

Construction Contractor Sales & Use Tax Issues

Presented By:

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Overview

TODAY'S AGENDA

- Real Property vs. Tangible Personal Property
- Case Law
- Exemptions
- Business Fixtures
- Contractee Certification Process
- Exemption Forms
- Tools & Equipment
- Items Consumed or Used
- Licensing Requirements



Sales & Use Tax in Construction

- **Sales Tax** a tax that is levied upon certain sales of products, merchandise, or services
- **Use Tax** a tax upon purchases and the use of certain items and services within the state where no original sales tax has been collected. The use tax rate is equal to the sales tax rate in one's county. Every state with a sales tax also has a companion use tax.

Real Property vs. Tangible Personal Property

- R.C. 5739.01(B)(5) – a “sale” does not include “a construction contract in which tangible personal property is incorporated into a structure or improvement on and becoming real property”
- A construction contractor is the consumer of all tangible personal property incorporated into realty as part of a construction contract



Real Property vs. Tangible Personal Property

- Real Property
 - R.C. 5701.02 – Land and, unless otherwise specified, buildings, structures, improvements, and fixtures on the land
- Tangible Personal Property
 - R.C. 5701.03 (A) – Every tangible thing that is the subject of ownership and is not real property
- Business Fixture
 - R.C. 5701.03(B) – An item of tangible personal property that is permanently affixed to realty and that primarily benefits the business conducted on the premises and not the realty

Real Property vs. Tangible Personal Property

- Real Property
 - Contractor pays tax as the consumer
 - Contractor pays tax at material or produced cost
- Tangible Personal Property
 - Contractee pays tax as the consumer
 - Contractee pays tax on the marked up price from the contractor which includes installation labor



Real Property vs. Tangible Personal Property

Test Your Knowledge:



Q: Contractor builds a new house for Contractee.
Which party is responsible for paying the tax on the materials purchased to build the house?

Real Property vs. Tangible Personal Property

Test Your Knowledge:



A: Contractor. A house is real property and therefore, because the materials purchased to build the house were incorporated into real property sold to Contractee, Contractor is the consumer of the material and pays tax in accordance with R.C. 5739.01(B)(5).

Real Property vs. Tangible Personal Property

- Real property vs. tangible personal property determination impacts:
 - Who pays tax
 - Tax base used for calculating the tax owed
 - Accurate determination of bids and budgets



Real Property vs. Tangible Personal Property

- Items Never Treated as Construction Contract Under R.C. 5739.01(B)(5) and O.A.C. 5703-9-14(C):
 - Carpeting
 - Landscaping and lawn care services
 - Agricultural land tile
 - Grain bins



Real Property vs. Tangible Personal Property

- Examples of Items Treated as Business Fixtures:
 - Gas station canopies
 - Security cameras that protect inventory of interior rooms
 - HVAC and flooring for computer rooms
 - Specialty lighting/parking lot lighting at car dealerships
 - Window treatments
 - Specialty cabinetry



Real Property vs. Tangible Personal Property

Test Your Knowledge:

Q: A business contractee asks its contractor to install a handicap ramp on its premises. Is the handicap ramp a business fixture?



Real Property vs. Tangible Personal Property

Test Your Knowledge:

A: No. A handicap ramp is never a business fixture. The handicap ramp is not specialized to the particular business and is not for the primary benefit of the business itself and is therefore not a business fixture.



Case Law



- *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74
 - Must analyze whether an item that meets the definition of real property in R.C. 5701.02 is “otherwise specified” as tangible personal property under R.C. 5701.03.
- *Newcome Electric Systems v. Tracy*, Ohio BTA, No. 97-M-320
 - BTA found data cabling was a business fixture because it primarily benefitted the business



Case Law

- *F.P. & E., Inc. v. Tracy*, Ohio BTA No. 96-M-806
 - BTA found gas station canopies were business fixtures
- *Oregon Ford, Inc. v. Wilkins*, Ohio BTA No. 2005-A-111
 - BTA found parking lot lighting used to illuminate inventory at car dealership was a business fixture



