

5703-9-14 Sales and use tax; construction contracts; exemption certificates.

- (A) A "construction contract" is any agreement, written or oral, pursuant to which tangible personal property is or is to be transferred and incorporated into real property, as defined in section 5701.02 of the Revised Code, so as to become a part thereof without regard to whether it is new construction or an addition to or alteration of an existing building or structure. A "construction contractor" is any person who performs such an agreement, whether as prime contractor or subcontractor.
- (B) Tangible personal property that is permanently affixed to real property, but that primarily benefits the business conducted on the premises by the occupant, is a "business fixture," as defined in section 5701.03 of the Revised Code, and retains its status as personal property after such affixation is made. An agreement to transfer and install a business fixture is a sale and not a construction contract.

The transfer and affixation of personal property where title to the personal property does not transfer to the owner or lessee of the premises is a sale and not a construction contract. The item affixed remains personal property since the failure to transfer title displays an intention not to make the affixation permanent.

Tangible personal property that is temporarily affixed during construction, such as temporary electricity or water service hook-ups, fencing, construction elevators, shoring lumber, and concrete forms, is not incorporated into real property for sales and use tax purposes. This applies even if these items remain affixed after construction is completed due to inadvertence, convenience, or economic necessity.

- (C) The sale and installation of the following items is never a construction contract and such transactions are to be treated as the sale and installation of tangible personal property for sales tax purposes:
 - (1) Carpeting, including carpet padding, tack strips, adhesive, and similar materials that are integral and necessary components of a carpet installation transaction;
 - (2) Agricultural land tile as defined in division (B)(5)(a) of section 5739.01 of the Revised Code;
 - (3) Portable grain bins as defined in division (B)(5)(b) of section 5739.01 of the Revised Code; and
 - (4) Trees, shrubs, sod, seed, fertilizer, mulch, and other tangible personal property transferred as part of a landscaping and lawn care service as defined in division (DD) of section 5739.01 of the Revised Code. This provision shall not be construed to alter or affect the classification of such items after installation is completed.
- (D)
 - (1) A construction contractor who purchases materials or taxable services for incorporation into real property is the consumer of those materials or services and shall pay sales or use tax on their purchase price, except as provided by paragraph (F) of this rule. The construction contractor is the consumer, even if a subcontractor provides the actual labor to incorporate those materials into the real property.

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Nevertheless, a construction contractor may purchase exempt from tax those materials or services that will be incorporated:

- (a) Into real property under a construction contract with the United States government or its agencies, the state of Ohio, or an Ohio political subdivision;
- (b) Into real property that is owned, or will be accepted for ownership at the time of completion, by the United States government or its agencies, the state of Ohio, or an Ohio political subdivision;
- (c) Into a house of public worship or religious education or a building used exclusively for charitable purposes by a nonprofit organization operated exclusively for charitable purposes as defined in division (B)(12) of section 5739.02 of the Revised Code;
- (d) Into the original construction of a sports facility under section 307.696 of the Revised Code;
- (e) Into 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;
- (f) Into a horticulture structure or livestock structure as defined in section 5739.01 of the Revised Code for a person engaged in the business of horticulture or producing livestock; or
- (g) Into a hospital facilities entitled to exemption under 140.08 of the Revised Code.

(2) When claiming exemption under paragraph (D)(1) of this rule, the contractee and contractor must issue exemption certificates in accordance with paragraphs (I) and (J) of this rule. The contractee shall be deemed to be the consumer of all materials and services purchased under the claim of exemption and liable for the tax on the incorporated materials or services in the event the tax commissioner ascertains that the contractee was not entitled to exemption.

(E) A construction contractor who also makes substantial sales of the same types of tangible personal property that the contractor incorporates into real property in performing construction contracts may purchase those types of tangible personal property excepted from sales and use tax on the basis of resale under division (E) of section 5739.01 of the Revised Code. The contractor, unless granted direct payment authority, must have a consumer's use tax account with the department of taxation and accrue and pay use tax on the price of all materials consumed in performing construction contracts, in accordance with rule 5703-9-04 of the Administrative Code.

Similarly, a construction contractor who purchases materials without payment of the tax because the contractee has claimed an exemption under paragraph (D) of this rule must pay use tax on any materials not used on the exempt job and consumed by the contractor in a taxable manner.

(F)

(1) A person who manufactures or fabricates items of tangible personal property, and then sells some of the items and incorporates some into real property, must elect whether to be treated as a manufacturer or as a construction contractor on the

purchase of raw materials incorporated into the manufactured items. The manufacturer/construction contractor need not notify the tax commissioner of such election and may elect to treat purchases of raw materials for distinct manufactured items differently. However, complete records must be maintained to show how the person elected to treat each purchase of raw materials.

