



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

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July 14, 2022

[REDACTED]

Via email to: [REDACTED]

Re: Legal Opinion 20211204 – Contractor’s Entitlement to Sales and Use Tax Exemption

Dear [REDACTED]

I am writing in response to your email to the Arkansas Department of Finance and Administration (“Department”) requesting renewal of Legal Opinion No. 20170714. That request was presented by you to the Department on behalf of your client, [REDACTED] (“Requestor”).

Your letter presented the following facts for consideration:

*The reason for this renewal request is that Requestor is planning a new construction project on the Requestor campus, but for a different building than the building that was the subject of Opinion No. 20170714. One of the buildings located on Requestor’s campus prior to the issuance of Opinion No. 20170714 fell into disrepair after Opinion No. 20170714 was issued and had to be demolished. The demolished building was used to provide Requestor’s services to its children and adolescent residents as part of its continuum of care, including group therapy session, seminars, and other treatment and care programs to its children and adolescent residents, and must be replaced and updated.*

*The new building: (1) will be located in the exact same location as the prior demolished building and remain part of the Requestor campus; (2) will be used solely to provide Requestor’s services to its children and adolescent residents as part of its continuum of care, including group therapy sessions, seminars, and other treatment and care programs to its children and adolescent residents; and (3) is necessary to allow Requestor the space it needs to provide these services and programs. Also, all the parties and relationships between the parties are the same – the new building will be constructed by the same construction company/contractor and under the same contractual terms.*

*I believe the legal and factual conclusions of Opinion No. 20170714 are still valid and would apply to this new Requestor construction project as well without*

*requiring a new legal opinion. However, I included these additional facts out of an abundance of caution.*

*Respectfully, I request that you please include a confirmation of these additional facts (i.e. construction of a new Requestor campus building that will be used solely to provide services to its children and adolescents as part of Requestor's continuum of care as part of this request for renewal of Opinion No. 20170714, if possible.*

## **RESPONSE**

As further explained below, Revenue Legal Opinion No. 20170714 is renewed as to Requestor and applies equally to the construction project Requestor proposes to undertake, provided that the facts and contract provisions between Requestor, its contractors, and subcontractors are the same for this new project as the facts and contract provisions presented for consideration in Opinion No. 20170714.

## **DISCUSSION**

The Arkansas Gross Receipts (Sales) Tax is generally applicable to the sale of tangible personal property and certain enumerated services. Ark. Code Ann. § 26-52-301 (Supp. 2021). The tax is computed based on the total consideration paid for the taxable property or service. When a sale of tangible personal property or a taxable service occurs in Arkansas, a taxable transaction occurs, and the tax should be collected and remitted. Arkansas Gross Receipts Tax Rule GR-5.

The Arkansas Compensating (Use) Tax is due on the purchase of any tangible personal property that is purchased out of state and brought into Arkansas for use, storage, consumption, or distribution. Ark. Code Ann. § 26-53-106 (Supp. 2021). There is a presumption that tangible personal property shipped, mailed, expressed, transported, or brought to this state by a purchaser was purchased from a vendor for storage, use, distribution, or consumption in this state. Ark. Code Ann. § 26-53-106(d)(2) (Supp. 2021). The tax shall be paid at the rate of the location of delivery. Ark. Code Ann. § 26-52-521(b)(2) (Repl. 2020).

The term “contractor” is defined in Ark. Code Ann. § 26-52-103(6) (Supp. 2021) to include any person who undertakes to construct or repair any building or other improvement to real estate. A business that undertakes the construction of a new building comes within the definition of the term “contractor”. Contractors are deemed to be the end consumers of all materials used in the performance of a contract. Accordingly, the contractor must pay sales or use tax on all materials and taxable services used by them in fulfilling the contract.

Ark. Code Ann. § 26-52-413 (Repl. 2020) provides a sales tax exemption and states:

All sales to all orphans' homes in this state, or children's homes, which are not operated for profit and whether operated by a church, religious organization, or

other benevolent charitable association shall be exempt from the gross receipts or gross proceeds tax, commonly referred to as the sales tax.

Additionally, all sales tax exemptions apply equally to the Arkansas Use Tax.

In Legal Opinion No. 20170714, this Department determined that Requestor is a “children’s home” as that term is used in Ark. Code Ann. § 26-52-413 (Repl. 2020). You also indicate that Requestor operates its children’s home on a nonprofit basis. Accordingly, purchases of tangible personal property and services by Requestor for the children’s home are exempt from Arkansas sales and use tax.

Ordinarily, when materials are purchased by a contractor for use in fulfilling a construction contract, the contractor is considered to be the consumer of the materials and is responsible for paying sales or use tax on the purchase regardless of whether the contractor is acting on behalf of a contractee for whom the purchase would be tax exempt. However, in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), the Supreme Court held that under certain circumstances, a contractor may act as an agent for the exempt taxpayer so that the purchase will be an exempt transaction. However, as the Supreme Court noted in *United States v. New Mexico*, 455 U.S. 720 (1982), *Kern-Limerick* involved a case where the entity serving as a federal procurement agent was so closely associated with the Government, and so lacked an independent role in the purchases, as to “make the sale – in both a real and a symbolic sense – a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure.” *Id.* at 742.

