

23VAC10-210-410. Contractors respecting real estate.

A. Basic rules. A contractor is defined as any person who contracts to perform construction, reconstruction, installation, repair, or any other service with respect to real estate or fixtures thereon, including highways, and in connection therewith to furnish tangible personal property, whether such person be a prime contractor or subcontractor. Unless otherwise noted, the law treats every contractor as the user or consumer of all tangible personal property furnished to the contractor or by the contractor in connection with real property construction, reconstruction, installation, repair, and similar contracts.

Tangible personal property incorporated in real property construction that loses its identity as tangible personal property and becomes real property is deemed to be tangible personal property used or consumed by the contractor. Any sale, distribution, or lease to or storage for such a contractor is deemed a sale, distribution, or lease to or storage for the ultimate consumer (the contractor), and not for resale by the contractor. The dealer (supplier) making the sale, distribution, or lease to or storage for such a contractor must collect the tax from the contractor. No sale to a contractor is exempt on the ground that the other party to the contract is a governmental agency, a public service corporation, a nonprofit school, or nonprofit hospital, or on the ground that the contract is a cost-plus contract.

A contractor must remit the use tax on any tangible personal property purchased exclusive of the tax and furnished to the contractor except when such property is purchased and furnished to a contractor by a governmental unit or agency. Property that is exempt from the tax when purchased by a manufacturer, processor, miner, public service corporation, commercial radio, television or cable television operation, farmer, or shipbuilding and repair business may also be furnished to a contractor without such contractor becoming subject to use tax. Contractors may also purchase machinery and tools to be used directly in industrial manufacturing or processing (see 23VAC10-210-920) exempt from the tax.

A contractor, whether the contractor be a prime contractor or subcontractor, does not pass the sales or use tax on to anyone else as a tax. The contractor will take the amount of the tax into consideration in submitting bids.

If a supplier of a contractor doing work in Virginia does not collect the Virginia tax from the contractor, the contractor will be liable for the use tax on the contractor's purchases from the supplier.

B. Person who is a using or consuming contractor and also a seller. A person who is a using or consuming contractor, as explained in subsection A of this section, may also be engaged in the business of selling tangible personal property to customers, including contractors, for use or consumption by such customers. If so, the person is a dealer with respect to such sales and is

required to obtain a Certificate of Registration.

After obtaining a Certificate of Registration as a dealer because the contractor is engaged in the business of selling tangible personal property to customers for use or consumption by the customers, a contractor may purchase the tangible personal property under a resale exemption certificate. The contractor may not purchase under a resale exemption certificate any tangible personal property which the contractor knows at the time of purchase will be furnished by the contractor in connection with any specific contract. If such a person, as a using or consuming contractor, removes from the contractor's sales inventory for use in the performance of any contract any tangible personal property purchased under a resale certificate, the contractor must include the cost to such contractor of such tangible personal property on the contractor's dealer's return and pay the tax.

C. Fabricator (manufacturer, processor, or miner) who fabricates tangible personal property and sells it to customers. A person who fabricates tangible personal property and sells it to customers, including contractors, for use or consumption by them, must add the sales tax to the sales price and collect it from the customer for payment to the state. Raw materials, component parts, and other tangible personal property to be fabricated for sale may be purchased under a resale certificate of exemption.

D. Fabricator (manufacturer, processor, or miner) who fabricates tangible personal property exclusively for use and consumption in real property construction contracts. A fabricator who contracts to perform services with respect to real estate construction, and in connection therewith to furnish tangible personal property for incorporation in real estate construction thereby causing it to lose its identity as tangible personal property by becoming real property, is classified as a using or consuming contractor and must pay the tax on the cost price of the raw materials that make up such fabricated property. The tax must be paid at the time of purchase to all suppliers who are authorized to collect the tax. In instances where the supplier is not authorized to collect the tax or fails to collect the tax, the tax must be remitted directly to the Department of Taxation on Form ST-7, Consumer's Use Tax Return.

E. Fabricator (manufacturer, processor, or miner) who operates in a dual capacity of fabricating tangible personal property for sale or resale and fabricating for its own use and consumption in the performance of real property construction contracts. A manufacturer, processor, or miner who operates in a dual capacity of fabricating tangible personal property for sale or resale and fabricating for the manufacturer's, processor's, or miner's own use and consumption in the performance of real property construction contracts shall follow a primary purpose rule based on gross receipts in determining sales and use tax application.

