

DEPARTMENT OF STATE REVENUE

Information Bulletin #60
Sales Tax
October 2020
(Replaces Bulletin #60 dated November 2017)
Effective Upon Publication

SUBJECT: Contractors and Construction Material; Purchases of Construction Material; Sales of Construction Material

REFERENCES: [IC 6-2.5-1-5](#); [IC 6-2.5-1-14.7](#); [IC 6-2.5-1-14.9](#); [IC 6-2.5-1-27.7](#); [IC 6-2.5-3-2](#); [IC 6-2.5-3-3](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-9](#); [IC 6-2.5-5-3](#); [IC 6-2.5-8-9](#); [45 IAC 2.2-3-7](#) through [45 IAC 2.2-3-12](#); [45 IAC 2.2-4-21](#) through [45 IAC 2.2-4-26](#)

DISCLAIMER: Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is not consistent with the law, regulations, or court decisions is not binding on either the department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUMMARY OF CHANGES

Aside from technical nonsubstantive changes, the content of the bulletin has been reorganized, but the substance of most sections remains mostly the same, with the following additions: a new section was included to address the taxability of contracts between subcontractors and general or prime contractors; a statement regarding the purchase of safety equipment for use in government contracts; and examples have been added in different sections.

I. INTRODUCTION

The purpose of this bulletin is to address the application of Indiana gross retail ("sales") tax and use tax with regard to the purchase or sale by a construction contractor of tangible personal property that is converted into real property. There is a difference in the tax collection and remittance requirements for construction material purchased by a contractor, which depends on whether the contractor is operating under a "time and material" contract or a contract that does not meet the definition of a time and material contract. Generally, a contractor operating under a time and material contract is a retail merchant that is selling the construction material that it incorporates into real property, and must be registered with the department and collect sales tax on the material portion of their contracts. Additionally, as a retail merchant, such contractors may purchase construction material exempt from sales tax under the "sale for resale" exemption.

Conversely, Contractors operating under any other type of construction or installation contract (e.g., "lump sum" contracts) are **not** acting as retail merchants selling construction material. They must pay sales or use tax on their construction material (unless their customer could have purchased the material exempt themselves), but they consequently do not collect sales tax from their customers on the contracts to convert the construction material into real property.

The bulletin explains in more detail how these rules affect the taxability of construction materials purchased by a contractor, and the taxability of the contracts.

II. DEFINITIONS

"Construction Material" means any tangible personal property to be converted into real property. Examples of construction material that may be converted into real property through incorporation or installation include, but are not limited to, doors, garage doors, windows, cabinets, garbage disposals, water heaters, water softeners, alarms, furnaces, central air conditioning units, gutters, carpeting and other flooring materials, drywall, lumber, asphalt, concrete, fencing, trees, shrubbery, and pre-fabricated construction material.

Examples of items that typically remain tangible personal property, and, therefore, *are not* considered construction material, include, but are not limited to, personal computers, televisions, refrigerators, stoves, dishwashers, clothes washers and dryers, window air conditioning units, and other removable items such as furniture.

Construction material has been converted into real property when it has been attached to or incorporated into real property in such a way that would lead one to reasonably believe the construction material has been permanently affixed to the real property. Construction material incorporated into real property becomes part of and indistinguishable from the real property into which it has been incorporated.

Conversions of tangible personal property into real property include incorporations and installations of tangible personal property into facilities or structures. Incorporations and installations of tangible personal property into facilities or structures may include improvements to and repairs of existing facilities or structures.

"Contractor" means any person engaged in converting construction material into real property on behalf of another person. The term includes, but is not limited to, general or prime contractors, subcontractors, and specialty contractors.

Examples of contractors include, but are not limited to, persons engaged in building, concrete work, carpentry, plumbing, heating and cooling, electrical work, roofing, plastering, tile work, road construction, landscaping, installing underground sprinkler or drainage systems, and making other improvements or repairs to real property.

"Time and Material Contract" means a contract in which the cost of construction material and the cost of labor or other charges are stated separately.

III. PURCHASES OF CONSTRUCTION MATERIAL

In general, all sales of tangible personal property, including sales of construction material, are subject to the state sales tax, while sales of real property are not. The conversion of construction material into real property does not alter this general rule with respect to the taxes imposed on the purchaser's acquisition or use of that material. Thus, absent an exemption, all construction material purchased by a contractor is taxable at the time the material is purchased, or, if acquired exempt, upon disposition. Contractors purchasing construction material are generally liable for paying the tax to the supplier at the time the material is purchased.

