

Cite as Det. No. 01-178, 21 WTD 240 (2002)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of )	<u>D E T E R M I N A T I O N</u>
Interpretation )	
)	No. 01-178
)	
... )	
)	
)	Letter Ruling Request
)	Docket No. . . .
)	
)	

RULE 17001, RULE 211, RULE 171; RCW 82.04.050, RCW 82.04.190, RCW 82.04.270: RETAIL SALES TAX – RENTAL OF EQUIPMENT WITH OPERATOR -- PUBLIC ROAD CONSTRUCTION. A person hired by a county for his skill, knowledge, and expertise in bridge construction is not merely renting equipment with an operator to perform work under the specific direction of a lessee, but was acting as a subcontractor whose work was subject to contract specifications. The proper tax classification for such activities is public road construction.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Mahan, A.L.J. – County public works department [seeks further clarification of] a letter ruling regarding a public road construction contract being subject to retail sales tax.

ISSUE:

Is a county’s contract with a private contractor for the construction of a bridge subject to retail sales tax when the contract is referred to in an attachment as an “hourly equipment rental and labor contract?”<sup>1</sup>

---

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

## FACTS:

In the winter of 1999, rains caused the failure of road fill and culvert damage on a county road. The . . . County Department of Public Works (County) decided to repair the damage by having a pre-fabricated single lane bridge kit installed and fill removed below the bridge. Because time did not allow for plans to be completed and a formal bidding process, the County contracted to have the work completed on a time and material basis.

Under a “Contract” dated September 5, 2000, the contractor selected by the County agreed to construct a bridge and remove the culvert and associated fill. The County’s commissioners signed the contract. The contract stated the “bridge will consist of steel pile bents with cast in place concrete pile caps, and a pre-fabricated superstructure to be provided by the owner and erected by the contractor.” The contractor was selected because of its experience in bridge building. The total amount paid to the contractor was \$ . . . .

The County supplied a survey, two pages of plans showing the location of piers and reinforcement requirements, and a County employee on site to inspect and direct the work and to fill in details and specifications not supplied in the abbreviated plans. The agreement specifies that the work will also meet the “Standard Specifications of the Washington Department of Transportation [WSDOT].”

The contractor supplied all labor, equipment, and material (other than the bridge kit). Attachment A – Pay Rate Schedule provided the rates paid for equipment and labor. The rates for the equipment included the labor for operation of the equipment and all profit and overhead costs. The total specified in Attachment A was \$ . . . . According to the County, because of the incomplete plans it was not possible to accurately specify the final contract price, hence the difference between the amount in Attachment A and the amount actually paid to the contractor.

Attachment B refers to the contract as an “hourly equipment rental and labor contract.” The attachment further describes the work as being done on a “force account basis.” This allowed the County to keep the contractor on the job beyond the time specified in Attachment A. The scope of work was described as:

Rental to the Contracting Agency of fully operated and maintained equipment specified here and itemized herein [in Attachment A], providing labor as required, and providing piling, concrete, re-bar, and other material as required. The specified equipment will be under the direction of the Contracting Agency for the duration of the project and shall be utilized for the construction of a bridge, including pile driving, construction of concrete pile caps, erection of a pre-fabricated bridge superstructure, removal of the existing culvert and associated fill, and other work as required.

The County states that it refers to contracts for road construction not put out for bid as hourly equipment rental contracts. Such contracts are often done on an “emergency” basis, such as with this bridge project.

The contractor charged retail sales tax in the amount of \$ . . . on equipment charges, which included labor for operation of the equipment. It did not charge tax on labor not associated with the operation of equipment.

The County states that it had not previously been charged retail sales tax on similar public road construction contracts. In order to clarify its retail sales tax obligations and prior to making a claim for a refund of taxes, the County wrote to the Department of Revenue's (Department) Taxpayer Information and Education section (TI&E). In a letter dated February 26, 2001, TI&E stated:

When the county contracts for equipment with an operator, we must determine whether the contractor is performing public road construction or the county is renting equipment. When the contractor is responsible for the performing the work to contract specifications and determines how the work will be performed, the contractor is performing public road construction. Charges made to the county, in this case, are not subject to sales tax. On the other hand, when the contractor is not responsible for performing work to contract specifications and does not determine how the work will be performed, the county is renting equipment with operator. Charges made to the county under such circumstances are subject to the retail sales tax.

