TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

45, C-5226

September 18, 1940

OPINION NO. 1740

UNITED STATES; CONTRACTS; CONSTRUCTION; COST PLUS CONTRACTS:

After examination of the United States naval air base contract of August 5, 1939, NOy-3550, and the law applicable thereto, it is the opinion of the Attorney General that the Contractors are true independent contractors, and are not acting as agents of the United States in purchasing materials for the contract projects.

TAXATION; GROSS INCOME TAX; FEDERAL CONTRACTORS:

In view of the fact that the Contractors under the United States naval air base contract of August 5, 1939, NOy-3550 are not agents of the United States, supply houses furnishing them materials are liable to gross income tax at the wholesale rate of ¼ of 1%, and the Contractors are liable to tax at the Contractors' rate of l½% upon the amount received from the United States for the projects, including materials and labor and the Contractor's fixed-fee.

Honorable Wm. Borthwick
Tax Commissioner
Territory of Hawaii
Honolulu, T. H.

Dear Sir:

In your letter of April 1, 1940, you request our opinion as to the imposition of the gross income tax imposed

by Act 141 (Ser. A-44) L. 1935 in connection with the naval air base projects authorized by the Act of April 25, 1939, Pub. No. 43, 76th Congress, 1st Sess. c. 87. This involves the taxing jurisdiction of the Territory, which is the subject of an opinion of even date. The other questions involved are as follows:

1. Are local merchants and business firms liable to gross income tax in connection with the sale of materials to be used for such projects under the conditions hereinafter set forth?

2. Are Hawaiian Dredging Company, Limited, Raymond Concrete Pile Company and Turner Construction Company liable for gross income tax measured by the payments received by them from the United States Government representing (a) the fixed-fee of $898,000.00, as paid to them under the contract from time to time, as hereinafter set forth, or (b) the total sums paid to them by the United States under the contract?

Said Act of April 25, 1939, Pub. No. 43, 76th Congress, 1st Sess. 53 Stat. 590, c. 87 provides in section 4 as follows:

> "Sec. 4 (a) To enable the Secretary of the Navy to accomplish without delay or excessive cost those public-works projects authorized by this Act to be located outside the continental limits of the United States, he is hereby authorized to enter into contracts upon a cost-plus-a-fixed-fee basis after such negotiations as he may authorize and approve and without

advertising for proposals with reference thereto. Approval by the President shall be necessary to the validity of any contract entered into under authority of this section. The fixed fee to be paid the contractor as a result of any contract entered into under authority of this section shall be determined at or before the time such contract is made, and shall be set forth in such contract. Such fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary of the Navy. Changes in the amount of the fee shall be made only upon material changes in the scope of the work concerned as determined by the Secretary of the Navy whose determination shall be conclusive.

* * *

"(c) In any project the contract for which is negotiated under authority of this section, the Secretary of the Navy may waive the requirement of a performance and a payment bond and may accept materials required for any such project at such place or places as he may deem necessary to minimize insurance costs."

The contract with which we are concerned was entered into on August 5, 1939 between the United States Government, with the approval of the President and the Secretary of the Navy, and Hawaiian Dredging Company, Limited, Raymond Concrete Pile Company and Turner Construction Company, the latter two being foreign corporations and the first an Hawaiian corporation. The Act provided that the contract might be entered into with two or more firms jointly and the three companies above named constitute a joint adventure for the performance of this contract.

The contract provides in Article 1 that the Govern-

ment will designate an officer of the Civil Engineer Corps, United States Navy, as Officer in Charge who, under the direction of the Government's contracting officer, shall have the right to attend meetings of the boards of the contracting companies for the purpose of submitting propositions and questions and receiving information with the intent of safeguarding the interests of the United States, promoting beneficial relationships "and making decisions within the scope of his delegated authority and not in conflict with any provision of this contract." Provision is further made for resident Officers in Charge who shall be under the direction of the Officer in Charge and shall have charge locally in the field.

Article 3 provides: "The Contractors shall construct or otherwise accomplish the completion of the following enumerated public works projects at the locations indicated * * * the approximate estimated cost of each being stated to indicate generally its degree of magnitude and not as a limit of cost." the various projects embraced in the contract are then set out.

Article 4 provides that the enumerated projects "as and when accomplished shall conform to the following enumerated plans which will be furnished by the Government."

Article 5 requires the contractors to furnish supplementary plans and specifications determined by the Government to be necessary, subject to approval by the Contracting Officer.

