

**CONSTRUCTION CONTRACTS ON INDIAN LAND
GUIDANCE AND REQUIREMENTS**

The following information explains the general application of tax to sales and purchases by construction contractors building on Indian land. The information also explains the contractual and transactional requirements so that construction contractors contracting with Indian customers can structure the contracts in order to minimize or eliminate the sales and use tax liability.

References: [Regulations 1616, Federal Areas](#) and [1521, Construction Contractors](#).

APPLICATION OF TAX

Indian: The application of tax to a particular purchase by an Indian depends on whether ownership of the item being sold or purchased transfers to the Indian purchaser on Indian land.

Non-Indian: When a non-Indian retailer makes a sale on or off Indian land to a non-Indian customer or a sale to an Indian customer off a reservation, sales or use tax applies unless the sale is otherwise nontaxable. However, a non-Indian retailer's sale of tangible personal property to an Indian is not taxable if the delivery is made to the Indian purchaser on a reservation and title (ownership) transfers to the purchaser on the reservation.

Construction contracts in general

Fixtures

Construction contractors are, in general, retailers of fixtures that they furnish and install in the performance of construction contracts, and tax applies to their sales of the fixtures. This is true regardless of whether the contract is structured as a lump-sum or time-and-material contract. However, sales tax does not apply to a construction contractor's charges for fixtures the contractor furnishes and installs on the reservation.

Machinery and Equipment

A construction contractor is generally the retailer of machinery and equipment even though the machinery and equipment is furnished in connection with a construction contract and, generally, tax applies to the contractor's gross receipts from such sales. (Reg. 1521, subd. (b)(2)(C)1.)

However, if delivery is made to an Indian purchaser on the reservation and title to the machinery or equipment passes to the Indian purchaser on the reservation before the construction contractor makes any use of the machinery or equipment, the sale to the Indian purchaser is exempt from tax. (Reg. 1616, subd. (d)(4)(A).)

Materials

In general, a construction contractor furnishing and installing materials pursuant to a lump-sum construction contract is the consumer of materials, and tax applies to the vendor's sale of materials to the construction contractor (Reg. 1521, subd. (b)(2)(A)1.), not to the transaction between the construction contractor and its customer.

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Under subdivision (b)(2)(A)2. of Regulation 1521, a construction contractor may be deemed the retailer of materials, rather than the consumer of materials and may contract to sell materials and also to install the materials sold.

In order for the construction contractors to qualify as the retailers of materials that they furnish and install, the contractors must enter into a construction contract that “explicitly provides for the transfer of title prior to the time the materials are installed, *and* separately state the sales price of materials, exclusive of the charge for installation” (commonly referred to as a “time-and-material contract”). A lump-sum construction contract does not qualify as it does not “separately state the sales price of materials, exclusive of the charge for installation” and thus it *cannot* be created by a contract requiring the contractor to separately state materials costs on invoices. (Reg. 1521, subd. (a)(8).)

Furthermore, a lump-sum construction contract does not become a time-and-material construction contract when the amounts attributable to the materials, fixtures, labor, or tax are separately stated *in the invoice*. A lump-sum construction contract that only contains a clause passing title to the materials prior to installation is not sufficient. To the extent separate statements of the sales price of materials, exclusive of installation charges, are included in documents that are not themselves part of the contract, such documentation does not fulfill this requirement. However, a change order which modifies the type, amount, cost, or other specification of materials to be furnished *before* the materials are supplied, or modifies any specification for the installation of the materials *before* the installation, may constitute a valid amendment to the contract as to materials not previously supplied.

Subcontractors who *furnish* and *install* materials to Indian customers on a reservation must also explicitly provide in their construction contracts for the transfer of title prior to the time the materials are installed *and* must separately state the sales price of materials, exclusive of the charge for installation. Title to the material must transfer from the subcontractor *on the reservation*.

Indian Construction Contractors

Under subdivision (d)(4)(C) of Regulation 1616, sales tax does not apply to sales of materials, fixtures, and machinery and equipment to Indian construction contractors (i.e., contractors who are Indians) if the property is delivered to the Indian contractor on the reservation.

Non-Indian Construction Contractors

Sales tax does apply to the retail sales of materials to non-Indian construction contractors (i.e., a construction contractor that is not itself an Indian) regardless of the delivery of the materials on the reservation and the permanent attachment of those materials to the realty. (Reg. 1616, subd. (d)(4)(C).)

