

Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

AF

**Matter of:** Reimbursing Contractor for State Sales Tax  
Paid by Contractor in Providing Service to  
U.S. Army

**File:** B-249429

**Date:** February 4, 1993

## DIGEST

Under a contract which provides that the government pay "the actual direct costs" for the materials used under the contract, the government is not constitutionally immune from Utah state sales taxes paid by the contractor for such materials. The legal incidence of the state sales tax falls on the contractor as the purchaser of supplies in the state and the government may therefore reimburse the contractor for the taxes.

## DECISION

By letter dated July 1, 1992, the Finance and Accounting Officer, U.S. Army Dugway Proving Ground, asked whether the federal government is immune from paying Utah state sales tax under a contract for janitorial services. The contract provides that the contractor shall be paid the "actual direct costs" for the materials used and the shipping costs incurred under the contract. The contractor paid sales tax on the supplies and materials used to perform the services specified in the contract, including, for example, ammonia, dust pans, rags, and sponges. Under the circumstances presented here, the federal government is not immune from paying Utah's sales tax and the Army Proving Ground should continue to reimburse the contractor for state sales tax incurred under the contract.

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Direct taxation occurs where the legal incidence of the tax falls directly on the United States as the buyer of goods, Korn-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), or as the consumer of services, 53 Comp. Gen. 410 (1973), or as the owner of property, United States v. County of Allegheny, 322 U.S. 174 (1944). If, on the other hand, the legal incidence of the tax falls directly on a business enterprise which is supplying the federal government as a customer with

PUBLISHED DECISION  
72 Comp. Gen.

goods or services, it is the contract or other agreement which determines what the government must pay for the items supplied.<sup>1</sup> For example, contract language stating that the "price includes all applicable taxes" will authorize full payment of the contract price, even though some of the cost of the item is attributable to taxes paid by the contractor. 64 Comp. Gen. 655, 657 (1985).

In this case, the legal incidence of Utah's sales tax falls on the contractor as the purchaser of supplies in the state. Under Utah Code Ann. § 59-12-103(1)(1) (1992), Utah imposes a sales tax "on the purchaser" of "tangible personal property." Dugway Proving Ground agreed, under its janitorial services contract, to pay "the actual direct costs" for the materials and supplies used to perform the services specified in the contract. We think that the term "actual costs" as used in the contract includes state taxes paid by a contractor. See B-147316, Jan. 9, 1962; Federal Acquisition Regulation § 31.205-41.

*Milton J. Auster*  
for Comptroller General  
of the United States

APPROPRIATIONS/FINANCIAL MANAGEMENT  
Appropriation Availability  
Purpose availability  
Specific purpose restrictions  
Taxes  
State/local governments

APPROPRIATIONS/FINANCIAL MANAGEMENT  
Claims Against Government  
Contract terms  
Taxes  
Reimbursement

<sup>1</sup>In Alabama v. King and Boozer, 314 U.S. 1 (1941), the Court held that a tax paid by a government contractor was not prohibited simply because its burden was passed on to the United States economically by the terms of a contract. Although the economic burden of a tax is traditionally shifted to the government in the form of increased costs, such a shift is not indicative of a shift in legal incidence. Gurley v. Rhoden, 421 U.S. 200, 204 (1975); United States v. Boyd, 378 U.S. 39, 44 (1964).

B-249429