Article 6 requires that all work under the contract be completed within thirty-six months.

Article 7 provides that the Contractors shall provide all plant and equipment required for the accomplishment of the work under this contract, but equipment in excess of a stated value shall not be purchased or rented except after prior approval. Provision is made as to items of costs in connection with the equipment. It is further provided that the Contracting Officer may take possession at any place he may elect of any item of plant or equipment for the purpose of transporting it to the site and may subsequently return any such item to the possession of the Contractors for use on the work. Article 7 further provides that: "the Contractors agree to use such items of plant and equipment and such shop, storage, transportation, communication, and other facilities owned by the Government as may be made available to them and as directed by the Officer in Charge or a Resident Officer in Charge." It is further provided: "The title to each item of plant and equipment purchased for the Government passes to the Government when acceptance of title is authorized or approved by the Con-

tracting Officer or a duly authorized representative."

Article 9 requires the Contractors to furnish all services and labor for the accomplishment of the work "except such as may be furnished by the Government." Detailed provisions are made as to items of cost in connection with services and labor, and it is further provided that the Government may require the Contractors to dismiss from the work any employee who is incompetent, insubordinate or otherwise objectionable. Provision is made that the Government may, in the discretion of the Contracting Officer, "provide transportation facilities for personnel employed by the Contractors."

We now come to the portion of the contract which is headed "Materials." Article 10 provides that: "All materials required for the accomplishment of the work under this contract shall be provided by the Contractors, including materials, articles, and supplies required for temporary use and such as may be consumed in use." No order in excess of five hundred dollars may be placed without prior approval of the Government. It is stated that sub-contractors, material men, or suppliers shall use only United States goods with such exceptions as may be allowed by the Secretary of the Navy under Section 10b, Title 41, U.S.C. It further is provided that: "The Contracting Officer, may, in his discretion and on behalf of the Government, take possession at any place he may elect of any material pro-

cured by the Contractors for the purpose of transporting it to the site * * * and may subsequently return such material to the possession of the Contractors for use * * * The title to each item of materials, articles, and supplies passes to the Government when acceptance of title is duly authorized or approved by the Contracting Officer."

Article 11 requires that the materials, equipment and workmanship be of the best grade and contains provisions for the furnishing of information to the Contracting Officer for his approval as to materials and equipment to be incorporated in the work.

Article 12 covers the matter of inspections and provides: "The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material, and the contractors shall promptly segregate and remove the same from the premises." If, however, the work is found to be defective after it has already been completed the contractors are to be allowed their costs in connection with replacement thereof, unless guilty of gross negligence or fraud. Materials are to be inspected at the place of manufacture or shipment whenever the quantity justifies it, otherwise at the site, and it is further provided that in-

spection and acceptance shall be final, with enumerated exceptions.

Article 14 provides for termination of the contract under specified conditions and in such event it is agreed that the Government shall assume and become liable for all obligations, commitments and claims that the Contractors have undertaken in good faith, but it is further provided that: "The obligation of the Government to make any of the payments required by this Article shall be subject to reasonable withholding for any unsettled claims which the Government may have against the Contractors."

Article 18 requires compliance with sections 276b and 276c, Title 40, U.S.C. relating to the non-rebate of wages.

Articles 23 and 25 contain provisions as to the furnishing of information and keeping of records with right of examination by the Contracting Officer or Officer in Charge.

Article 27 is headed "Compensation" and provides as follows: "The Government hereby covenants, promises, and agrees to and with the Contractors, in consideration of the covenants and agreements on the part of the (contractors, herein contained, being strictly performed and kept by the Contractors, as specified herein, to pay or cause to be paid to the Contractors the sum of the actual net cost to the Contractors of the materials actually furnished and the services

and labor actually performed under the terms of this contract, plus a fixed-fee amounting to $898,000.00." This article also defines the term "actual net cost" and among the items includes: paragraph (a), the actual net cost to the Contractors of all items of plant and equipment purchased by them for the Government with the approval of the Contracting Officer and the amount of rental for plant and equipment owned by the Contractors; paragraph (d), the actual net cost to the Contractors "of all materials furnished by them under the provisions of Article 10 hereof", including among other items, insurance; paragraph (o), "the net amount of any U.S. Social Security taxes and any State or local taxes, fees or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organizations, materials, or personnel under any applicable valid law or regulations issued by competent authority."

Article 28 covers payments to the Contractors and contains a provision that the Contracting Officer shall have the right to defer approval of payments at any time in an amount not to exceed ten per centum of all payments previously made on account of the Contractors' fee.