However, a construction contractor may resell the materials as a retail sale prior to making any use of them (e.g., installing them) only if its construction contract separately states the sales price of materials, exclusive of the charge for installation (e.g., not a lump-sum contract, but a time-and-material contract as described in subdivision (a)(7) of Regulation 1521), and the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed and in fact

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the contractual provisions are carried out. If a subcontractor in fact passes title, not to the Indian Tribe, but to the prime contractor, the prime contractor would be the consumer of materials as the first construction contractor with the obligation to both furnish and install the materials, unless the prime contractor complies with subdivision (b)(2)(A)2. of Regulation 1521, so as to be a retailer with respect to those materials. The fact that the Indian tribe may have paid the subcontractor will not exempt the transaction from tax unless title to the materials passes prior to use (installation) by the subcontractor.

REQUIRED DOCUMENTATION

Indian Construction Contractor

How tax applies to a particular sale or purchase by an Indian contractor depends on whether ownership of the item being sold or purchased transfers to the Indian purchaser on the reservation.

Sales tax does not apply to sales of materials, fixtures, or machinery and equipment to Indian construction contractors if the property is delivered and title passes to the Indian construction contractor on the reservation and the property is installed or used on the reservation. The following documentation is used to support the exemption:

- Documentation showing that the purchaser is an Indian, such a Tribal ID card, a letter from a tribal council, articles of incorporation for an Indian organization, or a letter from the U.S. Department of the Interior.
- Documentation of delivery and transfer of title to the Indian construction contractor on the reservation.
- For non-installed property, an exemption certificate from the Indian purchaser to substantiate that its sale was exempt from tax.

Non-Indian Construction Contractor and Subcontractors

In order for the retail sale of the materials to be exempt from tax to an Indian tribe, the non-Indian construction contractor and all subcontractors, the following requirements must be satisfied:

1. The construction contract must be a time-and-material contract.
 - a. The contract, including any supporting documentation expressly incorporated by reference, must explicitly provide for the transfer of title prior to the time the materials are installed, *and*
 - b. The contract must separately state the sales price of materials, exclusive of the charge for installation;
2. The contractor or subcontractor must have and make available a copy of the completed exemption certificate issued by the Indian customers to the contractor, or a copy of the exemption certificate the subcontractor receives from its prime contractor that was issued by the Indian customer to the prime contractor;
3. In addition to an exemption certificate, when the work is performed by a subcontractor, the subcontractor must obtain a completed and timely resale certificate from the construction contractor with whom they enter into a construction contract;

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4. The delivery documentation such as contracts of sale, invoices, bills of lading, delivery receipts, and freight invoices must support title passage on the reservation. Unless the deliveries are shipped by the retailer's own facilities, the deliveries must be shipped "F.O.B reservation" so that title passes on the reservation;
5. The contractor must have and make available a copy of documentation showing that the purchaser is an Indian such a Tribal ID card, a letter from a tribal council, or a letter from the U.S. Department of the Interior; and
6. The contractual provisions must in fact be carried out.

Advisable documentation: Although it is not a requirement to have notarized statements of delivery on the reservation, (see [Publication 146, Sales to American Indians, and Sales on Indian Reservations](#)), having such notarized statements can expedite the verification of on-reservation delivery.

Exemption Certificates must have the following elements ([Reg. 1667\(c\)\(1\)](#)):

Must be in writing and must include the following:

- Date
- Signature of the purchaser, the purchaser's agent, or the purchaser's employee;
- Name and address of the purchaser
- Number of the purchaser's seller's permit, or if the purchaser is not required to hold a seller's permit, a notation to that effect and the reason
- Description of the property purchased under the certificate; and
- A statement* of the manner in which or the purpose for which the property will be used so as to make the sales tax inapplicable to the sale.

*To relieve the seller from liability for the sales tax, the statement must be one covered under the provisions of Chapter 4 (commencing with Section 6351) of the Sales and Use Tax Law that entitles the seller to regard the gross receipts from the sale as exempted from the sales tax. In the case of construction, contracts on Indian Lands the following statement would suffice:

"Exempt sale to Indian purchaser with delivery on Indian reservation to purchaser under the provisions of Sales and Use Tax Regulation 1616."