- (a) If the person elects to be treated as a manufacturer, the purchase of all raw materials may be exempted from the tax on the basis that they will be incorporated as a material or part into an item manufactured for sale under division (B)(43)(a) of section 5739.02 of the Revised Code. The manufacturer must accrue and pay use tax on the price of any self-manufactured item subsequently consumed in performing a taxable construction contract, or in any other taxable manner, in accordance with paragraph (A) of rule 5703-9-21 of the Administrative Code.
 - (b) If the person elects to be treated as a construction contractor, the person must pay sales or use tax on the acquisition cost of all raw materials, unless such materials are ultimately consumed in performing a nontaxable construction contract under paragraph (D) of this rule. The construction contractor must pay sales or use tax on all raw materials, and no refund of such tax will be allowed, even though the raw materials are incorporated into an item manufactured for sale. If such sale is a retail sale, the construction contractor is acting as vendor and must appropriately collect sales tax on such transaction.
- (2) The election required by paragraph (F)(1) of this rule applies only to the purchase of raw materials that will become parts or components of manufactured items. Machinery and equipment used by the person in manufacturing shall be taxed based upon its quantified primary use without regard to how the manufacturer/construction contractor elects to treat the raw materials for sales and use tax purposes.
- (G) The contractee may, or upon request of the contractor pursuant to the procedure specified in division (C) of section 5739.03 of the Revised Code shall, certify to the contractor what portions of a contract will be, at the completion of the contract, classified as personal property and what portions will be classified as real property. The fact that a certification has been made by the contractee must be noted in every written construction contract, and the contractor, subcontractors, and contractee shall each maintain a copy of the certification with the job documentation. If the tax commissioner subsequently determines that property certified by the contractee as personal property is, in fact, real property, the contractee shall be deemed the consumer of all materials incorporated into such real property and may be assessed sales or use tax thereon along with applicable interest and penalty.

The certification of the contractee has application only to the tangible personal property installed or incorporated pursuant to the contract. Equipment, tools, and supplies used by the contractor in performing the contract shall be taxed based upon their primary use without regard to the contractee's certification.

(H) Machinery, equipment, tools, supplies, and other tangible personal property purchased or leased by a construction contractor and used or consumed in performing a construction contract, including a contract specified in paragraph (D) of this rule, are taxable. The repair or installation of these items also is taxable.

(I)

(1) A contractee claiming an exemption specified in paragraph (D) of this rule must complete and deliver to the contractor a construction contract exemption certificate. If the contractee is a governmental entity, a government official must sign under the "political subdivision" section of the certificate. All other contractees claiming exemption must sign under the "owner/contractee" section. If there is one prime contractor on the job, the contractee need only supply one exemption certificate to the prime contractor.

The contractor should make copies of the construction contract exemption certificate signed by the contractee and use those copies when making purchases of materials that will be incorporated into real property pursuant to the construction contract. A prime contractor must provide copies to all subcontractors for their use in purchasing materials for the job. The contractor or subcontractor must sign each certificate copy used when purchasing materials.

The original exemption certificate must be retained in the records of the contractor. A copy of the certificate also must be retained in the records of each subcontractor.

(2) Rather than using copies of the construction contract exemption certificate when making purchases of materials, the contractor or subcontractor may use a contractor's exemption certificate when purchasing materials for incorporation into real property pursuant to a contract where the contractee claims exemption under paragraph (D) of this rule.

(J) Forms required to be prescribed by rule are hereby prescribed for use as a construction contract exemption certificate and as a contractor's exemption certificate. The forms may be obtained from the department of taxation and are available on the department's web site. They may be reproduced as needed. To be valid, a construction contract exemption certificate must be signed by the contractee claiming exemption. Each certificate, or copy of a certificate, submitted to a vendor must be signed by the contractor or subcontractor making the purchase. A certificate covers all sales of materials made by the vendor to a contractor or subcontractor for incorporation into real property under that construction contract. The vendor must maintain the certificate to document the reason tax was not charged.

To be valid, all necessary signatures must be dated and all certificates must specify the reason for exemption and must clearly identify the contract and specify the job site.

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(K) The ~~following~~ forms “STEC CC, Construction Contract Exemption Certificate, and “STEC CO, Contractor’s Exemption Certificate” located on the department’s website, are incorporated in this rule by reference:

~~(1) The construction exemption certificate revised March 15, 2004;~~

~~(2) The contractor's exemption certificate, revised March 15, 2004.~~