Exemptions

- R.C. 5739.02(B)(13) – Provides exemption for building and construction materials and services incorporated into certain exempt construction contracts
- R.C. 5739.03(B)(6) – Contractor claiming exemption under R.C. 5739.02(B)(13) must obtain certification (construction contract exemption certificate) from contractee stating the contract is exempt
- R.C. 5739.03(C) – Contractor may obtain from a contractee a certification stating what portion of the contract is for real property and what portion is for personal property. The contractor may rely on this certification and the contractee will be liable for tax on anything erroneously certified as personal property

Exemptions

- O.A.C. 5703-9-14(D) - a contractor may purchase materials and services exempt from tax if they are incorporated into:
 - realty on a government contract
 - realty to be accepted for ownership by a government agency on completion of the contract
 - a house of public worship as defined in R.C. 5739.02(B)(12)
 - the original construction of a sports facility under R.C. 307.696
 - a hospital facility entitled to exemption under R.C. 140.08



Exemptions

- O.A.C. 5703-9-14(D) - a contractor may purchase materials and services exempt from tax if they are incorporated into (*continued*):
 - horticulture structure or livestock structure as defined in R.C. 5739.01 for a person engaged in the business of horticulture or producing livestock
 - real property in another state, if the materials or services, when sold to a construction contractor in that state for incorporation into real property in that state, would be exempt from a tax on sales levied in that state



Exemptions

- O.A.C. 5703-9-14(H)
 - Machinery, tools, equipment and supplies used by a construction contractor to perform a contract are taxable to the contractor. Repairs are also taxable.
- O.A.C. 5703-9-14 (I) and (J) – Exemption certificate requirements:
 - Construction contract exemption certificates must be signed on an official form by both the contractee and contractor
 - Contractor must make copies of the construction contract exemption certificate and, if the prime contractor, supply a copy to each subcontractor who is then required to sign
 - Contractors and subcontractors may also make exempt purchase using a properly executed contractor's exemption certificate



Exemptions

Test Your Knowledge:

Q: A professional soccer team in Columbus enters into a construction contract with a construction company to build a new stadium downtown.

Which party will be considered the consumer required to pay tax?



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Exemptions

Test Your Knowledge:

A: Neither party.

The new stadium is an exempt contract under O.A.C. 5703-9-14(D) and therefore the contract to build the stadium is exempt from taxation under R.C. 5739.02(B)(13).



Sales Tax in Construction

Generally, a contractor does not collect sales tax from their customer on the performance of a real property construction contract.

For real property jobs, the contractor is considered the consumer of the materials installed and must pay sales or use tax at the time the materials are purchased.



Sales Tax in Construction

- If installing a “business fixture”, this becomes a taxable sale and the contractor is required to collect sales tax.
- A business fixture is any item that benefits the business conducted on the premises, not the realty.



Sales Tax in Construction

Examples of Business Fixtures	Examples of Real Property
Business signage	Restrooms
Office cubicles	Doors, windows, walls, flooring* in a building
Gas station canopies	Driveways
Walk-in coolers	Garage doors
Data server rooms	Residential swimming pools
Fuel storage tanks	Building roof, gutters

Sales Tax in Construction

- Before starting a job, the contractor must determine if they are selling a business fixture or selling real property.
- This determination is **imperative** in order to determine proper sales tax treatment.

Sales Tax in Construction

Selling a Business Fixture	Selling Real Property
The sale and installation of a business fixture is a retail sale , not a construction contract. Even though permanently attached, a business fixture is not deemed real property. The transaction is defined as the sale and installation of tangible personal property	The incorporation of materials (TPP) into realty, such as; building walls, painting a room, paving a parking lot, etc, that benefits the realty is a construction contract. The contractor is the “consumer” of the TPP installed into real property.
Contractor charges sales tax on total contract amount.	Contractor pays tax on materials, does not collect tax from customer.

Sales Tax in Construction

Selling a Business Fixture	Selling Real Property
All costs including the cost of material, labor, and mark-up must be included in the taxable price.	As there is no retail sale, no tax needs to be collected from the customer.
Sales tax is calculated on the total cost (taxable base) of the business fixture sold. The construction contractor needs to maintain a regular county vendor's license; or if located out-of- state, a seller's use account.	The construction contractor must pay sales tax on the material purchased and incorporated into real property. If the material vendor does not collect sales tax, the contractor must accrue the use tax and remit to the state on a consumer's use tax or direct pay permit account.