Article 29 contains a finding: "that the fee to be paid under the terms of this contract does not exceed 10 per-centum of the estimated cost of the contract exclusive of the fee."

It appears that it has been the practice of the Officer in Charge to accept title to all items of materials and equipment purchased for the purposes of the Contract at the point of manufacture or purchase, wherever possible. Such materials and equipment are then shipped on Government bills of lading or by Government transportation. In making purchases locally the Contractors follow the practice of securing prices from two or three firms. The firm selected to receive the order receives a written purchase order within a day or two upon which there is stamped a statement, the form of which up to approximately April 1, 1940, was as follows:

> "The Government of the United States hereby takes title to the materials included in this order. Upon their delivery to the custody of Hawaiian Dredging Company, Limited, Raymond Concrete Pile Company and Turner Construction Company, Contractors, NOy-3550 Navy Yard, Pearl Harbor, T.H., state or local sales taxes are not chargeable. Invoice for payment shall be submitted to the foregoing Contractors at the above address for reimbursement by the Government."

Following April 1, 1940 the form of the stamp was as follows:

> "The materials covered by this order are for the exclusive use of the United States and title to the same vests in the United States upon their delivery to the custody of the Hawaiian Dredging Company, Raymond Concrete Pile Company, and Turner Construction Company, Contractors, Contract NOy-3550, Navy Yard, Pearl Harbor. T. H. State and local taxes are not applicable to this purchase for the sole account of the United States. Invoice for payment shall be submitted to the said Contractors to be paid and charged to the account of the United States."

The application of the gross income tax to the firms selling materials to the Contractors in the manner above stated, and to the Contractors themselves, depends upon the true nature of the transactions involved. There can be no doubt but what the contract which has been outlined above is nothing more or less than a construction contract. The Contractors undertook to construct or otherwise accomplish certain enumerated projects and the payments due them under the contract are agreed to be made in consideration of strict performance of their covenants and agreements. The provisions contained in the contract re government supervision, approval and examination of records are only such as are proper to keep down the costs and assure prompt and faithful performance of the work; there is nothing which could lead to the conclusion that the Government is itself performing the work and that the Contractors are nottrue contractors but mere agents. It is true that, with reference to the equipment, Article 7 contemplates that the Government may furnish its own equipment and that the Contractors may purchase equipment for the Government. It is also provided in Article 9 that the Government may furnish services and labor, and in Article 9 that the Government may furnish transportation facilities. There is no provision whatsoever that the Government may furnish materials or that the Contractors may purchase materials acting as agents for the Government.

The provisions of the contract as to the acceptance of title of equipment and materials when approved by the Contracting Officer are authorized by paragraph 4 (c) of the enabling act, Pub. No. 43, 76th Congress, 1st Sess. supra, which provides that the Secretary of the Navy "may accept materials required for any such project at such place or places as he may deem necessary to minimize insurance costs." (Italics added) It was intended that the Government might accept title before the time it ordinarily would do so in order that the Government might have the risk of loss, to minimize insurance costs which otherwise would accrue through insurance carried by the Contractors and chargeable to the Government under the terms of the contract. The acceptance of title to minimize insurance costs signifies nothing as to whether the title passes from the firms supplying the materials and equipment to the Contractors and thence to the Government or whether on the other hand, as claimed, there is a direct sale from the said firms to the Government through the medium of the Contractors acting as mere purchasing agents.

In addition to the provisions of the contract already cited the following provisions are in point and indicate that the Contractors are acting as true contractors and not as purchasing agents in furnishing the materials.

The provisions of Article 12 as to the rejection of defective material and workmanship and as to the correction and replacement thereof are not in keeping with the theory of an agency. Under the agency theory the three companies, acting as agents, would be responsible merely for neglect and would not be obliged to carry the burden of replacing the materials should they prove unacceptable. The contract is so framed as to make it clear that the Contractors must look to the manufacturers for relief as to any materials rejected, and that the United States has no relations with the manufacturers or supply firms and no interest in the question as to whether or not the supply houses can be obliged to take back the rejected materials.

