

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)  
(916) 324-3828

January 29, 1992

Begin deleted text REDACTED TEXT End deleted text  
Boise, Idaho 83707

RE: Begin deleted text REDACTED TEXT

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Dear Begin deleted text REDACTED TEXT End deleted text

Mr. E. W. Hopkins of Out-of-State Auditing has forwarded to the Legal Division your letter of November 21, 1991, to Mr. Douglas Heinz of that office. I have been assigned the responsibility of answering. You have requested an opinion regarding qualifying certain of your company's ("Trus Joint") contracts as being for a fixed price within the terms of the fixed-price construction contract exemption from the recent tax increases. (Rev. & Tax. Code § 6376.1.) Further statutory citations are, unless otherwise stated, to the Revenue and Taxation Code.) You are requesting clarification of an opinion issued to you on this same topic by Assistant Chief Counsel Gary J. Jugum on July 17, 1991, a copy of which you attached to your letter.

You have asked how the wording set forth below affects the status of Begin deleted text REDACTED TEXT End deleted text contracts as being for a fixed price:

"This proposal is effective for 30 days after the date shown above. If this proposal is accepted within that period, the prices show below are guaranteed by Begin deleted text REDACTED TEXT End deleted text for all materials delivered before [A], but in no case more than 120 days from the date of acceptance ["the termination date"]. Thereafter, prices are subject to change on undelivered materials to reflect any increases in Begin deleted text REDACTED TEXT End deleted text costs."

**OPINION**

In determining whether a contract is a "fixed-price" contract we have consistently required that it satisfy the following criteria: (1) it be binding prior to July 15, 1991, (2) neither party has an unconditional right to terminate the contract; (3) the contract must fix all costs at the onset; and (4) the agreement must include a provision which fixes the tax obligation on a tax-included basis or sets forth either the amount or the rate of tax and does not provide for an increase in the amount of tax. In construction contracts, we consider a contract awarded pursuant to an irrevocable bid made prior to July 15, 1991, which is accepted prior to becoming revocable as being for a fixed price even if the contract is actually awarded after July 15. Please

note that, to be considered as being for a fixed price, the bid must be accepted within the original period of irrevocability or any extension of the period granted prior July 15, 1991. If the bid is accepted during an extension of the period of revocability which was granted after July 15, 1991, it does not qualify as being for a fixed price.

In his letter, Mr. Jugum concluded that you quote your price to California customers on a tax-included basis and that neither party reserves the right to unconditionally terminate the contract. The remaining question, then, is whether or not the obligation is fixed – i.e., if either party reserves the right to pass on tax increases.

The contract guarantees the bid price for thirty days only. Thus, assuming the bid date is prior to July 15, 1991, and the contract is accepted prior to that period running out, the obligation is fixed prior to July 15. It is, however, fixed only for goods which are delivered prior to the termination date. Since Begin deleted text REDACTED TEXT End deleted text specifically reserves the right to pass on to the purchaser any cost increases to which goods delivered after termination date are subject, the contract is not for a fixed price regarding those goods. Therefore, even if a given contract was executed prior to July 15, 1991, or was executed pursuant to an irrevocable bid which was accepted during the original period of revocability or any extension of that period granted prior to July 15, 1991, sales of goods delivered after termination date (assuming it is after July 15, 1991) are subject to the increased tax rates.

Two caveats. I have written this assuming that at the time of contracting a delivery schedule is set forth so that the customer knows when the materials are delivered. If, however, the time of delivery is open-ended, that creates the potential for varying the delivery dates so as to alter the tax consequences. If such be the case, the contract would not be for a fixed price. Also, the entire discussion may be moot if your contracts are executed under the authority of a general construction contract. If the general contract qualifies as being for a fixed price, so do construction, materials, and equipment sub-contracts awarded pursuant to it.

I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid  
Tax Counsel

JLW:es  
4245I

bc: Out-of-State District Administrator

(916) 445-3723

July 17, 1991

Begin deleted text REDACTED TEXT End deleted text  
Boise, Idaho 83707

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Dear Begin deleted text REDACTED TEXT End deleted text

This is in response to your letter of July 12, 1991. You have inquired as to whether your company's product proposal and purchase agreement is a fixed price contract for California sales and use tax purposes, with reference to the tax rate increase which became effective here on July 15, 1991.

We have reviewed the sample copy which you have furnished us. The printed form recites "Sales and Use Taxes Not Included Unless Listed Above." However, with respect to your California customers, it has been your practice to include sales tax. In the space for description of materials and prices, the price is typically quoted as follows: "Begin deleted text REDACTED TEXT End deleted text PRICE (F.O.B. Truckbed Jobsite, sales tax incl.) [price]." We are of the opinion that these agreements are fixed price agreements. There is no recital in the "terms and conditions" to the effect that tax increases will be passed on to the purchaser.

As to invoices issued to customers after July 15, 1991, with respect to product proposal and purchase agreements entered into prior to that date, tax should be invoiced at the old rate, with a notation "fixed price contract entered into prior to July 15, 1991."

Very truly yours,

Gary J. Jugum  
Assistant Chief Counsel

GJJ:wk  
3234C

bc: Out-of-State District Administrator