

## Opinion No. 53-5712

March 24, 1953

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Edward M. Hartman State Comptroller The Capitol Santa Fe, New Mexico

{\*105} On March 11, 1953, you addressed an inquiry to this office asking two questions relative to building and bonds at New Mexico A. & M. College, Las Cruces, New Mexico.

The first question is whether the sale or privilege tax is leviable against the building contractor when buildings are being erected on a cost plus, fixed fee, contract basis, for the college, which has a state exemption under § 76-1405, as amended, 1941 Comp., N.M.S.A. If the tax is assessable and payable by the college should it be treated as an overhead charge?

**Answer:** In a cost plus, fixed fee, contract, the sale or privilege tax authorized by § 76-1401, et seq., N.M.S.A. 1941 Comp., is a tax against the contractor and purchaser of the materials and, as held in the case of **State of Alabama v. King and Boozer, 62 S. Ct. 43, 314 U.S. 1, 86 L. Ed, 3:**

"The fact that the economic burden of the tax is passed on to the United States does not make it a tax upon the United States. In this case the legal incidence of the tax was on the contractor, not on the United States; the contractor, in buying the materials, was not the agent or representative of the government; and the transaction was not such as to place the government in the role of purchaser. No constitutional immunity of the United States from state taxation prevents a state from applying its sales tax to a purchaser of building materials by one who buys them for use, and uses them, in performing a cost plus fixed fee building contract for the government, although the contract provides that the title to such materials shall vest in {\*106} the United States upon delivery, and acceptance by a government officer, at the building site, and that the contractor shall be reimbursed by the government for the cost of materials including the tax."

The tax is levied against the purchaser of materials. The mere fact that he passes this tax on to the ultimate purchaser makes no difference. The tax is an enforceable tax against the purchaser regardless of any immunity given to the government branch for whom the contract is being performed.

Thus, it is the opinion of this office that this tax should be treated as an overhead charge in the computation of the cost of the completed building, and as such paid along with all of the other building contract costs.

The second question involves the feasibility of issuing bonds pursuant to § 6-266, 1941 Compilation.

**Answer:** This statute requires that no additional bonds be issued if the total payments for any year would exceed the year's income from the permanent fund. You furnished us with certain data which indicates very conclusively that the income for the year 1951-52 would exceed aggregate payments for any year. If this situation should hold true in future years the feasibility of issuing bonds is entirely dependent upon the needs and requirements of the college itself. Therefore it is the opinion of this office that it is perfectly legal for the A. & M. College to issue additional bonds under the bonding provisions of our statutes.

We sincerely hope that this answers your inquiries.

By: Fred M. Standley

Assist. Attorney General