



STATE OF DELAWARE
DEPARTMENT OF FINANCE
DIVISION OF REVENUE
CARVEL STATE BUILDING
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**DIVISION OF REVENUE
TECHNICAL INFORMATION MEMORANDUM 93-5**

AUGUST 19, 1993

I. INTRODUCTION

This Technical Information Memorandum, constitutes the Division of Revenue's Regulations with regard to contractor licensing and bonding requirements under 30 Del. C. §375; 30 Del. C. §§2501, 2502 and 2503. These regulations are promulgated under 30 Del. C. §§2103 and 563.

II. SUMMARY OF REQUIREMENTS

A. Section 375 Requirements (Non-Residents)

1. Surety bonds in the amount of 6% of the amount of the contract(s) or subcontract(s) requiring the provision of labor or labor and material are required for all non-resident contractors for contracts within the State of Delaware in which either:
 - (a) The single contract or subcontract totals \$20,000 or more; or
 - (b) The contract or subcontract is a "cost-plus" contract whose estimated cost-and-profit totals \$20,000 or more; or
 - (c) The aggregate of two or more contracts or subcontracts in a calendar year totals \$20,000 or more.
2. The Division of Revenue will accept cash bonds irrespective of the size of the contract or contracts covered by the bond. The Director of Revenue will, by application, accept bank letters of credit to fulfill the bonding requirements. Requests for authorization to accept bank letters of credit should be made by letter to the Director of Revenue. The bank issuing or confirming a letter of credit presumptively must be a bank authorized to do banking business within Delaware.
3. The contractor's bond shall be filed before construction commences on any contract upon which a bond is required pursuant to 30 Del. C. § 375, as outlined in Paragraphs 1 (a)-(c) above.

4. A non-resident contractor having a valid contract with the Delaware Department of Transportation. (DelDot) and having fulfilled the DelDot bonding requirements shall be deemed to have complied with the bonding requirements as outlined in Paragraphs 1 (a)-(c) above.
5. The civil penalty for failure or refusal to comply with this section is a fine of up to \$10,000 for each such occurrence.
6. Willful or knowing noncompliance with this section constitutes a crime punishable by a fine of up to \$3,000 and/or imprisonment of up to six (6) months.

B. Chapter 25 Requirements

1. Any person desiring to engage in business as either a contractor or subcontractor in the State of Delaware, whether such person is a resident or non-resident of Delaware, must obtain a license from the Division of Revenue. The licensing fee is \$75.00 per year (proratable the first year). This license will not be issued to any person, however, until the following conditions have been met:
 - (a) All Section 375 (30 Del. C. § 375) requirements have been met, including when appropriate, compliance with the bonding requirements discussed in Paragraph II. A. of this memorandum.
 - (b) The contractor complies with the contractors' license application requirements including documenting compliance with unemployment and workers' compensation laws as enforced by the Department of Labor and Industrial Accident Board. As part of these requirements, the contractor must file a Form UC-1 issued by the Department of Labor and furnish a clear photocopy of the first page of the contractors' worker compensation policy or proof of approved self-insurance. These forms are obtainable as part of the Contractors' Licensing Packet issued by the Division of Revenue. Contractors should submit completed forms to the Division of Revenue, which will forward these forms to the respective agencies.
 - (c) If the contractor has already met all unemployment insurance requirements at the time of applying for a Revenue license, the contractor must nonetheless re-file a form UC-1 with the Division of Revenue or submit a Certificate of Notice issued by the Division of Unemployment Insurance.

2. In the case of contracts in excess of \$50,000 which are competitively bid, the contractor or subcontractor shall have initiated the license application procedure with the Division of Revenue prior to, or in conjunction with, the submission of a bid on a contract, or in the case of a subcontractor, prior to the submission of a bid by the general contractor.
3. Every architect, professional engineer, contractor, or construction manager must file with the Division of Revenue a statement of the total value of any contract or subcontract entered into with a non-resident of the State of Delaware within ten (10) days of entering into such contract. This statement (Form 5060) must include the names and addresses of the contracting parties, along with their Federal Employer Identification or Social Security number (whichever is on their Division of Revenue business license), the date the contract was awarded and amount of the contract.
4. The civil penalty for failure to comply with the provisions of this section shall be a fine in the amount of up to \$10,000 for each such occurrence.
5. Willful or knowing failure to comply with the provisions of this section constitutes a crime punishable- by a fine of up to \$3,000 and/or imprisonment of up to six (6) months.