The contract requires compliance with such statutory provisions as section 10b, Title 41, U.S.C., which relates to contracts for public works, and the contract does not refer to section 10a of said Title 41, U.S.C. which contains provisions similar to those contained in section 10b in the situation where the United States is acquiring the materials other than under a construction contract; nor is any reference made to section 35 of Title 41, U.S.C. which relates to the furnishing of "materials, supplies, articles, and equipment in any amount exceeding ten thousand dollars." No provision is made to protect the United States in the matter of liability under Compensation Act, chapter 15, Title 5, U.S.C.,

which would apply if the Government were itself doing the work with the Contractors as mere agents, and, on the other hand, it is evidently contemplated that the Contractors will comply with the local Workmen's Compensation Law, provision being made for reimbursement to them of "compensation and employers liability insurance," Article 27 (c). It further is provided by Article 16 that the Contractors shall secure all necessary permits and licenses and this provision is worded so as to include local permits and licenses as well as Federal, this again being inconsistent with the agency theory.

Most important of all the contract specifically provides for the payment to the Contractors, as part of the actual net cost, of the net amount of taxes which the Contractor may be required to pay on or for any plant, equipment, process, organization, materials or personnel under any applicable valid law, also United States Social Security taxes. Such provisions would not have been made had it been contemplated that the Contractors were mere agents of the United States who were to act as such agents in purchasing materials for the contract jobs.

The construction of the contract as one providing for a true construction contract with independent contractors and not for the employment of contractors as agents is in accordance with the usual construction put upon cost plus contracts when a govern-

ment is involved. J.B. McCrary Engineering Co. v. White Coal Power Co., 35 F. (2d) C.C.A. 4th, 142; Baumann v. City of West Allis, 204 N.W. (Wis.) 907. When a government enters into a contract the contract is strictly limited by the governing statutes and it is impossible to construe the contract as an agency contract in the absence of established procedure authorizing the employment of the contractor as a government agent or employee as distinguished from an independent contractor.

By what authority does the Officer in Charge state, as is stated in a letter to the Tax Commissioner, dated November 14, 1939, that the Contractors act as the Government's agents in making the purchase? The mere authority of the Officer in Charge to accept title to the materials at the earliest possible date to save insurance does not constitute authority to employ the Contractors as purchasing agents for the United States. In the first place, as already noted, the contract did not provide that the Contractors should act as such purchasing agents nor that the Government should buy the materials and furnish them for the contract projects. Instead the contract provided that the Contractors should furnish the materials Inasmuch as the statute required the contract to be approved by the President, the contract cannot have been amended without the President's approval. Moreover, the distinction made between mere acceptance of title and the vesting of authority in the

Contractors to act as purchasing agents is not a mere technical distinction. Although the rubber stamp provided to be placed on the purchase orders states that invoices for payment shall be submitted to the Contractors and evidently contemplates that the supply house shall look to the Contractors alone for their payment the theory that the Contractors are purchasing agents puts it into their power to create charges against the United States (as undisclosed principal) by neglecting to use this rubber stamp. An agreement between a principal and his agent that the agent alone shall be liable upon contracts with third parties is not sufficient to relieve the principal of liability where the agent does not follow instructions as to the form of contract to be made by him. Restatement of the Law of Agency, sec. 189, comment "a"; Collentine v. Johnson, 202 N.W. (Iowa). 535, 538; Perth Amboy Mfg. Co. v. Condit and Bowles, 21 N.J. 661, 662, 664. No statutory authority exists by which it may be placed in the power of these Contractors to pledge the credit of the United States, and such direct liability would interfere with the right of the United States to withhold payments to the Contractors as provided in Article 14 (b) (6) and Article 28 of the Contract, for the protection of the Government against unsatisfactory performance.

The theory that the Contractors are purchasing agents for the United States not only is without support in the contract or United States statutes but also is contrary to the provisions of the United States statutes requiring purchases of materials from the lowest bidder after advertisement of proposals: Section 5, Title 41, U.S.C. Sections 561 and 571, Title 34, U.S.C. To the effect that section 5 of Title 41, U.S.C., formerly section 3709, Revised Statutes, applies to the navy, see 21 Op. Atty. Gen. 182, 184; 30 Op. Atty. Gen. 381. I understand that the Contractors make purchases without public advertisement regardless of amount. The mere solicitation of proposals by the Contractors is not the advertising required by statute. 17 Comp. Gen. 427, 431, citing 14 Comp. Gen. 364.