In *New Mexico*, the Court found it insufficient that the Government maintained control over the contractor’s procurement systems, property management and disposal practices, methods of operational costs, and other operations under the contracts. *Id.* at 729. Likewise, it was insufficient that the title of the purchased property passed directly to the government. The *New Mexico* Court noted that in *Kern-Limerick* the contractor “identified itself as a federal procurement agent and when it made purchases title passed directly to the Government; the purchase orders themselves declared that the purchase was made by the Government and that the United States was liable on the sale.” The Court emphasized that each transaction required specific Government approval. *Id.* at 742.

In order to qualify for an exemption on a purchase made through a purchasing agent, the exempt taxpayer must be the actual purchaser of the materials by contract and in fact. Each exempt purchase and use must be made in the name of and subject to the approval and control of the exempt taxpayer. If the methods described by Requestor with regard to the question presented for opinion in Legal Opinion No. 20170714 are fully implemented with regard to the present construction project, then adequate approval and control procedures will be in place to satisfy this requirement. Each purchase must also conform to the laws and regulations governing such purchases by the exempt taxpayer.

Therefore, the conclusions reached in Legal Opinion No. 20170714 are equally applicable to the proposed construction project that is the subject of the present opinion request. This conclusion is based on your representation that Requestor is the actual purchaser, and the contractor, subcontractor, or sub-subcontractor is the purchasing agent, consistent with procedures outlined by Requestor in the Exhibit A attached to its request for opinion that resulted in the issuance of Legal Opinion No. 20170714. Accordingly, purchases made by a contractor or subcontractor for use in constructing a building for Requestor will be tax exempt provided those purchases follow the procedures identified in that Exhibit A. The applicable provisions of that Exhibit A are repeated below for your information.

This opinion is based on my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any changes in the facts or law could result in a different opinion. Pursuant to Arkansas Gross Receipts Tax Rule GR-75(B), this opinion is binding on the Department for three (3) years from the date of issuance.

Sincerely,

John Theis, Attorney  
Revenue Legal Counsel

**Exhibit "A"**

Excerpt from the Supplementary Conditions to  
AIA Document A201-2007 General Conditions of the  
Contract for Construction

Psychiatric Residential Treatment Facility  
[REDACTED], Arkansas

**Article 3.4.4 Owner's Agent for Procurement**

3.4.4.1 Notwithstanding the foregoing or any other provisions of this contract, Contractor shall act as Owner's agent in the purchase of materials used in the construction of the project.

3.4.4.2 Except where provisions are otherwise made by the Owner, the Contractor shall furnish all materials, articles, supplies and equipment required for the execution of the work under this contract. The Contractor shall act as the purchasing agent of the Owner in effecting such procurement and the Owner shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in manner required by the provisions of this contract. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Owner shall otherwise direct.

3.4.4.3 Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Owner without vesting in the Contractor and such title (except as to property to which the Owner has obtained title to at an earlier date) shall vest in the Owner at the time payment is made therefor by the Owner or by the Contractor or upon delivery thereof to the Owner or the Contractor, whichever of said events shall first occur. This provision for passage of the title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Owner's right of absolute fulfillment of all the terms of this contract.

3.4.4.4 Each subcontract entered into by Contractor and any sub-subcontract entered into by a subcontractor of Contractor shall, unless otherwise directed by the Owner, provide that: (i) the subcontractor and any sub-subcontractors shall act as the purchasing agent of the Owner to the extent and with the same authority granted to Contractor in Article 3.4.4.2 in regard to such action by the Contractor and (ii) title to purchases for which the subcontractor and sub-subcontractor is entitled to reimbursement shall pass to the Owner in the same manner as that specified in Article 3.4.4.3 in regard to purchases for the cost of which the Contractor is entitled to reimbursement.

**3.4.4.5** Each purchase order shall be issued under the Owner's letterhead in one of the following formats:

[REDACTED]  
By its agent, [REDACTED]  
[REDACTED]

or

[REDACTED]  
By its agent, [REDACTED]  
and its agent, (*Subcontractor*)  
[REDACTED]

or

[REDACTED]  
and its agent, (*Subcontractor*)  
and its agent, (*Sub-subcontractor*)  
[REDACTED]

**3.4.4.6** The Contractor, Subcontractor or Sub-subcontractor as agent for the Owner shall sign each purchase order.

**3.4.4.7** No purchase in excess of \$10,000 shall be made hereunder without the prior written approval of the Owner, except that the Owner may, in its discretion, either reduce the limitation on the amount of any purchase which may be made without such prior approval or authorize the Contractor to make purchases in amounts not in excess of \$50,000 for any one purchase without obtaining such prior approval.

**3.4.4.8** No subcontract or purchase order in excess of the limitations shall be entered into by the Contractor without prior written approval of the Owner.

**Article 3.6 Taxes**

**3.6.2.1** Subject to the provisions of the Arkansas Department of Finance and Administration Sales Tax Opinion Number [ ] and Article 3.4.4, the purchase of supplies and materials for the construction of the qualifying facility and any ancillary work in support of the qualifying facility will be exempt from sales and use tax. The