Sales Tax in Construction

- **Difference Between Selling a Business Fixture or Selling Real Property**

Contract for...

a Business Fixture		Real Property	
Material Cost*	\$10,000	Material Cost*	\$10,750
*(Materials purchased tax exempt under the resale exception)		*(Includes sales tax paid to vendor or use tax accrued) (\$10,000 x 7.5%)	
Labor Cost	\$5,000	Labor Cost	\$5,000
Permit Fees	<u>\$500</u>	Permit Fees	<u>\$500</u>
Subtotal	\$15,500	Subtotal	\$16,250
Sales Tax (15,500 * 7.5%)	\$1,162.50	Sales Tax	\$0
Total	\$16,662.50	Total	\$16,250

Sales Tax in Construction

What about
contractors who enter
into mixed contracts?



Mixed Contracts - Certification Process

- Contractor requests certification from contractee
- Contractee may issue a certification to contractor as to which portion of contract is real vs. personal property
- O.R.C. 5739.03 (C) allows for this certification process
- The determination will indicate if contractor is a consumer of materials (real property) or a vendor of personal property

Mixed Contracts - Certification Process

- Establishes the consumer of materials for the job
- Protects the contractor from sales or use tax liability if incorrect classification of real or personal property occurs
- There is no prescribed form issued by the Department of Taxation

Mixed Contracts

- The contractee certification process makes a distinction between the portion of the contract that is realty versus the portion that is personal property and/or a business fixture.

B) Itemization of REAL property portions:		C) Itemization of PERSONAL property portions:	
Work Descriptions	Estimated Cost	Work Descriptions	Estimated Cost
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

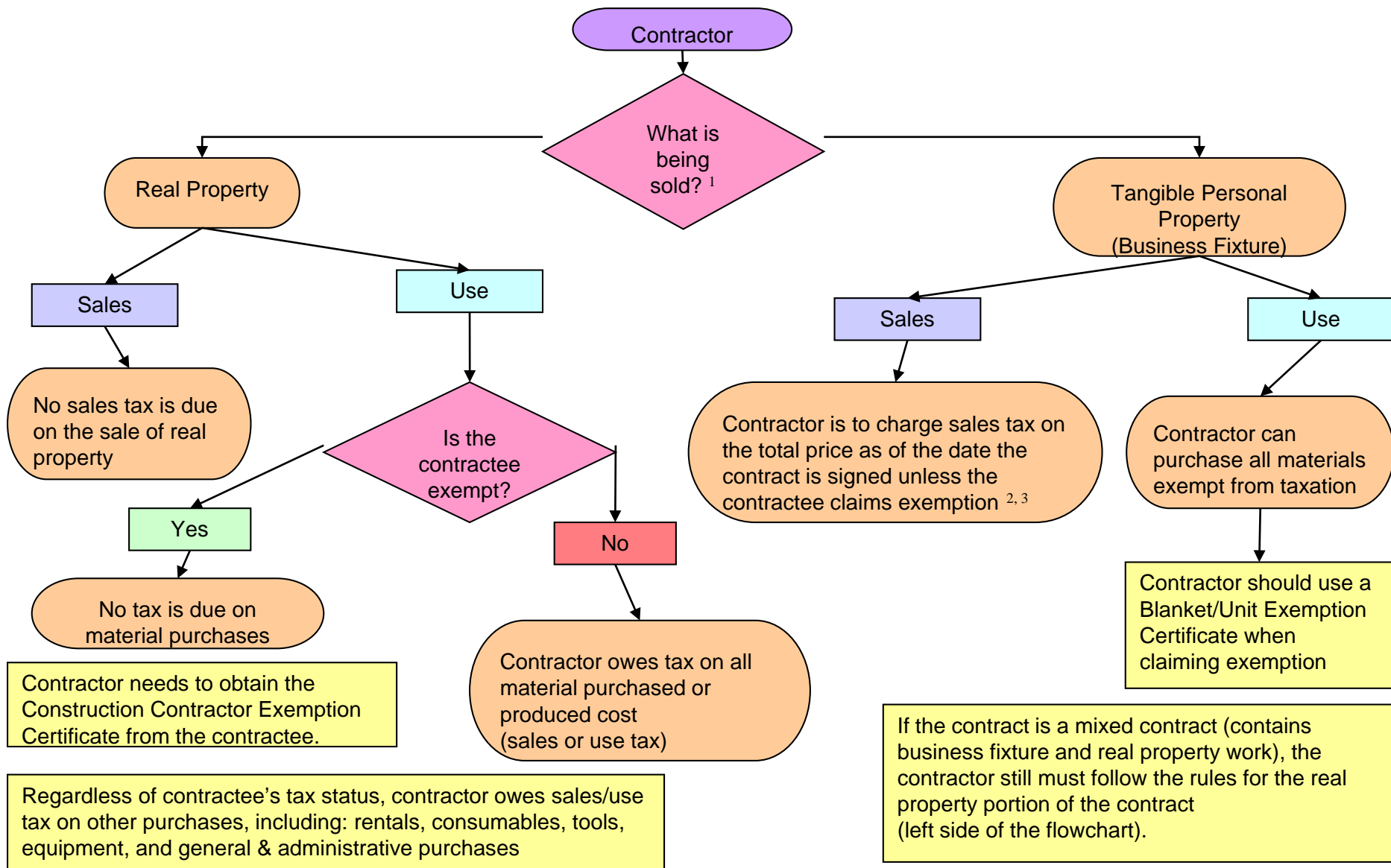
- Certification will determine if the contractor is either a consumer of materials purchased for a job, or the reseller of materials purchased for a job.

