



## INDIANA DEPARTMENT OF REVENUE

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### INFORMATION BULLETIN #60 SALES TAX NOVEMBER 2017

(Replaces Bulletin #60 dated April 2011)

Effective Jan. 1, 2010 (Retroactive (See Note in Summary of Changes))

**SUBJECT:** Contractors and Construction Material; Purchases of Construction Material;  
Sales of Construction Material

**REFERENCES:** IC 6-2.5-1-5; IC 6-2.5-1-14.7; IC 6-2.5-1-14.9; IC 6-2.5-1-27.7; IC 6-2.5-3-2; IC 6-2.5-3-3; IC 6-2.5-4-1; IC 6-2.5-4-9; IC 6-2.5-5-3; IC 6-2.5-8-9; 45 IAC 2.2-3-7 through 45 IAC 2.2-3-12; 45 IAC 2.2-4-21 through 45 IAC 2.2-4-26

**DISCLAIMER:** Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is not consistent with the law, regulations, or court decisions is not binding on either the department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

#### SUMMARY OF CHANGES

Aside from technical nonsubstantive changes, this bulletin has most significantly been updated to reflect a number of statutory changes made by P.L.181-2016. In response to the Indiana Tax Court's decision in *Lowe's Home Centers, LLC v. Indiana Department of Revenue*, 23 N.E.3d 52 (2014), which, among other things, invalidated the department's regulations addressing contractors and the use of construction material, the Indiana General Assembly codified in P.L.181-2016 the definitions of "construction material," "contractor," and "time and material contract." In addition, portions of P.L.181-2016 clarified contractors' sales and use tax responsibilities with respect to the purchase, use, and sale of construction material. Because the statutory changes codified regulations overturned by the Tax Court, the 2016 statutory changes were given retroactive effect, beginning January 1, 2010.

Regarding the effective date of the bulletin, because the 2016 statutory changes were given retroactive effect, the bulletin's updates which reflect the statutory changes made by P.L.181-2016 are also retroactive in effect, beginning January 1, 2010. However, this bulletin also removes language regarding "hot mix asphalt" manufacturers, a change which is independent of amendments in P.L.181-2016. The effective date of the bulletin does not apply to that particular change. "Hot mix asphalt" manufacturers will be addressed in another department bulletin, with a separate effective date within that document.

## I. INTRODUCTION

The purpose of this bulletin is to address the application of Indiana gross retail (“sales”) tax and use tax with regard to the purchase or sale by a construction contractor of tangible personal property that is converted into real property.

### A. Purchases of Construction Material

In general, all sales of tangible personal property, including sales of construction material, are subject to the state sales tax, while sales of real property are not. The conversion of construction material into real property does not alter this general rule with respect to the taxes imposed on the purchaser’s acquisition or use of that material. Thus, absent an exemption, all construction material purchased by a contractor is taxable at the time the material is purchased, or, if acquired exempt, upon disposition.

**Note:** For more information on the application of the sales and use tax to contractors’ purchases and use of construction material, see *SECTION III – PURCHASES OF CONSTRUCTION MATERIAL*.

### B. Sales of Construction Material

Under Indiana law, contractors are retail merchants selling tangible personal property at retail when they (1) dispose of, or (2) convert construction material into real property under a time and material contract. Because all sales of tangible personal property, including sales of construction material, are taxable, contractors converting construction material into real property under a time and material contract must collect and remit sales tax on the material portion of their contracts.

**Note:** For more information on contractors’ sales of construction material and the use of time and material contracts, see *SECTION IV – SALES OF CONSTRUCTION MATERIAL*.

## II. DEFINITIONS

The following definitions apply throughout this information bulletin.

A. **“Construction Material”** means any tangible personal property to be converted into real property.

1. Examples of construction material that may be converted into real property through incorporation or installation include, but are not limited to, doors, garage doors, windows, cabinets, garbage disposals, water heaters, water softeners, alarms, furnaces, central air conditioning units, gutters, carpeting and other flooring materials, drywall, lumber, asphalt, concrete, fencing, trees, shrubbery, and pre-fabricated construction material.

2. Examples of items that typically remain tangible personal property, and, therefore, *are not* considered construction material, include, but are not limited to, personal computers, televisions, refrigerators, stoves, dishwashers, clothes washers and dryers, window air conditioning units, and other removable items such as furniture.

3. Construction material that has been converted into real property when it has been attached to or incorporated into real property in such a way that would lead one to reasonably believe the construction material has been permanently affixed to the real property. Construction material incorporated into real property becomes part of and indistinguishable from the real property into which it has been incorporated.

4. Conversions of tangible personal property into real property include incorporations and installations of tangible personal property into facilities or structures. Incorporations and installations of tangible personal property into facilities or structures may include improvements to and repairs of existing facilities or structures.

**B. “Contractor”** means any person engaged in converting construction material into real property on behalf of another person.

1. The term includes, but is not limited to, general or prime contractors, subcontractors, and specialty contractors.

2. Examples of contractors include, but are not limited to, persons engaged in building, concrete work, carpentry, plumbing, heating and cooling, electrical work, roofing, plastering, tile work, road construction, landscaping, installing underground sprinkler or drainage systems, and making other improvements or repairs to real property.