III. RELEASE OF BONDS

The Division of Revenue procedure to release a contractor bond is as follows:

After completion of a bonded contract, the contractor or subcontractor must notify the Division of Revenue in writing of completion and request cancellation of the bond. The Division of Revenue, upon receipt of the Bond Cancellation Request will take the following steps:

1. Examine Division of Revenue records to determine compliance with all state taxes and licensing fees. Accounts receivable records will also be checked for any outstanding balance due and owing the State of Delaware.
2. Contact the Department of Labor to determine compliance with all unemployment insurance requirements.
3. Upon determination that both Division of Revenue and Department of Labor requirements have been fulfilled, the Division of Revenue, in the case of a surety bond, will send a final release to both the surety company and the contractor or subcontractor acknowledging such compliance, and the bond will thereafter be released pursuant to the surety company's procedures.

4. If it is determined that the contractor or subcontractor has not complied with any State of Delaware obligations, the Division of Revenue will notify both the surety company and the contractor or subcontractor as to the nature and amount of the obligations due and owing to the State of Delaware.
5. Upon fulfillment of all outstanding State of Delaware obligations, the surety company and contractor or subcontractor will be so notified, and the bond will thereafter be released pursuant to the surety company's procedures.
6. In the case of a cash bond, the Division of Revenue will notify the contractor or subcontractor of either compliance or noncompliance with Delaware law. If noncompliance is found, the Division of Revenue will inform the contractor or subcontractor as to the type and extent of the outstanding obligation. Upon determination of the contractors' or subcontractors' compliance with all applicable laws and, following receipt of the Department of Labor's notice thereof, the cash bond will be released. Cash bonds will be released by mailing a State of Delaware check in, an appropriate amount to the contractors' or subcontractors' place of business upon completion of the required investigations.

IV. DEFINITIONS:

A. Definitions Relating to Contractors

1. "Contractor" includes every person engaged in the business of furnishing labor or both labor and materials in connection with all or any part of the construction, alteration, repairing, dismantling or demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains and every other type of structure as an improvement, alteration or development of real property; a person is a contractor whether he is a general contractor or a subcontractor, or whether he is a resident or a non-resident. A real estate developer is included within the definition of a contractor to the extent the developer's activities come within the above definition.
2. "Subcontractor" means any person, partnership, firm, corporation or other business association or entity which enters into a contract (oral or written) directly with a prime contractor or directly with another subcontractor, to perform labor or to perform labor and provide materials in connection with such labor, on a site of contract construction located in this State.
3. "Resident Contractor" or "Resident Subcontractor" includes any general contractor, prime contractor, construction manager, subcontractor or other type of construction contractor who regularly maintains a place of business in Delaware. Regularly maintaining a place of business in Delaware does not include site trailers or other facilities serving only one contract or related set of contracts.

If any such contractor entity is itself composed of more than one entity (as in a partnership or joint venture) the contractor entity shall itself be treated as a separate entity, which must comply with the provisions of 30 Del. C. §375, and §§2501-2503, to the extent they are otherwise applicable. If at least one of the constituent entities making up the contractor entity regularly maintains a place of business in this State, such contractor entity shall be construed to be a “resident” or “resident person” or “resident contractor” of this State. If none of such constituent entities regularly maintains a place of business in this State, such contractor entity shall be construed to be a “non-resident” and a “nonresident person”.

If any contractor is not composed of more than one constituent entity in a partnership or joint venture or some other legal relationship, and if such contractor regularly maintains a place of business in this State, such contractor shall be construed to be a “resident contractor.” This definition shall not be construed to mean that a post office box, site trailer, or similar temporary structure constitutes a “main office” for purposes of these sections. The statute is intended specifically to exclude such temporary structures or temporary offices or offices from the definition of “resident” or “resident contractor” or “resident subcontractor.” Thus, use of a post office box or temporary structure such as a site trailer does not constitute residency for purposes of either 30 Del. C. §375, or 30 Del. C. §§2501-2503, inclusive, as amended by H.B. 558, 65 Del. Laws Ch. 476.

4. **“Non-Resident Contractor” or “Non-Resident Subcontractor”**: is defined as a general contractor, prime contractor, construction manager, subcontractor or other type of construction contractor who is not a resident contractor (as “Resident Contractor” is defined by the preceding paragraph of this memorandum) or, one who does not regularly maintain a place of business in this State.

