comptroller as required by §3.286 of this title (relating to Seller's and Purchaser's Responsibilities) when the contractor sells, leases, or rents taxable items. A contractor who separately states a charge for equipment that the contractor uses is not renting that equipment to the customer.

(C) A contractor who purchases taxable items under a valid resale certificate and uses the items in a taxable manner owes sales or use tax on the items. For example, a contractor who incorporates materials from a tax-free resale inventory into realty under a lump-sum contract must accrue and remit tax based on the purchase price of the materials. The contractor must remit the tax to the comptroller for the reporting period in which the materials were used. A contractor who purchases items that are specifically intended for use in a lump-sum contract may not issue resale certificates in lieu of tax for such items. See §3.285 of this title (relating to Resale Certificates; Sales for Resale).

(D) A contractor may not accept a direct payment exemption certificate when the contractor performs a lump-sum contract for a person who holds a direct payment permit. The lump-sum contractor owes tax on all taxable items that are used on the job or that are incorporated into the direct payment permit holder's realty. A direct payment permit holder may not authorize a contractor or any other person to purchase tax free any taxable item through use of the direct payment permit holder's permit. See §3.288 of this title (relating to Direct Payment Procedures and Qualifications).

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