A. Time and Material Contractors

Transactions involving tangible personal property are exempt from tax if the person acquiring the property acquires it for resale. This also applies to construction material. Because contractors operating under a time and material contract are retail merchants selling construction material when they either dispose of or convert that material into real property under a time and material contract, they may purchase that construction material exempt from tax under the sale for resale exemption.

To purchase construction material exempt from sales tax (i.e., tax does not need to be paid by the contractor at the time of purchase), contractors using time and material contracts must provide their vendor or supplier with their own properly completed General Sales Tax Exemption Certificate (Form ST-105). A contractor may issue an exemption certificate only if they have registered as a retail merchant with the department (See Section IV below).

B. Other Construction or Installation Contractors

The purchase and use of construction material by contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract (e.g., lump sum contracts) purchase construction material for their own use or consumption in the fulfillment of contractual obligations to provide real property improvement services. As such, contractors using contracts that do not meet the definition of a time and material contract are **not** reselling construction material. They are therefore not eligible to purchase construction material exempt from sales tax under the sale for resale exemption. Instead, such contractors will not charge their customers sales tax. They should either: (1) pay sales tax at the time the construction material is purchased; or (2) self-assess and remit use tax at the time the construction material is converted into real property if that construction material was purchased or otherwise acquired without paying sales or use tax.

C. Purchase of Construction Material for Exempt Customers (the "Ultimate Purchaser" Exception)

Notwithstanding the general rule that a contractor not operating under a time and material contract is required to pay sales tax on their purchase of construction materials (or self-assess use tax at the time the construction material is converted into real property if that construction material was purchased or otherwise acquired without paying sales tax), a contractor may purchase construction material exempt from sales tax if the contractor's

customer would be exempt from sales and use taxes had the customer purchased the construction material directly from the vendor or supplier. In other words, if the ultimate purchaser or recipient of the materials could have purchased such materials exempt themselves, the contractor may purchase the construction materials exempt. Such customers include nonprofit organizations and federal or Indiana governmental entities. **NOTE:** the exemption only applies to construction material that will be incorporated into real property; it does not extend to any other tangible personal property that will be used or consumed in the fulfillment of the contract. See note below.

A customer's ability to purchase construction material exempt from tax is evidenced by the customer's properly completed Form ST-105. The contractor must accept their exempt customer's properly completed exemption certificate and then issue their own exemption certificates to their vendors or suppliers when making exempt purchases. Contractors may **not** reissue their customer's exemption certificates to any vendor or supplier of construction material. Exemption certificates issued to and accepted by contractors must be retained by the contractor for a period of a minimum of three years, beginning at the end of the year in which the construction material was purchased or sold.

When a contractor operates under a time and material contract for an exempt customer, they may purchase the construction material exempt from sales and use tax for that reason as well. They must follow these same rules regarding ST-105s. A time and material contractor may choose to mark either the sale for resale exemption or the purchases for an exempt customer exemption on their ST-105, depending on the appropriate circumstances.

When a contractor purchases or otherwise acquires construction material without paying sales tax, the contractor has the burden of proof with respect to establishing that its purchase or use of that construction material was exempt from tax and that the disposition of that construction material was not subject to the sales or use tax. Additionally, a contractor's subsequent, non-exempt use or disposition of construction material that the contractor purchased or otherwise acquired exempt from tax will subject the contractor's use of that construction material to use tax.

NOTE: Prior versions of this bulletin (between December 2001 and November 2017) provided that a construction contractor's purchase of public safety equipment required by contract to be used in the construction and repair of public roads, bridges, highways, and other public infrastructure for an exempt governmental entity were exempt from sales and use tax. Examples of such equipment included, but were not limited to: traffic signals; signs; barrels; barricades; temporary pavement markings; materials to construct temporary traffic lanes, roads, and bridges; erosion control and drainage materials; aggregates used to set grades; and field offices and communications equipment, provided such offices and equipment are exclusively for the use of government representatives.

This policy was based on extending the "ultimate purchaser" provision to such equipment, even though the equipment would not be considered construction material intended to be incorporated into real property. Upon review of the bulletin, it was determined that the department had no authority to declare such equipment exempt when the law clearly stated that the equipment would not qualify for the exemption. As such, this section was removed with the publication of the November 2017 version of the bulletin. However, the department did not definitively state in the bulletin that the equipment was no longer considered exempt, and thus, it may have been the case that contractors and their exempt customers still considered the equipment exempt.