The specific intention of this definition is that anyone maintaining only a site trailer, other temporary structure or post office box within this State be classified for purposes of Title 30, Delaware Code, as a “non-resident contractor.” Such a non-resident, as well as any architect, professional engineer, contractor, or construction manager, is under specific duties pursuant to Title 30, Delaware Code, as explained throughout this memorandum.

5. **“Real Estate Developer”** involves the acquisition of land (raw or improved), the building of structures thereon, and the sale of the land with structure to customers.

B. Specific Documents Required

1. Resident and non-resident contractors alike must obtain and comply with:
 - (a) Contractor and subcontractor licensing requirements set forth in Title 30, Delaware Code, Chapter 25.
 - (b) Department of Labor Form UC-1 and applicable worker's compensation documents may be obtained in the licensing packet available from the Division of Revenue, which will forward these documents, to the respective agencies.
2. Non-residents must comply, in addition to the requirements set forth above, with the non-resident contractor bonding provisions of Title 30, Delaware Code, Chapter 3, as summarized in Paragraph II. A. of this memorandum.

C. Liability of Non-Resident Contractor or Subcontractor Employing Solely Non-Resident Personnel

1. Non-resident contractors or subcontractors employing solely non-resident personnel must comply with Title 30, Delaware Code, Chapters 3 and 25; as well as Chapter 11 (pertaining to withholding taxes). Additionally, every non-resident contractor or subcontractor employing resident or non-resident individuals at any construction site within the State must withhold Delaware State income taxes from any remuneration paid to such individuals. Delaware state withholding taxes must be withheld from such individuals' salaries regardless of their state of residence or if such individual has another state's income tax withheld from that salary.
2. However, non-resident contractors employing solely non-resident personnel are not required to obtain Delaware unemployment compensation insurance for such non-Delaware residents.
3. Any Delaware residents employed by a non-resident contractor or subcontractor must be covered by Delaware unemployment compensation insurance in compliance with Department of Labor specifications.

D. Mandatory Compliance With Both Gross Receipts and Licensing Provisions

Delaware law requires payment of both gross receipts taxes and license fees. Gross receipts tax of 65/100 (.0065) of the aggregate gross receipts paid to contractors for contracts performed within the State of Delaware less a monthly \$12,000 exclusion plus a 10% surtax minus a \$30 per month nonrefundable credit shall be payable monthly to the Division of Revenue on or before the 20th day of each month with respect to the aggregate gross receipts for the immediately preceding month, unless the contractor's taxable gross receipts in any month do not exceed \$7,500, in which case the tax is payable by calendar quarter. License fees of \$75 per year are also due and payable to the Division of Revenue pursuant to 30 Del. C. §2501.

Gross receipts taxes are not payable in lieu of license fees; nor are license fees assessed in lieu of gross receipts taxes. Both gross receipt taxes and license fees are mandated by law as separate obligations due and payable in and of themselves.

Title 30, Del. C., §2501(5), as amended, defines “gross receipts” as follows:

“Gross receipts’ includes all sums received by a contractor for any work done or material supplied in connection with any real property located in this State, but, does not include sums paid to subcontractors by the contractor; provided said subcontractor is subject to the provision of this Chapter with respect to these sums; and provided that a written agreement exists between the contractor and subcontractor stating the exact sums payable to said contractor. It (Emphasis added.)

In order to be able to deduct the amounts paid to subcontractors by the contractor from the gross receipts, Form 1280, Subcontractor Payments, must be completed and attached to the gross receipts tax form for verification.

Only amounts paid to persons subject to taxation as a **CONTRACTOR** may be deducted **REGARDLESS** of the contractual relationship under which the payments are required to be made. The person must be engaged- in business as a contractor as defined in Paragraph IV. A. 1. of this memorandum in order to be deducted as a subcontractor.

A partial listing of examples of amounts which a contractor may pay under a contract but CANNOT deduct as amounts paid to subcontractors, is noted below:

- Materials supplied **without** construction labor provided by the seller of the materials
- Delivery or transportation charges
- Equipment rentals including delivery and set-up costs

- Construction trailer rentals
- Building permits, zoning costs or any amount paid to any state, county, city or municipal government body
- Environmental impact studies
- Utility costs during construction Non-construction services such as:
 - Accounting
 - Architectural
 - Cleaning
 - Engineering
 - Exterminating
 - Horticultural
 - Inspections and/or testing related to workmanship or quality of materials/supplies.
 - Interior Design
 - Legal
 - Sanitation
 - Scaffolding
 - Security
 - Surveying
 - Trash Removal

V. REAL ESTATE DEVELOPERS

Persons engaging in real estate development as defined in Paragraph IV. 5. of this memorandum are contractors as to a portion of their business activities. In light of the difficulty of drawing a bright line between non-taxable development and taxable contractor activities, the Division of Revenue has determined that a tax based upon the gross proceeds from sales of real estate and any structures erected thereon less deductions according to the terms of Paragraphs V. 2. through 5. below accurately reflects the proper amount of gross receipts received by the developer for the portion of his business activities falling within the definition of “contractor.” The Division reserves the right, however, to assert, in litigation with any developer seeking to assert a tax liability based upon a lesser amount than indicated by this calculation, that Delaware statutory law provides for a tax that is, in fact, greater than the one provided under Paragraph V. of this memorandum.

