

565.1800**Memorandum****CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE****To:** Mr. Wayne Fortier
Lakewood - Branch Office**Date:** May 20, 1993**From:** John L. Waid
Tax Counsel**Subject:** [No Permit Number]
REDACTED TEXT
Alternate Title Clause (DOD 252.232-7004)

I am answering your memorandum to me of February 17, 1993. You stated that REDACTED TEXT has requested that the Board reconsider its position, based on my memorandum of April 20, 1992, that DOD FAR Supplement ("DOD") 252.232-7004 does not in and of itself accelerate passage of title to the United States in tangible personal property purchased by a government contractor prior to use by it in performing a contract with the United States.

You attached to your memorandum a letter to you dated January 29, 1993, from Mr. REDACTED TEXT, REDACTED TEXT Corporate Director for Government Liaison and Contract Compliance. Mr. REDACTED TEXT argues that FAR 52.232-16, "Progress Payments," should be read into contracts containing DOD 252.232-7004 even though it is not set forth in the contract. Mr. REDACTED TEXT argues as follows: "DFARS 52.232-7004 is dependent upon the FAR 52.232-16 progress payments clause, and therefore, the FAR clause, containing the title passing wording must be considered a part of the contract even though it may not be explicitly incorporated into the contract." Mr. REDACTED TEXT makes it clear that the contracts at issue do not contain the Progress Payments clause. He further argues that ASPR 7-104.35(c), which he says preceded DOD 252.232-7004, was required to be included in DOD contracts "as an addition to the basic progress payments clause" (ASPR 7-104.35(a) and says that in 1991 DOD required that the agreement contain the Progress Payments Clause for the contractor to get customary flexible progress payments. (See, DOD 232.502-1-71(b)(iii).)

Mr. REDACTED TEXT notes that the Flexible Progress Payments clause appeared as DOD 52.232-7004 in the 1984 DOD Supplement. It was later re-numbered 252.232-7004, and then 252.232-7003, the number it bears today. Since the contracts at issue appear to have been executed prior to 1991, we will continue to refer to the clause as 252.232-7004 for convenience. The authority for use of the clause is now found at DOD 252.232-4-70(b).

Mr. REDACTED TEXT attached a copy of a portion of the 1984 version of FAR Subpart 32.5, "Progress Payments Based on Costs," which prescribes the policies, procedures, forms, solicitation provisions, and contract clauses for providing contract financing through progress payments based on costs. (FAR 32.500.) FAR 32.501 authorizes progress payments as follows:

"Progress payments may be customary or unusual. Customary payments are those made under the general guidance in this subpart, using the customary progress payment rate, the cost base, and frequency of payment established in the Progress Payments clause, and either the ordinary liquidation method or the alternate method Any other progress payments are considered unusual, and may be used only in exceptional cases"

The FAR sets forth the customary progress payment rate but provides that the DOD may establish other customary rates for foreign military sales and for flexible progress payments. (FAR 32.501-1.) FAR 32.502 establishes the criteria for use of a progress payments clause in solicitations and resulting contracts generally. "The contracting officer shall insert the clause at 52.232-16, Progress Payments, in solicitations and fixed-price contracts under which the Government will provide progress payments based on costs." (FAR 32.502-4.)

Mr. REDACTED TEXT attached a copy of FAR 52.232-16 (APR 1984). He also attached a copy of DOD Part 32, "Contract Financing," Subpart 32.5, "Progress Payments Based on Costs," presumably also as it read in 1984. DOD 32.501-1 sets forth the customary progress payment rates, and section 32.502-1 sets forth the standard to determine when customary flexible progress payments should be made. Section 32.502-4(71) states that the clause at DOD 52.232-7004 shall be inserted when a flexible progress payment rate is used in the contract. Mr. REDACTED TEXT attached copies of the April 1984 and May 1985 versions of section 52.232-7004. No title-passing clause is included in either version nor is FAR 52.232-16 required to be included in the contract for either version of the clause to be effective.

OPINION

The rule is that title clauses of contracts with the federal government determine passage of title to materials used in performance of the contracts to the government for purposes of the sales and use tax law. (Aerospace Corp. v. S.B.E. (1990) 218 Cal.App.3d 1300, 1313.) Therefore, we must look to the clauses included in the contracts, whether fully set forth or incorporated by reference, to determine if title to tangible personal property purchased by a government contractor for use in performing its contract(s) passed to the United States prior to use by the contractor.

Mr. REDACTED TEXT admits that the contracts at issue do not contain a title-passage clause. We cannot agree that 52.232-16 must be read into these contracts in order for 252.232-7004 to be operative. FAR 32.501 provides the general authority for using progress payments. FAR 52.232-16 is required to be included in fixed-price contracts only. Mr. REDACTED TEXT himself notes that it was possible to obtain flexible progress payments in contracts subject to the DOD Supplement without the presence of 52.232-16 until the 1991 revision. Therefore, the inclusion of 52.232-16 was not a pre-requisite to the operation of DOD 252.232-7004.

Agency supplements to the FAR are designed to deal with agency-peculiar procurement situations and needs, provide necessary agency implementation procedures, and displace existing agency procurement regulations. (ABA, Public Contract Law Section, The FAR System: Its Critical Formative Years, 1984-1986 (1988), "First Quarterly Report (July 31, 1984), A-1.14.) Supplements thus derive their authority from the FAR generally but need not incorporate specific FAR provisions. As Mr. REDACTED TEXT himself notes, in this particular case, the DOD Supplement was changed in 1991 so that flexible progress payments may only be obtained now if the FAR Progress Payments Clause is included in the contract, thus indicating that was not a requirement prior to that date.

We also cannot agree that ASPR 7-104.35(c) required that flexible progress payment procedures be included in DOD contracts. This paragraph gives the Contracting Officer the authority to reduce or suspend progress payments in the event of contractor failure to make proper progress or to liquidate such payments at a rate higher than the standard percentage if warranted under conditions set forth therein. ASPR 7-104.35(a)(3) provides for the possibility of flexible progress payments, if provided by ASPR Appendix E-530.

In sum, under Aerospace we must look to the contract itself to see if the required title-passage clauses are included. If not, there is no accelerated title passage. Mr. REDACTED TEXT admits that DOD 252.232-7004 contains no title-passage clauses nor is any other such clause included elsewhere in the contract. The DOD clause does not need the inclusion of FAR 52.232-16 to be effective. Rather, both clauses derive their authority from FAR 32.501. Therefore, we re-iterate our previous opinion that DOD 252.232-7004, now 252.232-7003, does not pass title to tangible personal property purchased by a contractor for use in performing its federal government contracts to the United States prior to its use by the contractor. After 1991, the DOD Supplement indicates that there is such title passage, but due to the inclusion of 52.232-16, and not on the authority of 252.232-7003.

JLW:es

Title-6

cc: Mr. Mike Hilbert, Aerospace Coordinator (MIC:39)