With that in mind, any public safety equipment described above will be considered exempt by the department if purchased before the date of publication of this bulletin, and for a nine month period thereafter. Beginning July 1, 2021, absent any statutory change in the law that codifies the prior policy, the only manner in which such public safety equipment may be purchased exempt by a construction contractor is if it is purchased for resale to the governmental entity. The governmental entity's ST-105 would then establish that the items may be sold by the contractor to the entity exempt from sales tax. This transaction may be accomplished as part of a time and material contract, or if the contractor does not operate under a time and material contract, in a separate retail transaction between the contractor and the governmental entity. However, in the latter case, such a contractor would have to be registered as a retail merchant with the department in order to make such an exempt transaction.

Furthermore, it should be noted that safety equipment or items used or worn by employees of the construction contractor pursuant to these contracts with governmental entities were never considered exempt by the department. Examples of taxable safety equipment or items include, but are not limited to, hardhats, safety glasses, safety vests, and pest control.

D. Application of Use Tax

In general, the storage, use, or consumption of tangible personal property in Indiana is subject to use tax if the property was acquired in a retail transaction, regardless of where the transaction took place, and where Indiana sales tax had not been paid on that property.

More specifically, a contractor's conversion of construction material into real property in Indiana is subject to use tax if that construction material was purchased or otherwise acquired by the contractor, regardless of where the purchase took place, and Indiana sales tax had not been imposed and no exemption applied. However, notwithstanding this general rule, a contractor's conversion of construction material into real property is not subject to use tax in Indiana (i.e., use tax does not need to be self-assessed and paid by the contractor) in the following situations:

- If sales tax or use tax was previously imposed on the contractor's acquisition or use of that construction material. Contractors are responsible for documenting prior payments of tax and must be able to show that any tax previously imposed on its acquisition or use of the construction material was paid;
- If the contractor's customer could have purchased the construction material exempt from tax had the customer purchased the construction material directly from the supplier. A customer's ability to purchase construction material exempt from tax is evidenced by the customer's properly completed Form ST-105 General Sales Tax Exemption Certificate;
- If the conversion of the construction material into real property is governed by a time and material contract; or
- If the construction material was acquired by the contractor in a transaction that was exempt from the sales tax under any part of Indiana Code 6-2.5-5 **and the construction material is being used, stored, or consumed for the purpose for which it was exempted.**

NOTE: A contractor's subsequent, non-exempt use or disposition of construction material purchased or otherwise acquired exempt from tax will subject the contractor's use of that construction material to tax. Contractors are responsible for self-assessing and remitting to the department any use tax due. Use tax liabilities are to be imposed at the same rate as the sales tax and calculated using the gross retail price of any construction material subject to tax.

Example #1: A contractor that operates under a contract that is not a time and material contract purchases construction materials for an exempt project. They supply their vendor with their Form ST-105, showing that the project is an exempt project. They do not pay their vendor sales tax on the construction materials. However, once the project is complete, they end up with construction material left over that they will use on other non-exempt projects. Use tax is now due on those materials. The contractor will report the use tax on their annual income tax return, by using an ST-115, or on their ST-103 if they are registered to collect sales tax for projects in which they operate under a time and material contract.

IV. SALES OF CONSTRUCTION MATERIAL

In general, all sales of tangible personal property, including sales of construction material, are subject to tax. Retail merchants are required to collect and remit sales tax as agents of the state.

Under Indiana law, contractors are retail merchants selling construction material when they dispose of or convert construction material into real property under a time and material contract. Time and material contracts are contracts in which the cost of construction material and the cost of labor or other charges are stated separately. Because all sales of tangible personal property, including sales of construction material, are taxable, contractors converting construction material into real property under a time and material contract must collect and remit sales tax on the material portion of their contracts.

In addition to collecting sales tax on the material portion of a time and material contract, tax should be collected on charges for the following services, as the charges are considered part of the gross retail income subject to tax: preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed with respect to the construction material before the material is transferred or delivered to the contractor's customer.