1. The developer shall treat as gross proceeds, subject to gross receipts tax, gross proceeds received from the 'sale of real property with structures (commercial and/or residential) built thereon. Gross receipts shall not include gross proceeds received from the sale of real estate which has been improved by the developer as owner of the property, but upon which no structures have been built (i.e., see Rak v. Division of Revenue. Delaware Tax Appeal Board Docket #977, September 10, 1990).
2. The developer shall be entitled to deduct, in addition to the statutory monthly exclusion, at the time of sale and not before, from gross proceeds the developer's cost of the land and improvements thereto other than structures. In determining the cost of the land and improvements thereto other than structures, only the following costs may be included, and they must be allocated on a per lot basis:

- a. Cost of raw land;
- b. Site improvement costs, including but not limited to site clearing, landscaping, erection/construction of open space/recreational facilities and installation of street, sanitary and storm sewers, water lines, power lines and other utilities;
- c. Engineering costs associated with rezoning (if applicable) and subdivision of the site
- d. Legal costs/fees incurred in connection with the rezoning (if applicable) and subdivision of the site;
- e. Fees involved in obtaining final site plans and permit;
- f. Interest and other carrying costs associated with the acquisition and development of the site, regardless of whether interest has been expended or capitalized for federal income tax purposes (to be allocated on a per-lot basis).

Payments to subcontractors deducted under Paragraph V. 2. may not be deducted again under Paragraph V. 3.

3. In determining the gross receipts tax, the developer may also deduct from gross proceeds, at the time of the sale and not before, miscellaneous expenses, so as to equate the gross receipts tax treatment of a real estate developer with that of a contractor, including:
 - a. The developer's share of realty transfer taxes;
 - b. Real estate commissions/fees' (maximum of 2 % of gross proceeds);
 - c. Sales concessions to buyers (i.e., points, settlement help, etc.);
 - d. Other costs associated with a specific subdivision (other than general administrative and overhead) and
 - e. Decorating and space planning costs associated with model homes.

Expenses deducted under this Section must be allocated on a per lot basis.

4. In lieu of deducting the actual cost of land and improvements (Paragraph V. 2.) and miscellaneous expenses (paragraph V. 3.), the developer may, at its sole option, elect to use an assumed cost of land improvements and miscellaneous expenses equal to thirty percent (30%) of the gross proceeds from the sale of the property.

An election under this section shall be irrevocable for a period of one year from the date of such election and shall apply to all development activities of such contractor during such one-year period. Subsequent elections may be made on an annual basis on January 1 of each year. Deductions under this section can only be made at the time of the sale and not before.

5. In addition, in determining the gross receipts tax, the developer will be entitled to deduct from gross proceeds all payments made to subcontractors as provided in 30 Del. C. Ch. 25 with respect to the real property being sold, to the extent such subcontractor payments are not of the type specified under subparagraph (2) or (3) of this paragraph.

VI. EFFECTIVE DATE

The provisions of this Technical Information Memorandum are applicable to all contracts executed after August 19, 1993, except for Section V, which is effective for all gross receipts received after June 30, 1993.

VII. TECHNICAL INFORMATION MEMORANDUM NUMBERS 86-10 (December 29, 1986) and 90-1 (March 1,1990)

Technical Information Memorandums 86-10 (December 29,1986) and 90-1 (March 1,1990) are hereby incorporated by reference, merged, and supplemented. To the extent of any inconsistency, this Memorandum controls.

VII. CONTACT PERSONS FOR ADDITIONAL INFORMATION

<u>Division of Revenue:</u>	David M. Smith Senior Tax Examiner (302) 577-2554
<u>Department of Labor:</u>	Mary Gryzik Status Unit Supervisor (302) 368-6745
<u>Industrial Accident Board:</u>	Doris Chapman Production Supervisor (302) 577-2884



William M. Remington
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