Any person who is principally fabricating tangible personal property for sale or resale shall apply the tax according to subsection C of this section. Such fabricators should collect and remit the tax based upon the total amount for which tangible personal property and services are sold, except that charges for labor and services rendered in installing, applying, remodeling, or repairing property sold may be excluded from the tax when separately stated or charged. In addition, any person who withdraws tangible personal property from inventory for use and consumption in the performance of real property construction contracts is liable for the tax based on the fabricated cost price of the tangible personal property withdrawn. Fabricated cost

price is computable by totaling the cost of materials, labor, and overhead charged to work in process. Freight inward at the plant is treated as an element of the cost of the materials.

Any person who is principally fabricating tangible personal property for that person's own use and consumption in real property construction contracts shall apply the tax according to subsection D in this section. In addition, persons who sell tangible personal property to consumers must register, collect, and pay the tax on the retail selling price of the tangible personal property. Such person is entitled to purchase exempt from the tax only that tangible personal property that can be identified at the time of purchase as purchases for resale. If the person is unable to identify at the time of purchase the tangible personal property that will be resold, such person is required to pay the tax to the person's supplier. If at a later date, the person sells the tangible personal property at retail, the tax is collected upon retail selling price. Such persons are not entitled to credit for the tax paid to suppliers since the transactions are separate and distinct taxable transactions.

A person who fabricates tangible personal property, both for sale or resale and for use in real property construction contracts, may apply to the Tax Commission to pay any tax directly to the state and avoid the collection of tax by suppliers, if such person's purchases are made under circumstances that normally make it impossible at the time of sale to determine the manner in which such property will be used. (See 23VAC10-210-510 on direct payment permits.)

F. Fabricator's production exemptions, when allowable. Fabricators of tangible personal property may take the status of industrial manufacturers, processors, or miners under 23VAC10-210-920 or 23VAC10-210-960, and when fabricating tangible personal property for sale or resale, such fabricators may enjoy the production exemptions set out in 23VAC10-210-920 or the mining exemptions set out in 23VAC10-210-960. The production and mining exemptions are not available to a fabricator of tangible personal property who fabricates for the fabricator's own use or consumption (as a contractor or otherwise) and not for sale or resale. However, a fabricator whose principal or primary business is the fabrication of tangible personal property for sale or resale, and who, as a lesser or minor part of this business, fabricates for such fabricator's own use and consumption, will not be deprived of the production exemptions set out in 23VAC10-210-920, or the mining exemptions set out in 23VAC10-210-960.

G. Reserved.

H. Retailer selling and installing tangible personal property. Any person who sells tangible personal property at retail and installs such property as part of or incidental to the sale is a retailer and is required to add the sales tax to the sales price. The tax does not apply to installation charges when separately stated on a sales invoice. If the installation charge is not separately stated, the tax must be computed on the total charge.

Retailers are deemed to be the users or consumers of all supplies used in installing tangible personal property. Therefore, retailers are subject to the tax on all such supplies purchased.

I. Construction materials temporarily stored in Virginia. Construction contractors may purchase exempt from tax construction materials for temporary storage in Virginia to be used in exempt construction projects in other states or foreign countries. Contractors entitled to this exemption may obtain certificates of exemption upon written request to the Department of Taxation. The

request should include information to show that the construction materials could be purchased by the contractor free from sales or use tax in the other state or foreign country.

This exemption is restricted to construction materials incorporated into exempt real property construction. The tax applies to equipment, tools, supplies, etc., used in performance of the construction contract. The tax applies to all other construction materials, temporarily stored in Virginia, that will be incorporated into real estate construction projects outside Virginia.

J. Government contracts. Generally, purchases of tangible personal property by contractors in connection with real property construction contracts with the governments of Virginia or the United States or political subdivisions thereof, are sales to such contractors for such contractors' own use or consumption and contractors are subject to the tax on such transactions. This applies regardless of whether title to such property passes directly to the governmental entity upon purchase by the contractor or if the contractor is reimbursed directly by the government entity for the cost of such property.

Only in instances where the credit of a governmental entity is bound directly and the contractor has been officially designated as the purchasing agent for such governmental entity will such purchases be deemed exempt from the tax.

Contractors are not subject to the use tax when provided with tangible personal property purchased by a governmental entity for use in real property construction contracts. For further information relating to the sales and use tax exemption for purchases by governments generally, see 23VAC10-210-690 on Governments.

For pollution control equipment and facilities, see 23VAC10-210-2070; use tax generally, see 23VAC10-210-6030; highway contractors specifically, see 23VAC10-210-410.

Statutory Authority

§§58.1-203, 58.1-609.3(1), 58.1-609.3(2), and 58.1-610 of the Code of Virginia.

Historical Notes

Derived from VR630-10-27; revised June 1, 1979; January 1, 1979; August 1, 1981; amended, eff. January 1, 1985; Volume 39, Issue 24, eff. September 30, 2023.