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CONTRACT — SPECIFICATIONS FOR PUBLIC CONTRACT PROVIDED PRICE SHALL BE INCREASED OR DECREASED SHOULD THERE BE CORRESPONDING INCREASE OR DECREASE AFTER CONTRACT HAD BEEN LET, IN EVENT FREIGHT RATES ALTERED — SUBSEQUENTLY INTERNAL REVENUE CODE SECTION 3475 WAS ENACTED — TRANSPORTATION COMPANY REQUIRED TO COLLECT FROM CUSTOMER, TAX OF THREE PER CENT OF COST OF TRANSPORTATION — SUCH ADDITIONAL TAX NOT INCREASE OR DECREASE IN PUBLIC FREIGHT RATES OF COMPANY — DOES NOT AUTHORIZE INCREASE OR DECREASE IN COMPENSATION PAYABLE UNDER TERMS OF CONTRACT.

## SYLLABUS:

When it is provided in the specifications for a public contract that the contract price shall be increased or decreased in the event that after the contract has been let there shall be a corresponding increase or decrease in the event that the freight rates in effect at the time of the entering into the contract shall be altered and subsequently thereto Section 3475 of the Internal Revenue Code was enacted requiring the transportation company to collect from the person engaging its services a tax of three per cent of the cost of transportation, such additional tax constitutes neither an increase nor decrease in the public freight rates of the company and, therefore, does not authorize either an increase or decrease in the compensation payable under the terms of the contract.

Columbus, Ohio, April 6, 1944

Hon. H. G. Sours, Director, Department of Highways  
Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion reading as follows:

“In making final settlement with contractors who deal with the Department of Highways, and to continue current operations, it is our desire that you advise us formally concerning your interpretation of the following:

The department, on the 29th day of December, 1941, added the following language to its specifications — specifically to the proposal. It is —

‘FREIGHT RATES —

The bids submitted under this proposal are acknowledged by the State to be based upon the published railroad freight rates in effect on the date of taking bids, or theretofore officially promulgated to take effect at a fixed date thereafter. Should there be any subsequent changes in such rates, adjustment in the contract price will be made upon the basis of properly authenticated information, when final settlement is made by the State with the successful bidder. Should there be an increase in rates, the State will, in addition to the compensation otherwise agreed upon, pay the contractor the cost to him of such increase. Should there be a reduction in rates, there will be deducted from the compensation otherwise payable to the contractor, the amount of the saving to him resulting from such reduction. The provisions of this paragraph shall apply only to materials incorporated in the work or wholly consumed in its con-

struction, and shall not apply to tools or equipment, The Director shall have full authority to prescribe the substance and form of proof which he may require as a basis for computing such additions or deductions in the compensation.'

Subsequent thereto the United States Government imposed a tax of 3% on the transportation of property (imposed by the 1942 Revenue Act).

In order to determine our duties and responsibilities to contractors in the payments of final estimates, and whether or not certain deductions may be made, the answers to the following questions will greatly benefit the department.

1. Does the language, added to the proposal, hereinbefore set forth, include the transportation tax?

2. Is the transportation tax to be regarded as a part of the freight rate?"

In order to answer your inquiry it is necessary to refer to what is designated in your letter as a tax of three per cent on the transportation of property imposed by the United States Government. Such tax is levied by Section 3475 of the Internal Revenue Code, as amended by Section 1 of Pub. No. 180, on November 4, 1943, sub-paragraphs (a) and (c) of which read:

"(a) There shall be imposed upon the amount paid within the United State after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or aid from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation."

"(c) The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiv-

ing any payment specified in subsection (a) shall collect the amount of the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the preceding month, and pay the taxes so collected to the collector in the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe."

In the specifications entitled "FREIGHT RATES" set forth in your inquiry, you have provided that the adjustment in the purchase price may be increased or decreased in the event that the freight rates in effect at the time of taking bids have thereafter been modified; that if there is an increase in such rates the contract price will be increased in like amount but if there be a reduction in such rates there shall be a corresponding decrease in the contract price.

An examination of the language contained in Section 3475 of the Internal Revenue Code will show that the tax is imposed against the amount paid for the transportation of property, or, in other words, is a tax imposed upon what is referred to in your request as the "FREIGHT RATES". Such tax is imposed upon the person required by the contract of transportation to pay the transportation costs and collected by the first transporter and remitted by such transporter to the Federal Government.

It will be observed from the language of the section, as above quoted, that the tax is not levied upon the transporter. He is made the agent of the Federal Government to collect the tax from the person engaging his services as transporter. If the tax were levied upon the transportation company and thereafter included in its transportation charges as a part of the cost of transportation it would appear that such charge would be a part of the freight rate, as defined in your regulation. However, since Section 3475 of the Internal Revenue Code specifically requires the transportation company to collect an additional sum, in addition to the freight rate, from the person engaging the transportation facilities it is not as a part of the freight rates, but in addition thereto. It would, therefore, appear that such charge is not a part of the freight rate, as such term is used in the specifications promulgated by you on December 29, 1941.

Specifically answering your inquiry, it is my opinion that when it is provided in the specifications for a public contract that the contract price shall be increased or decreased in the event that after the contract has been let there shall be a corresponding increase or decrease in the event that the freight rates in effect at the time of the entering into the contract shall be altered and subsequently thereto Section 3475 of the Internal Revenue Code was enacted requiring the transportation company to collect from the person engaging its services a tax of three per cent of the cost of transportation, such additional tax constitutes neither an increase nor decrease in the public freight rates of the company and, therefore, does not authorize either an increase or decrease in the compensation payable under the terms of the contract.

Respectfully,

THOMAS J. HERBERT  
Attorney General