Sales Tax in Construction

For the business fixture portion, contractors should issue Certificates of Exemption to suppliers claiming “resale” as the basis for exemption

Contractors with Direct Pay Permits should not accrue tax on business fixture portion

Contractor should charge sales tax on the total price of business fixture portion including the cost of materials, labor, and mark-up unless contractee provides an exemption certificate or direct pay number.



¹ – Contractor may request the contractee to complete the Contractee Certification Form if tangible personal property is being sold.

² – Contractor is to remit this sales tax on a regular county vendor's license.

³ – No matter if the contractor is an in-state or out-of-state contractor, sales tax is to be charged when the contract is signed; not when draws are made.


Job Exemptions

- Common jobs that qualify for exempt status:
 - US Government, State of Ohio, or an Ohio Political Subdivision
 - Horticulture or livestock structures
 - House of public worship or religious education
 - Charities and 501(C)(3) organizations
 - Hospitals



Construction Contract Exemption Certificate

- Form STEC-CC
- The exemption only applies to job materials incorporated into the job
- Must be signed by the contractee to be valid



Department of
Taxation
tax.ohio.gov

STEC-CC
Rev. 11/10

Sales and Use Tax Construction Contract Exemption Certificate

Identification of Contract:

Contractee's (owner's) name _____

Exact location of job/project _____

Name of job/project as it appears on contract documentation _____

The undersigned hereby certifies that the tangible personal property purchased under this exemption certificate was purchased for incorporation into:

<input type="checkbox"/> Real property under a construction contract with the United States government, its agencies, the state of Ohio, or an Ohio political subdivision;	<input type="checkbox"/> Real property that is owned, or will be accepted for ownership at the time of completion, by the United States government, its agencies, the state of Ohio or an Ohio political subdivision;
<input type="checkbox"/> A horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock;	<input type="checkbox"/> A house of public worship or religious education;
<input type="checkbox"/> A building used exclusively for charitable purposes by a nonprofit organization operated exclusively for charitable purposes as defined in Ohio Revised Code (R.C.) section 5739.02(B)(12);	<input type="checkbox"/> A building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes;
<input type="checkbox"/> The original construction of a sports facility under R.C. section 307.696;	<input type="checkbox"/> A hospital facility entitled to exemption under R.C. section 140.08;
<input type="checkbox"/> Real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state;	<input type="checkbox"/> Building and construction materials and services sold for incorporation into real property comprising a convention center that qualifies for property tax exemption under R.C. 5709.084 (until one calendar year after the construction is completed).


The original of this certificate must be signed by the owner/contractee and/or government official and must be retained by the prime contractor. Copies must be maintained by the owner/contractee and all subcontractors. When copies are issued to suppliers when purchasing materials, each copy must be signed by the contractor or subcontractor making the purchase.