NOTE: Installation charges separately stated on an invoice are not included in gross retail income. Labor incurred as part of on-site installation may be exempt. For instance, in the case of an item that was ordered to specification but which requires further modification and adjustment in order to properly install, the labor incurred to modify the item so that it can be installed would be considered part of the installation, and if separately stated on the invoice, would not be subject to sales tax. For further guidance on installation charges, please refer to Sales Tax

Because contractors using time and material contracts are considered retail merchants, they must obtain a Registered Retail Merchant Certificate ("RRMC") by registering as a retail merchant with the department. Contractors can register to collect sales tax by visiting the State of Indiana's INBiz website, which allows businesses to register with multiple state agencies, at inbiz.in.gov. The filing of sales tax returns and the remittance of tax must be made using an electronic filing method, such as the department's online e-service portal, called the Indiana Taxpayer Information Management Engine (INTIME), which can be accessed at intime.dor.in.gov.

As mentioned in Section III, Part A above, contractors are retail merchants selling construction material when they dispose of or convert construction material into real property under a time and material contract, but they may accept properly completed exemption certificates from exempt customers - nonprofit organizations, federal or Indiana governmental entities, and other customers able to purchase construction material exempt. Exemption certificates issued to and accepted by contractors must be retained by the contractor for a period of a minimum of three years, beginning at the end of the year in which the construction material was purchased or sold, but the period could be longer depending on whether all necessary ST-103's have been filed.

NOTE: Contractors are responsible for self-assessing use tax if construction material purchased or otherwise acquired exempt from tax is not used for its exempt purpose. For more information on the application of use tax, see Section III, Part D above.

V. CONTRACTS BETWEEN CONTRACTORS

In a construction project, there can often be situations where one or more subcontractors work for one general or prime contractor, who works directly with the client. Subcontractors may have their own subcontractors working for them as well. The sales and use tax responsibility of each contractor would depend on the type of contracts under which each operate with their customers, starting with the subcontractors. This can be illustrated using an electrical subcontractor working for a prime contractor on the construction of a custom home, and changing the combination of construction contracts each could use:

- 1. The electrical subcontractor operates under a time and material contract, as does the prime contractor with the homeowner.** The electrical subcontractor is responsible for buying the electrical components of the home. Since the subcontractor operates under a time and material contract, they are a retail merchant, and therefore they can purchase the electrical components from their vendor exempt from sales tax under the sale for resale exemption. Because subcontractor is a retail merchant selling the construction material it incorporates into the home, the transaction between the subcontractor and the prime contractor is a taxable retail transaction. However, as another retail merchant, the prime contractor can purchase the construction material exempt under the sale for resale exemption as well. Prime contractor would then charge sales tax to the homeowner on the material portion of the subcontractor's materials.
- 2. The electrical subcontractor operates under a lump sum contract, while the prime contractor operates under a time and material contract with the homeowner.** The electrical subcontractor is responsible for buying the electrical components of the home. Since they do not operate under a time and material contract, they are not a retail merchant, and therefore they pay sales tax on their electrical components from their vendor. Because the contract between subcontractor and prime contractor is not a taxable retail transaction, prime contractor is not charged sales tax by the subcontractor. Prime contractor has not purchased materials from their subcontractor, and therefore they do not charge their customer sales tax on the materials from the subcontractor's contract, even though the contract between the customer and prime contractor is a taxable retail transaction.
- 3. The electrical subcontractor operates under a time and material contract, while the prime contractor operates under a lump sum contract with the homeowner.** The electrical subcontractor is responsible for buying the electrical components of the home. Since the subcontractor operates under a time and material contract, they are a retail merchant, and therefore they can purchase the electrical components from their vendor exempt from sales tax under the sale for resale exemption. Because the contract between subcontractor and prime contractor is a taxable retail transaction, prime contractor is charged sales tax by the subcontractor. However, because they are not a time and material contractor, the contract between the prime contractor and the homeowner is not a taxable retail transaction, and therefore they do not charge the homeowner sales tax.
- 4. The electrical subcontractor operates under a lump sum contract, as does the prime contractor with the homeowner.** The electrical subcontractor is responsible for buying the electrical components of the home. Since they do not operate under a time and material contract, they are not a retail merchant, and

therefore they pay sales tax on their electrical components from their vendor. The prime contractor is not charged sales tax by the subcontractor because the contract between them is not a taxable retail transaction. Similarly, because the prime contractor does not operate under a time and material contract, they are also not a retail merchant engaging in a taxable retail transaction, and therefore they do not charge the homeowner sales tax either.

If the ultimate purchaser or recipient is an exempt entity, the rules regarding the issuance of exemption certificates as outlined in Section III, Part C still apply. The purchaser would issue their exemption certificate to their general contractor. The general contractor would then issue their own exemption certificate to their subcontractors. The subcontractors would then issue their own exemption certificates to their vendors or suppliers.