**C. “Time and Material Contract”** means a contract in which the cost of construction material and the cost of labor or other charges are stated separately.

### **III. PURCHASES OF CONSTRUCTION MATERIAL**

The information contained in this section addresses the purchase and use of construction material by contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract – e.g., lump sum contracts. Contractors operating in this manner purchase construction material for their own use or consumption in the fulfillment of contractual obligations to provide real property improvement services. As such, contractors using contracts that do not meet the definition of a time and material contract are not reselling construction material and should not charge their customers sales tax. They should (1) pay sales tax at the time the construction material is purchased, or (2) self-assess and remit use tax at the time the construction material is converted into real property if that construction material was purchased or otherwise acquired without paying tax.

## **A. Application of Sales Tax**

In general, all sales of tangible personal property, including construction material, are subject to tax. Thus, absent an exemption, all purchases of construction material by contractors are taxable at the time the material is purchased, or, if acquired exempt, upon disposition. Contractors purchasing construction material are liable for paying the tax to the supplier at the time the material is purchased.

**1. Exemptions** – Notwithstanding the general rule, a contractor’s purchase of construction material is not subject to tax – i.e., tax does not need to be paid by the contractor at the time of purchase – if the contractor’s customer would be exempt from the sales and use taxes if the customer purchased the construction material directly from the supplier. A customer’s ability to purchase construction material exempt from tax is evidenced by the customer’s properly completed Form ST-105 General Sales Tax Exemption Certificate.

**a.** A contractor making exempt purchases as described above should do so only after obtaining and retaining a copy of the customer’s properly completed Form ST-105 General Sales Tax Exemption Certificate.

**b.** To purchase construction material exempt from tax, the contractor purchasing the construction material must submit its own properly completed Form ST-105 General Sales Tax Exemption Certificate to the supplier at the time the material is purchased. A contractor’s subsequent, non-exempt use or disposition of construction material that the contractor purchased or otherwise acquired exempt from tax will subject the contractor’s use of that construction material to tax. *See SUBSECTION B – APPLICATION OF USE TAX.*

**Note:** When a contractor purchases or otherwise acquires construction material without paying sales tax, the contractor has the burden of proof with respect to establishing that its purchase or use of that construction material was exempt from tax and that the disposition of that construction material was not subject to the sales or use tax.

## **B. Application of Use Tax**

In general, the storage, use, or consumption of construction material by a contractor in Indiana is subject to use tax if the construction material was acquired by a contractor in a retail transaction, regardless of where the transaction took place. When purchasing construction material, a contractor must (1) pay sales tax at the time the construction material is purchased; or (2) pay use tax at the time the construction material is converted into real property if the contractor purchased or otherwise acquired the construction material without paying tax and the contractor’s customer could not have purchased the construction material exempt from tax.

More specifically, a contractor's conversion of construction material into real property in Indiana is subject to use tax if that construction material was purchased or otherwise acquired by the contractor, regardless of where the purchase took place.

**1. Exemptions** – Notwithstanding the general rule, a contractor's conversion of construction material into real property is not subject to use tax in Indiana – i.e., tax, does not need to be self-assessed and paid by the contractor – in the following situations:

**a.** If sales tax or use tax was previously imposed on the contractor's acquisition or use of that construction material. Contractors are responsible for documenting prior payments of tax and must be able to show that any tax previously imposed on its acquisition or use of the construction material was paid;

**b.** If the contractor's customer could have purchased the construction material exempt from tax had the customer purchased the construction material directly from the supplier. A customer's ability to purchase construction material exempt from tax is evidenced by the customer's properly completed Form ST-105 General Sales Tax Exemption Certificate;

**c.** If the conversion of the construction material into real property is governed by a time and material contract. *See SECTION IV, SUBSECTION A – TIME AND MATERIAL CONTRACTS*; or

**d.** If the construction material was acquired by the contractor in a transaction that was exempt from the sales tax under any part of Indiana Code 6-2.5-5 and the construction material is being used, stored, or consumed for the purpose for which it was exempted.

**Note:** A contractor's subsequent, non-exempt use or disposition of construction material purchased or otherwise acquired exempt from tax will subject the contractor's use of that construction material to tax. Contractors are responsible for self-assessing and remitting to the department any use tax due. Use tax liabilities are to be imposed at the same rate as the sales tax and calculated using the gross retail price of any construction material subject to tax.

#### **IV. SALES OF CONSTRUCTION MATERIAL**

In general, all sales of tangible personal property, including sales of construction material, are subject to tax. Retail merchants are required to collect and remit sales tax as agents of the state.

##### **A. Time and Material Contracts**

Under Indiana law, contractors are retail merchants selling construction material when they (1) dispose of, or (2) convert construction material into real property under a time and

material contract. Time and material contracts are contracts in which the cost of construction material and the cost of labor or other charges are stated separately. Because all sales of tangible personal property, including sales of construction material, are taxable, contractors converting construction material into real property under a time and material contract must collect and remit sales tax on the material portion of their contracts.

