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Lewis M. Horowitz
horowitzl@lanepowell.com

Eric J. Kodesch
kodesche@lanepowell.com

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New Oregon Gross Receipts Tax Presents Special Challenges for Construction Projects Located in Oregon

Tax Legal Update

Oregon has enacted a *new gross receipts tax* (the “Oregon CAT”), largely based on the Ohio commercial activity tax (“Ohio CAT”), but with significant differences. We issued a [legal update](#) with a detailed summary of the Oregon CAT and its effect on businesses with Oregon-sourced receipts — for the construction industry that includes projects located in Oregon. Generally, the Oregon CAT *imposes a 0.57% tax* on “taxable commercial activity” in excess of \$1 million, with a subtraction for 35% of the greater of (a) “cost inputs” or (b) “labor costs,” apportioned to Oregon. Taxable commercial activity is generally defined as Oregon-source gross receipts. The Oregon CAT goes into effect on January 1, 2020.

The Oregon CAT could prove especially burdensome for the construction industry, particularly for general contractors and design professionals, because a substantial portion of gross revenue received often is dedicated to the payment of subcontractors, suppliers and subconsultants (who each will again pay the Oregon CAT on their Oregon-source gross receipts). Further, the statute *does not provide transition relief* for contracts entered into before the Oregon CAT could be factored into bids and contract prices.

Potential Exclusion

The Oregon CAT excludes from gross receipts, “[p]roperty, money and other amounts *received or acquired by an agent on behalf of another in excess of the agent’s commission, fee or other remuneration.*” The scope of this exclusion has not been defined for purposes of the Oregon CAT and the Oregon Department of Revenue (ODOR) may provide guidance about the exclusion.

In Ohio, an identical exclusion *may* apply to amounts received by a general contractor or design professional and paid to a subcontractor, supplier or subconsultant, depending on the contractual relationships between the owner, contractor/design professional, and subcontractor/supplier/subconsultant. Specifically, the Ohio Department of Revenue has issued administrative rules generally indicating that:

- A contractor’s gross receipts *include amounts the contractor receives under a typical lump sum (including fixed price or GMP) contract* in which the contractor bears the risks of the subcontractor/supplier costs.
- A contractor’s gross receipts *exclude amounts the contractor receives under a cost-plus contract*, other than the amounts above cost (i.e., the plus factor).

The regulations interpreting and implementing the Ohio CAT *do not apply in Oregon*. Nonetheless, it seems logical that the ODOR *might* consider the Ohio rules for guidance, at least initially. Accordingly, the Ohio lump sum contract versus cost-plus contract distinction could serve as a foundation for Oregon regulations when developed. ODOR will need to address these and other questions, such as whether a lump sum contract could make the contractor the owner’s agent with respect to the amount paid to subcontractors or suppliers. Of course it would be preferable to avoid this problem completely through a change in the law.

The Oregon legislature is already considering ways to address some of the problems created by, and objections to, the Oregon CAT. Late last week draft proposed amendments were submitted to [HB 2164-1](#). This bill will be the vehicle this session for “technical corrections” Payments to subcontractors are addressed favorably in Section 1 of the proposed amendment, via a proposed revision to Section 58(1)(b) of the Act. Specifically, proposed subsection (UU)(ii) on page 8 (italicized below) would amend the definition of “commercial activity” subject to the Oregon tax to exclude:

“[(QQ)] (UU) Revenue received by a business entity that is mandated by contract or subcontract to be distributed to another person or entity if the revenue constitutes:

(i) [certain commissions paid to commission sales contractors such as split real estate commissions, etc., as described above]. . .; and

(ii) *Subcontracting payments under a contract or subcontract entered into by a business entity to provide services, labor or materials in connection with the actual or proposed design, construction, remodeling, remediation or repair of improvements on real property or the location of the boundaries of real property.*”

Sections 7-10 would be of particular interest if any of your contracts qualify.

The Joint Committee on Tax Expenditures is scheduled to meet on June 14, 2019 at 8:30 a.m. to consider the proposed amendment. You should discuss this opportunity with your government-relations team, lawyers or lobbyists to ensure that any concerns you have with the Oregon CAT are timely addressed with legislative leadership, or at least to express support for the proposed language quoted above. *The technical corrections bill is likely to move very quickly.*

In the meantime, anyone involved in the construction industry should review their existing contracts to determine who may be obligated to pay for cost increases as a result of this new tax.