<p>Prime Contractor</p> <p>Name _____</p> <p>Signed by _____</p> <p>Title _____</p> <p>Street address _____</p> <p>City, state, ZIP code _____</p> <p>Date _____</p>	<p>Owner/Contractee</p> <p>Name _____</p> <p>Signed by _____</p> <p>Title _____</p> <p>Street address _____</p> <p>City, state, ZIP code _____</p> <p>Date _____</p>
<p>Subcontractor</p> <p>Name _____</p> <p>Signed by _____</p> <p>Title _____</p> <p>Street address _____</p> <p>City, state, ZIP code _____</p> <p>Date _____</p>	<p>Political Subdivision</p> <p>Name _____</p> <p>Signed by _____</p> <p>Title _____</p> <p>Street address _____</p> <p>City, state, ZIP code _____</p> <p>Date _____</p>

Construction Contract Exemption Certificate

Must have:

- Contractee (owner's) name
- Location of project
- Name of project
- Reason for exemption indicated
- Name, signature, address and date signed by contractor and contractee



Department of
Taxation
tax.ohio.gov

STEG CC
Rev. 11/10

Sales and Use Tax Construction Contract Exemption Certificate

Identification of Contract:

Contractee's (owner's) name _____

Exact location of job/project _____

Name of job/project as it appears on contract documentation _____

The undersigned hereby certifies that the tangible personal property purchased under this exemption certificate was purchased for incorporation into:

<input type="checkbox"/> Real property under a construction contract with the United States government, its agencies, the state of Ohio, or an Ohio political subdivision;	<input type="checkbox"/> Real property that is owned, or will be accepted for ownership at the time of completion, by the United States government, its agencies, the state of Ohio or an Ohio political subdivision;
<input type="checkbox"/> A horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock;	<input type="checkbox"/> A house of public worship or religious education;
<input type="checkbox"/> A building used exclusively for charitable purposes by a nonprofit organization operated exclusively for charitable purposes as defined in Ohio Revised Code (R.C.) section 5739.02(B)(12);	<input type="checkbox"/> A building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes;
<input type="checkbox"/> The original construction of a sports facility under R.C. section 307.696;	<input type="checkbox"/> A hospital facility entitled to exemption under R.C. section 140.08;
<input type="checkbox"/> Real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state;	<input type="checkbox"/> Building and construction materials and services sold for incorporation into real property comprising a convention center that qualifies for property tax exemption under R.C. 5709.084 (until one calendar year after the construction is completed).

The original of this certificate must be signed by the owner/contractee and/or government official and must be retained by the prime contractor. Copies must be maintained by the owner/contractee and all subcontractors. When copies are issued to suppliers when purchasing materials, each copy must be signed by the contractor or subcontractor making the purchase.

Prime Contractor Name _____ Signed by _____ Title _____ Street address _____ City, state, ZIP code _____ Date _____	Owner/Contractee Name _____ Signed by _____ Title _____ Street address _____ City, state, ZIP code _____ Date _____
Subcontractor Name _____ Signed by _____ Title _____ Street address _____ City, state, ZIP code _____ Date _____	Political Subdivision Name _____ Signed by _____ Title _____ Street address _____ City, state, ZIP code _____ Date _____

Contractor's Exemption Certificate

- Form STEC-CO
- May be provided to vendors when purchasing materials for tax exempt jobs