VI. CONTRACTORS AND MANUFACTURING

The exemptions from sales tax for machinery, tools, or equipment to be directly used in direct manufacturing and production, or tangible personal property to be directly consumed in direct manufacturing or production, require that the item being manufactured or produced be for sale. In other words, directly using or consuming tangible personal property in direct production or manufacturing an item for one's own use would make the use or consuming of that tangible personal property nonexempt.

Contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract are not retail merchants selling construction material. The construction material they purchase and tools they purchase are treated under the law as being for their own use. Therefore, they are not operating as manufacturers and they are not entitled to any of the manufacturing exemptions on the purchase of construction material or machinery, tools, or equipment.

Example #2: Contractor manufactures and installs stone countertops. Contractor operates exclusively under a lump sum contract. Because the contractor is not a time and material contractor, they are not a retail merchant that sells countertops. Even though tools and equipment are directly used in the direct manufacture of the countertops, and tangible personal property is directly consumed in the direct production of the countertops, they are not eligible for the manufacturing and production exemption because they are not selling the end product. Everything they purchase is for their own use.

On the other hand, because contractors operating under time and material contracts are retail merchants selling construction material when they dispose of or convert that material into real property under a time and material contract, contractors operating in this manner may qualify as manufacturers with respect to any pre-fabricated construction material they produce and then sell at retail.

A. Pre-fabricated Construction Material

Contractors engaged in the manufacture and subsequent sale of pre-fabricated construction material should collect and remit sales tax on those sales. As noted above, the gross retail income from which any sales or use tax liability shall be calculated with respect to the sale or use of pre-fabricated construction material includes any labor or delivery charges associated with the fabrication or delivery of that material. Sales or use tax is to be paid on the entire unitary or bundled transaction.

Example #3: Contractor makes custom cabinets for their customers and installs them under time and material contracts. In addition to charging for the cabinets themselves, Contractor separately charges for the labor involved in making the cabinets and the labor charged in installing the contract. The cabinets are taxable as construction material, and the labor for constructing the cabinets is subject to sales tax as a "bona fide" charge for fabrication. The installation charge is exempt from sales tax. If contractor did not separate the charge for manufacture, but instead wrapped it into a general labor charge with the installation charge, it would subject the entire labor charge to sales tax.

To the extent that sales tax is paid on materials in another state, Indiana will grant credit for the sales tax paid on the use tax owed to Indiana.

B. Machinery, Tools, and Equipment

Machinery, tools, and equipment are exempt only to the extent they are directly used to directly manufacture pre-fabricated construction material that will be sold in a retail transaction prior to the materials conversion into

real property. Otherwise, machinery, tools, equipment, as well as forms, supplies, equipment, utilities and any other items of tangible personal property used or consumed, but not incorporated into real property, by a contractor are subject to tax regardless of the exempt status of contractor's customer.

Example #4: The same contractor as in Example #3 purchases tools and equipment for various uses in their business. Some of the tools and equipment that contractor purchases are exclusively directly used in the direct production of the cabinets. Such items are exempt from the sales tax. Some of the tools and equipment are used for both the construction of the cabinets and for the installation. Installation is a post-production activity, so the tools and equipment are only exempt to the extent they are directly used in the direct production of the cabinets.

VII. PUBLIC STREETS AND PUBLIC UTILITY SYSTEMS

Contractors acquiring construction material for incorporation as an integral part of a public street or public water, sewage, or other utility service system are exempt from sales and use tax on the purchase of that material. The public street or utility service system must be required under a subdivision plat that was approved and accepted by the appropriate Indiana political subdivision, and it must be publicly maintained after its completion.

NOTE: This exemption includes only the construction material incorporated into the public street or public water, sewage, or other utility service. It does not extend to any machinery, tools, or equipment used by the contractor in the process of incorporating the construction material into its final form.

VIII. DIRECT PAY PERMITS

Direct payment permits do not certify that the issuer is entitled to an exemption and may not be issued to or accepted by a contractor unless the contractor is operating as a retail merchant making a retail transaction by disposing of construction material or converting construction material into real property under a time and material contract. Contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract will not be relieved of their use tax obligations by accepting direct pay permits from customers.

Robert J. Grennes, Jr.
Commissioner

Posted: 12/02/2020 by Legislative Services Agency
An [html](#) version of this document.