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B-160129 December 7, 1966

Number: B-160129

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The Honorable Joel T. Broyhill House of Representatives

Dear Mr. Broyhill:

Reference is mad to your letter of September 23, 1966, transmitting a copy of a letter dated September 20, 1966, from Arlington Masonry, Inc, Arlington, Virginia, concerning the payment of commonwealth of Virginia sales taxes on a construction project at Fort Meyer, Virginia.

The contractor says that he was informed only recently that the Commonwealth of Virginia plans to collect sales taxes on this job; that no effort was made to inform him of hte Commonwealth's intention to collect sales taxes on Federal construction projects; and that since in the past no State bas ever collected sales taxes on any Government job, this contract was entered into without any provision for sales taxes.

The Virginia Retail Sales and Use Tax Act (Code of Virginia, 1950, 1966 Cumulative supplement, Sec. 58-441.1, et seq.) was approved by the General Assembly of virginia on Mrach 12, 1966. It became effective September 1, 1966. Section 58-441.4 imposes a license or privilege tax upon every person who engages in the business of selling at retail or distributing tangible personal property in the Sate, or who rents or furnishes any of the things or services taxable under that chapter, or who stores for use or consumption in this State any item or article or tangible personal property as defined in that chapter. Section 58-441.15(a) provides that any person who contracts to perform construction or any other service with respect to real estate or fixtures thereon and in connection therewith to firnish tangible personal property, shall be deemed to have purchased such tangible personal property for use or comsumption, and that any sale distribution, or lease to or storage from such person shall be deemed a sale, distribution, or lease to or storage for the ultimate consumer and not for resale, and the dealer making the sale, distribution, or lease to or storage for such person shall be obligated to collect the tax to the extent required by that chapter.

In this connection the Rules and Regulations of the Virginia Retail Sales and Use Tax provide as follows:

"Sec. 1-27 Contractors.--Any person who conttracts to perform construction, reconstruction, installation, repair, or any other service with respect to real estate or fixtures thereon, and in connection therewith to furnish tangible personal property, is deemed to have purchased such tangible personal property

for use or consumption by him. This means that tangible personal property incorporated in real property construction with loses its identity (status) as tangible personal property in deemed to be tangible personal porperty used or consumed by the contructor. Any sale, distribution, or lease to or a storage for such a contractor is deemed a sale, distribution, or lease to or storage for the ultimate consumber (the contractor), and not for resale by the contractor; and the dealer (supplier) making the sale, distribution, or lease to or storage for such a contractor is obligated to collect the tax from him. No sale to such a contractor by his supplier is exempt on the ground that the other party to the contract is a governmental agency, a non-profit school, or a non-profit hospital, or on the ground that such contract is a cost-plus contract, or on any other ground. A contractor pays the tax to his supplier on sales byt he supplier to the contractor whether the contractor be a general contractor, a sub-contractor or a sub- sub-contractor. If an out-of-the State supplier of a contractor doing workin Virginia does not hold a Certificate of Registration for the collection of the Virginia tax from the contractor, the contractor will be liable for the State use tax on his purchases from such supplier."

Section 58-441.6(b) exempts fromt he taxes imposed byt he Act sales of building supplies, fixtures or equipment that enter into or become a part of a building or other lind of structure where the construction contract was entered into prior tot he date of enactment of the Act (March 21, 1966) provided delivery of the tangible personal property is made within the time specified in the contruction contract for the completion of the project involved.

With regard to the contractor's statement that he was informed only recently that the commonwealth of virginia plans to collect sales taxes on this job and that no effort was made to inform him of the Commonwealth's intention to collect sales taxes on Federal construction projects, the Virginia State Tax commission by letter dated October 26, 1966, informed us as follows:

"The bill which resulted in the enactment of the Virginia Retail Sales and Use Tax Act was pending in our General Assembly for some five or six weeeks and wide publicity was given to the bill in newspapers throughout the State. Later, the Virginia Department of Taxation held about 100 meetings throughout the State. I personally addressed a large group of contractors in Northern Virginia several months ago.

"Under separate cover I am sending you a copy of the Rules and Regulations which were issued early in August under the Virginia Retail Sales and Use Tax Act. Section 1-27 is on the subject of contractors. Before August, to-wit, early in July, we mailed every licensed contractor in Virginia a sheet on which was contained fundamental information."

The record shows that the Department of the Army (Norfolk District, Corps of Engineers, Norfolk, Virginia)awarded a fixed price formally advertised construction contract (contract No. DA-44-110-ENG-6020) to Merando, Inc., Washington, D.C., on April 20, 1966, for construction of an Enlisted Women's Barracks Complex, Fort Myer, Virginia, for the contract price of $1,854,330. General Provision No. 26 of the contract ("Federal, State, and Local Taxes (Aug. 1961)") provides in part: "(a) Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties." No other provision is made concerning State taxes.

The prime contractor (Merando, Inc.) awarded a subcontract to Arlington Masonry,

Inc., under date of June 3, 1966, in the amount of $287,000, calling for the subcontractor to: "[Article II]...complete...the masonry work...as required by all plans and/or all specifications for the above- captioned project [Contract No. DA-44-110-ENG-6020, E.W. Barracks Complex, Fort Myer, Va.]..." With respect to State taxes, the subcontract provides:

"Article VI...and the Subcontractor undertaken and assumes all the obligations and responsibilities of the Contractor required by the prime Contract, insofar as they are applicable to the part or parts of the work set forth in Article II above, including, but not restricted to...any requirements regarding compliance with applicable Federal, State, or Municipal Statutes or regulations and the payment of any taxes, permits, ...liable under or, because of, such statutes or regulations..."

With regard to the contractor's allegation that in the past no State has ever collected sales taxes on any Government job, it is well settled that the constitutional immunity of the United States from State taxation does not prevent a State from applying its sales tax to the purchase of building materials by one who buys them for use, and uses them, in performing a construction contract for the Government. See Alabama v. King and Booser, 314 U.S. 1; 44 Comp. Gen. 715; and with respect to the applicability of State use taxes to such purchases, see Curry v. United States, 314 U.S. 14.

As shown above, under the price contract all applicable State taxes are included in the contract price and thus the contract does not authorize increase in the contract price to cover State taxes. Under the tax clause in the price contract, the contractor assumes the Burden of the imposition, or of any increases, in State taxes, and the cotnract therefore does not authorize the Government to increase the price of the price contract for State taxes imposed on either the prime or subcontractor. While it would appear that Article VI of the subcontract, quoted above, requires the subcontractor to assume similar obligations regarding the payment of applicable State taxes, the resolution of that question must be left to the parties to the subcontract.

The enclosure to your letter is returned, and if we can be of any further service, please advise us.

Sincerely yours,

Frank H. Weitzel Assistant Comptroller General of the United States