**1. Gross Retail Income** – In addition to collecting sales tax on the material portion of a time and material contract, tax should be collected on charges for the following services, as the charges are considered part of the gross retail income subject to tax: preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed with respect to the construction material before the material is transferred or delivered to the contractor’s customer.

**Note:** Installation charges separately stated on an invoice are not included in gross retail income. Labor incurred as part of on-site installation may be exempt. For instance, in the case of an item that was ordered to specification but which requires further modification and adjustment in order to properly install, the labor incurred to modify the item so that it can be installed would be considered part of the installation, and if separately stated on the invoice, would not be subject to sales tax.

**2. Registration** – Because contractors using time and material contracts are considered retail merchants, they must obtain a Registered Retail Merchant Certificate (“RRMC”) by registering as a retail merchant with the department. The remittance of tax must be made, and sales tax returns must be filed, using an electronic filing method such as INtax.

**B. Exemptions and Exemption Certificates**

Transactions involving tangible personal property, including construction material, are exempt from tax if the person acquiring the property acquires it for resale. Because contractors are retail merchants selling construction material when they (1) dispose of, or (2) convert that material into real property under a time and material contract, they may purchase that construction material exempt from tax.

**1.** To purchase construction material exempt from tax, contractors using time and material contracts must provide their supplier with a properly completed Form ST-105 General Sales Tax Exemption Certificate.

**2.** A contractor may issue an exemption certificate only if they have registered as a retail merchant with the department.

**3.** As retail merchants, contractors using time and material contracts may accept properly completed exemption certificates from exempt customers – nonprofit organizations, federal or Indiana governmental entities, and other customers able to purchase construction material exempt – but they may not reissue those

certificates to any supplier of construction material. Contractors must issue their own exemption certificates to suppliers when making exempt purchases. Exemption certificates issued to and accepted by contractors must be retained by the contractor for a period of a minimum of three years, beginning at the end of the year in which the construction material was purchased or sold.

**Note:** Contractors are responsible for self-assessing use tax if construction material purchased or otherwise acquired exempt from tax is not used for its exempt purpose. For more information, see *SECTION III, SUBSECTION B – APPLICATION OF USE TAX*.

## **V. CONTRACTORS AND MANUFACTURING**

Contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract are not operating as manufacturers. Therefore, they are not entitled to any of the manufacturing exemptions. Contractors using these types of contracts do not sell construction material, and, among other things, the manufacturing exemptions require that the tangible personal property produced by the manufacturer be sold in the manufacturer's ordinary course of business.

On the other hand, because contractors are operating as retail merchants selling construction material when they (1) dispose of, or (2) convert that material into real property under a time and material contract, contractors operating in this manner may qualify as manufacturers with respect to any pre-fabricated construction material they produce and then sell at retail.

### **A. Pre-fabricated Construction Material**

Construction material manufactured, fabricated, or assembled inside or outside Indiana is subject to sales and use tax if the construction material is used, stored, consumed, or distributed in the state. Contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract should always pay sales tax or use tax on their purchases or use of pre-fabricated construction material.

Contractors engaged in the manufacture and subsequent sale of pre-fabricated construction material should collect and remit sales tax on those sales. As noted above, the gross retail income from which any sales or use tax liability shall be calculated with respect to the sale or use of pre-fabricated construction material includes any labor or delivery charges associated with the fabrication or delivery of that material. Sales or use tax is to be paid on the entire retail unitary transaction.

To the extent that sales tax is paid on materials in another state, Indiana will grant credit for the sales tax paid on the use tax owed to Indiana.

### **B. Machinery, Tools, and Equipment**

In general, utilities, machinery, tools, forms, supplies, equipment, and any other items of tangible personal property used or consumed, but not incorporated into real property, by a contractor are subject to tax regardless of the exempt status of contractor's customer.

Machinery, tools, and equipment are exempt only to the extent they are used to manufacture pre-fabricated construction material that will be sold in a retail transaction prior to the materials conversion into real property.

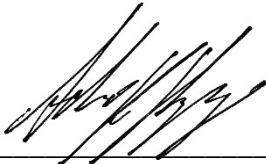
## **VI. PUBLIC STREETS AND PUBLIC UTILITY SYSTEMS**

Contractors acquiring construction material for incorporation as an integral part of a public street or public water, sewage, or other utility service system are exempt from sales and use tax on the purchase of that material. The public street or utility service system must be required under a subdivision plat that was approved and accepted by the appropriate Indiana political subdivision, and it must be publically maintained after its completion.

**Note:** This exemption includes only the construction material incorporated into the public street or public water, sewage, or other utility service. It does not extend to any machinery, tools, or equipment used by the contractor in the process of incorporating the construction material into its final form.

## **VII. DIRECT PAY PERMITS**

Direct payment permits do not certify that the issuer is entitled to an exemption and may not be issued to or accepted by a contractor unless the contractor is operating as a retail merchant making a retail transaction by disposing of construction material or converting construction material into real property under a time and material contract. Contractors operating under construction contracts or other installation contracts that do not meet the definition of a time and material contract will not be relieved of their use tax obligations by accepting direct pay permits from customers.



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