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February 28, 2014

Georgia Letter Ruling SUT No. 2014-02-28-01 Government & Govt. Contractors

This letter is in response to your request for guidance on the application of Georgia sales and use tax to certain purchases by the City for a drinking water treatment plant.

Facts

The City is currently involved in a competitive bid process to procure services for construction of a new drinking water treatment plant. The City intends to enter into a contract with a qualified construction entity through which the city will purchase materials, equipment, machinery, labor, and other services for the project.

The new water treatment plant will involve a number of treatment processes that will utilize machinery and equipment to produce drinking water from raw water. Examples of such machinery and equipment include:

- Water pumps
- Mixers
- Chemical storage and pumping equipment
- Instruments and electrical components
- Sedimentation plate equipment
- Blowers
- Motor control centers

Drinking water produced by the City's water treatment plant will be sold to customers.

Issue

Does the City qualify for a sales tax exemption for the production machinery and equipment it will purchase for its new drinking water treatment plant?

Analysis

Overview

Georgia levies and imposes a tax (subject to certain specific exemptions) on the retail purchase, retail sale, storage, use, or consumption of tangible personal property and certain enumerated services.¹ “Retail sale” or “sale at retail” means a sale of tangible personal property or taxable services to any person other than for resale.² “Sale” means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner, by any means of any kind of tangible personal property for a consideration.³ The amount subject to tax is the “sales price”. “Sales price” means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise without any deduction for the following:

- (i) The seller's cost of the property sold;
- (ii) The cost of materials used, labor, or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (iii) Charges by the seller for any services necessary to complete the sale; and
- (iv) Delivery charges.⁴

Exemptions

The following transactions are exempt from Georgia sales tax and could be applicable to the case at hand:

- Sales to any or municipality of this state, or any bona fide department of a municipality of this state are exempt when paid for directly to the seller by warrant on appropriated government funds.⁵
- Transactions in which tangible personal property is furnished by the United States government or by a county or municipality of this state to any person who contracts to perform services for the governmental entity for the installation, repair, or extension of any public water, gas, or sewage system of the governmental entity when the tangible personal property is installed for general distribution purposes, notwithstanding Code Section 48-8-63 or any other provision of this article. No exemption is granted with respect to tangible personal property installed to serve a particular property site.⁶

¹ O.C.G.A. §§ 48-8-1 and 48-8-30(a).

² O.C.G.A. § 48-8-2(31).

³ O.C.G.A. § 48-8-2(33).

⁴ O.C.G.A. § 48-8-2(34)(A).

⁵ O.C.G.A. § 48-8-3(1).

⁶ O.C.G.A. § 48-8-3(2).

Contractors

As a general rule, “[e]ach person who orally, in writing, or by purchase order contracts to furnish tangible personal property and to perform services under the contract within this state shall be deemed to be the consumer of the tangible personal property and shall pay the sales tax imposed by this article at the time of the purchase. Any person so contracting who fails to pay the sales tax at the time of the purchase or at the time the sale is consummated outside the limits of this state shall be liable for the payment of the sales or use tax.”⁷

In addition, “[e]ach person who contracts to perform services in this state and who is furnished tangible personal property for use under the contract by the person, or such person's agent or representative, for whom the contract is to be performed, when a sales or use tax has not been paid to this state by the person supplying the tangible personal property, shall be deemed to be the consumer of the tangible personal property so used and shall pay a use tax based on the fair market value of the tangible personal property so used irrespective of whether any right, title, or interest in the tangible personal property becomes vested in the contractors.”⁸

The two provisions quoted above establish the basic rule that contractors are liable for tax on all items used by the contractor to perform under the contract. O.C.G.A. § 48-8-63 provides that the contractor owes tax even on items provided to the contractor by the person for whom the contract is to be performed. However, O.C.G.A. § 48-8-63(h)(1) provides the following exception to this rule:

Nothing contained in this Code section shall be construed to impose any sales or use tax with respect to the use of tangible personal property owned by the State of Georgia, the University System of Georgia, or any county, municipality, local board of education, or other political subdivision of this state in the performance of contracts with such entities when the property is not actually used up and consumed in the performance of the contract. Tangible personal property incorporated into real property construction which loses its identity as tangible personal property shall be deemed to be used up and consumed within the meaning of this subsection. Any governmental entity which furnishes tangible personal property to a contractor for incorporation into a construction, renovation, or repair project conducted pursuant to a contract with such governmental entity shall issue advance written notice to such contractor of the amount of tax owed for such tangible personal property. The failure of the governmental entity to issue such advance written notice to the contractor of such tax liability shall render such governmental entity liable for such tax.

Thus, if a municipality owns tangible personal property and provides such property to a contractor to use in performing under a contract, the contractor does not owe use tax on the

⁷ O.C.G.A. § 48-8-63(b).

⁸ O.C.G.A. § 48-8-63(c).

property when the property does not lose its identity as tangible personal property, i.e., the property remains tangible personal property after the contractor has completed his work and has not been incorporated into real property. However, in the case of a public water system, even items that become real property retain their exempt status when such items are purchased by the federal government or a Georgia county or municipality, and the items are used for general distribution purposes.⁹

Ruling

As a municipality of this state, the City qualifies for a sales tax exemption pursuant to O.C.G.A. § 48-8-3(1) for all purchases of tangible personal property when such purchases are paid for directly to the seller by warrant on appropriated government funds. Thus, purchases of machinery and equipment that will be used in the City's new drinking water treatment plant are exempt when paid for in such a manner. If the City purchases machinery and equipment pursuant to this exemption and provides the machinery and equipment to a contractor to use in performing a contract, the contractor does not owe use tax on the machinery and equipment as long as the items do not lose their identity as tangible personal property, i.e., the machinery and equipment remain tangible personal property after the contractor has completed its work and have not been incorporated into real property.

In addition to the exemption discussed above, which applies to items of tangible personal property that retain their identity as tangible personal property, certain items that are incorporated into real property may be purchased and used exempt from sales and use tax. Specifically, pursuant to O.C.G.A. § 48-8-3(2), items purchased by the City for general distribution purposes within a public water system are exempt from sales and use tax even if the items are furnished to a contractor and ultimately incorporated into real property.

Based on the above, the City may make exempt purchases of the following water treatment machinery and equipment: water pumps, sedimentation plate equipment, mixers, blowers, chemical storage and pumping equipment, motor control centers, and instruments and electrical components.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances and taxpayer in question. Should the circumstances regarding the transactions change, or differ materially from those represented, then this ruling may become invalid. In addition, please be advised that subsequent statutory or administrative rule changes or judicial interpretations of the Statutes or Rules upon which this advice is based may subject similar future transactions to a different tax treatment than that expressed in this response.

⁹ O.C.G.A. § 48-8-3(2).