Ohio Department of Taxation <small>tax.ohio.gov</small>	<small>STEC CO Rev. 11/10</small>
Sales and Use Tax Contractor's Exemption Certificate	
Identification of Contract:	
Contractee's (owner's) name _____	
Exact location of job/project _____	
Name of job/project as it appears on contract documentation _____	
The undersigned hereby certifies that the tangible personal property purchased under this exemption from:	
_____ Vendor's name	
was purchased for incorporation into:	
<input type="checkbox"/> Real property under a construction contract with the United States government, its agencies, the state of Ohio, or an Ohio political subdivision;	<input type="checkbox"/> Real property that is owned, or will be accepted for ownership at the time of completion, by the United States government, its agencies, the state of Ohio or an Ohio political subdivision;
<input type="checkbox"/> A horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock;	<input type="checkbox"/> A house of public worship or religious education;
<input type="checkbox"/> A building used exclusively for charitable purposes by a nonprofit organization operated exclusively for charitable purposes as defined in Ohio Revised Code (R.C.) section 5739.02(B)(12);	<input type="checkbox"/> A building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes;
<input type="checkbox"/> The original construction of a sports facility under R.C. section 307.696;	<input type="checkbox"/> A hospital facility entitled to exemption under R.C. section 140.08;
<input type="checkbox"/> Real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state;	<input type="checkbox"/> Building and construction materials and services sold for incorporation into real property comprising a convention center that qualifies for property tax exemption under R.C. 5709.084 (until one calendar year after the construction is completed).
<p>This certificate may be used by a contractee or subcontractor when buying materials for a construction contract where the owner/contractee has claimed one of the above exemptions. This certificate covers all sales of materials by the above-named vendor to the contractor or subcontractor for this particular construction contract only.</p>	
Contractor/subcontractor	
Name _____	
Signed by _____ Title _____	
Street address _____	
City, state, ZIP code _____	
Date _____	

Items Used or Consumed

Test Your Knowledge:



Q: You are working on constructing a new building and your customer is tax exempt. What is the proper form you should obtain and keep on file?

- A. STEC-B
- B. Contractee Certification
- C. STEC-CO
- D. STEC-CC

Items Used or Consumed

Test Your Knowledge:

Answer:

D. STEC-CC



Direct Materials

- A construction contractor normally must pay sales tax on all materials for incorporation into real property
- Only if the customer is tax exempt may a contractor purchase materials tax exempt when working on real property. Exemption only applies to materials **incorporated** into the job.

Items Used or Consumed

- Items used or consumed by a contractor are taxable per Ohio Administrative Code 5703-9-14(H). i.e. consumable supplies.
- Items used or consumed are **always taxable** to the contractor. Even on exempt jobs.



Items Used or Consumed

- Tools
- Heavy Equipment
- Rentals
- Job Trailers
- Portable Toilets
- Air Compressors
- Scaffolding
- Dyed Diesel Fuel



Items Used or Consumed

- Sand Paper
- Cleaning Supplies
- Masking Tape
- Tarps



Items Used or Consumed

- Hard Hats, Safety Glasses
- Generators
- Welding Gases
- Propane
- Temporary Items
- Private Security
- Temporary Employment
- Landscaping & Snow Removal



Items Used or Consumed

Test Your Knowledge:



Q: You are renting scaffolding that will only be used on an exempt job. Is the rental charge exempt from sales tax?

Items Used or Consumed

Test Your Knowledge:



A: No. Any purchase or rental of tools, equipment or other supplies that are not incorporated into the real property are taxable to the contractor regardless of whether the construction contract is taxable or exempt.

Licensing

- What types license(s) does a contractor need to be compliant with sales and use tax?



Licensing

- Regular Vendor's License
 - Contactors located in **Ohio** should use this license to remit and report tax collected on retail sales (business fixtures)
- Seller's Use Tax Account
 - Contractors located **out-of-state** should use this license to remit and report tax collected on retail sales (business fixtures)
- Consumer's Use Tax Account
 - Used to self-report tax if not collected by the vendor
- Direct Payment Permit
 - Special authority granted to businesses that allows them to self remit the tax directly to the state in lieu of paying it to their suppliers

Items Used or Consumed

Test Your Knowledge:



Q: Does a contractor that only performs work on real property need to have a vendor's license?

Items Used or Consumed

Test Your Knowledge:



A: No. A vendor's license is only required if you are making taxable sales.

Additional Resources

OAC 5703-9-14

Real Property Defined – ORC 5701.02

Personal Property & Business Fixture Defined – ORC 5701.03

<http://codes.ohio.gov/>

Information Release – Manufactured Homes

Information Release – Service Station Canopies

Information Release – Computer Cabling

Information Release – Carpeting & Floor/Wall Covering

Information Release – Landscaping Services

Information Release – Building Maintenance & Janitorial Services

Information Release – Sourcing (including sourcing chart)

Information Release – Exemption Certificate Forms

Information Release – Leases and Rentals

All information releases can be found at:

https://www.tax.ohio.gov/sales_and_use/information_releases/index_sales.aspx

Questions?

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