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STATE OF CALIFORNIA

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LEGAL DIVISION - MIC 82
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
Telephone No.: (916) 324-3828
Fax No: (916) 323-3387

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December 11, 1995

BURTON W. OLIVER
Executive Director

REDACTED TEXT

RE: [No Permit Number]
Government Demonstration
Contract

Dear REDACTED TEXT:

I am responding to your letter dated September 25, 1995 to the Legal Division. You indicate that your company ("REDACTED TEXT") is a bioengineering research company whose research is funded primarily by grants, co-operative agreements, or contracts with various departments of the United States government. REDACTED TEXT is currently working on a demonstration project to produce methane from municipal solid waste and tuna sludge, which methane will be used to produce electricity. REDACTED TEXT will purchase equipment for the project from various vendors and will be reimbursed by the government.

You aver that title-passage clauses in REDACTED TEXT's contract with the government provide that title to the property REDACTED TEXT purchases for use on the contract passes to the United States prior to use by REDACTED TEXT. You attached to your letter excerpts from the contract containing the title-passage clauses to which you refer.

OPINION

As you know, a federal contractor may purchase tangible personal property for resale to the United States if the contract at issue contains certain clauses which have been held to pass title to the United States on an accelerated basis prior to use of the property by the contractor. Such purchase is excluded from sales tax. (Rev. & Tax. Code § 6007.) The resale to the United States is exempt from tax under Revenue and Taxation Code Section 6381. (See, Aerospace Corp. v. S.B.E. (1990) 218 Cal.App.3d 1300.) The contract clauses at issue in Aerospace were substantially identical to the title clauses contained in Federal Acquisitions Regulations (FAR) 52.245-2(c)(direct cost items)and 52.232-16(d)(indirect cost items).

You attached to your letter portions of Modification No. 5 to Subcontract No. YAT-5-14149-01 (undated) and Appendix B-3 to the contract, dated May 1, 1993. The modification, in part, requires that REDACTED TEXT treat all government property in accordance with the government Property clause of Appendix B. Clause 49 of Appendix B-3 sets forth the title-passage

clause at issue. It is substantially identical to that provided by FAR 52.245-5(c). Under this clause, title to items of direct cost passes to the government upon the vendor's delivery of the property to the contractor. Title to "all other property," the cost of which is reimbursable as an item of indirect cost passes to the government upon issuance of the property for use in performing the contract, commencement of processing of the property for use in contract performance, or reimbursement of the cost by the government, whichever occurs first. We have previously determined that, under the Aerospace rule, this clause provides for accelerated passage of title to items of both direct and indirect (i.e., overhead items) cost to the United States prior to use by the contractor. We thus conclude that, under this title-passage clause, REDACTED TEXT may purchase property for use in performance of the contract for resale to the United States, which purchase is excluded from tax under Regulation 1668. In order to qualify for the exclusion, REDACTED TEXT must timely issue its vendors resale certificates substantially conforming to Regulation 1668. The following resale to the United States is exempt from tax under Revenue and Taxation Code Section 6381.

For your information, I have included a copy of Regulation 1668. 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
Senior Staff Counsel

JLW:sr

Enclosure: Reg. 1668
cc: Out-of-State District Administrator (OH)