Although the letter provided general advice, it did not advise the taxpayer whether the contract at issue was subject to retail sales tax. The County appealed for further clarification for future contracting purposes and a ruling on whether the subject contract was subject to retail sales tax.

#### ANALYSIS

With respect to public road construction, RCW 82.04.050(7) provides:

The term [retail sale] shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind.

Because the construction labor and services on roads owned by political subdivisions, such as the County, are not taxable to the County as retail sales, retail sales tax is not charged or collected by the contractor. With respect to materials used in "public road construction," contractors and subcontractors, not the County, are considered to be the consumers of the materials used. RCW 82.04.190(3). The ultimate result of this statutory scheme is to remove the labor and services portion of the contract from retail sales taxability, with sales tax on materials being paid by subcontractors or contractors to their vendors (with the cost passed along to the County in the bid price). Thus, the state receives retail sales tax on the value of the materials used, but receives no sales tax on the labor and services portion of "public road construction"

projects. *See also* WAC 458-20-17001 (Rule 17001, government contracting) and WAC 458-20-171 (Rule 171, public road construction).

In contrast to public road construction, the term retail sales includes the “rental of equipment with an operator.” RCW 82.04.050(4). WAC 458-20-211 (Rule 211) provides guidance in distinguishing between construction projects and contracts for the rental of equipment with operators. It defines a subcontractor and a rental of equipment with operator as follows:

(c) The term "subcontractor" refers to a person who has entered into a contract for the performance of an act with the person who has already contracted for its performance. A subcontractor is generally responsible for performing the work to contract specification and determines how the work will be performed. In purchasing subcontract services, the customer is primarily purchasing the knowledge, skills, and expertise of the contractor to perform the task, as distinguished from the operation of the equipment.

(d) The term "rental of equipment with operator" means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed. Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment was used.

(Emphasis added.)

In some cases it may be difficult to distinguish between a contract to rent equipment with operator and a contract where an operator of equipment is working to contract specifications and determining how the work will be performed. Examples in Rule 211(8) provides some guidance in distinguishing such activity:

(b) ABC Crane is hired by a prime contractor to install a neon sign on the side of a new six-story building which is being constructed. ABC is responsible for making certain that the sign is correctly fastened to the side of the building and for installation of the electrical connections and meets the proper building codes. ABC is directly involved in construction and performs work to contract specification. Since the work is being done for the prime contractor for further resale, this is a wholesale sale, provided a resale certificate is obtained. Had ABC only been hired to hold the sign in place while the prime contractor fastened it, this would have been a retail rental of equipment with operator.

*See also* Det. No. 98-165, 19 WTD 122 (2000). In Det. No. 98-165, a water truck operator was found to be a subcontractor performing work to contract specification and determining how work was to be performed, because he was hired for his skill, knowledge, and expertise in determining how to compact the soils and fill materials at construction sites. Consequently, the taxpayer was found not to be renting equipment with an operator to perform work under the specific direction of a lessee.

In the present case, the County hired the contractor for its skill, knowledge, and expertise in building bridges, including pile driving, construction of concrete pile caps, erection of a pre-fabricated bridge superstructure, removal of the existing culvert and associated fill, and other work. Rule 211 does not require the specifications to be completed as might occur with a formal bid process. Consistent with the work being completed on a shortened time frame, the limited specifications in the contract were supplemented by WSDOT specifications and specifications supplied by a County employee as the work progressed. The contractor was required to follow those contract specifications and it was directly involved in the construction; it did not just rent equipment with an operator to the County for the County to construct the bridge. Although the contract was referred to as an “equipment rental and labor contract” in an attachment, we find under the facts presented that the contractor was generally responsible for performing the work to contract specification and determined how the work was to be performed. Accordingly, the labor on the county road was not subject to retail sales tax, in accordance with RCW 82.04.050(7).

#### DECISION AND DISPOSITION:

The taxpayer’s petition is granted with respect to equipment rental and labor costs on the . . . Bridge project, . . . not being subject to retail sales tax.

Dated this 28<sup>th</sup> day of November, 2001.