The procedure followed with respect to these purchases should be contrasted with the matter involved in OP. Let. Atty. Gen. (April 22, 1940) L.F. 46, No. 511. It there appeared that the three companies involved in this joint adventure are furnished fuel oil, diesel oil and gasoline from navy supplies under navy contracts. The fuel oil and diesel oil are delivered from the fuel depot at Pearl Harbor. The gasoline is delivered to the Contractors' trucks from commercial distributors in Honolulu who have the regular navy contract at the time for the sale of gasoline. These

distributors bill the gasoline to the navy and collect from the navy. In the instance cited, therefore, the purchase was made by the navy through regular naval officers acting in the usual channels, and constituted a bona fide government contract of purchase, the navy, however, delivering a part of its supplies or causing part of its supplies to be delivered to the Contractors. The purchases involved in this opinion are not of that type. We adhere to our former opinion that no tax applies to sale of fuel in the manner above stated but we are of the opinion that the purchases which are the subject of this opinion are purchases made by the Contractors under the obligation to furnish materials to the United States and that they are not purchasing agents for the United States Government.

The contention that the United States is furnishing all of the materials and equipment and that the Contractors are merely purchasing agents entirely overlooks the provision of the statute and contract as to the Contractors' fixed-fee. The statute provides that such fee shall not exceed 10 per centum of the "estimated cost of the contract." The fee has been estimated at $898,000.00 upon the finding that this does not exceed 10 per centum of the estimated cost of the contract. This is in accordance with the theory of the contract that the materials are being furnished by the contractors as part .

of the contract. If, however, the United States is furnishing the materials, having bought them direct from the supply houses through the medium of the Contractors as mere purchasing agents, it is evident that such materials would not be part of the cost of the contract any more than any United States facilities furnished to the Contractors. The fee of $898,000.00 therefore would be far in excess of that permitted by the statute.

If the matter were at all doubtful, the interpretation put upon it by Congress would have considerable weight. In enacting Public No. 63, 76th Congress, 3d Sess. c. 375, "An Act to authorize the construction or acquisition of naval aircraft, the construction of certain public works, and for other purposes," Congress provided, in Section 4, that: "The provisions of Section 4 of the Act approved April 25, 1939 (53 Stat. 590, 592), shall be applicable to all facilities authorized by this Act, including facilities located within the continental limits of the United States: Provided, That the fixed fee to be paid the contractor as a result of any contract entered into under the authority contained herein shall not exceed 6 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary of the Navy." Congress thus incorporated in this Act the statutory provision we are now considering. Said Public No. 63 was H. R. 9848, which as originally introduced, contained the following at the end of Section 4: "Provided,

further. That all contractors who enter into contracts authorized by this section shall be held to be agents of the United States for the purposes of such contracts." The House Committee on Naval Affairs recommended that this provision be struck out (Report No. 2267, Congressional Record, vol. 86, p 10267) and the bill was passed without this provision. Likewise, in enacting Public No. 588, 76th Congress, 3d Sess. c. 313, "An Act making appropriations for the Navy Department and the naval service for the fiscal year ending June 30, 1941, and for other purposes," Congress provided in connection with the appropriation for the Bureau of Yards and Docks, as follows: "The Provisions of section 4 of the Act approved April 5, 1939 (53 Stat. 590-592), shall be applicable to all public works and public utilities projects mentioned in this Act regardless of location." Said Public No. 588 was H. R. 8438 which, as it came from the Senate, contained Amendment No. 120, as follows: "The provisions of section 4 of the Act approved April 25, 1939 (53 Stat. 590-592) shall be applicable to all public-works and public-utilities projects mentioned in this Act: Provided, That all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purposes of such contracts

and all purchases under such contracts shall be exempt from Federal, State, and local taxes." Congressional Record, vol. 86. p. 11401. It was moved in the House that the House concur in Senate amendment No. 120 with a further amendment under which the proviso would have read: "Provided, That all purchases under contracts entered into under the authority contained in this paragraph shall be exempt from Federal, State, and local taxes, and for the purposes of such purchases the contractors shall be deemed to be agents of the United States." Congressional Record, vol. 86, p. 11401. This motion,however, was amended in the House so as to strike out the proviso altogether. Congressional Record, vol. 86, pp. 11402-11404. The clause incorporating Section 4 of the Act of April 25, 1939 was sent by the House to the Senate with the proviso eliminated, and accepted by the Senate in that form. Congressional Record, vol. 86, p. 11675. It thus appears that Congress, on these two separate occasions, emphatically rejected the interpretation now contended for.

Upon the theory which we have adopted that this is a true construction contract and that materials are being purchased by the Contractors in order to fulfill their contract, but not as purchasing agents of the United States, the gross income tax applies to the sales to the Contractors at the wholesale rate of ¼ of 1% (instead of 1½% due if the joint adventure were not taxable as contractors); and the tax applies to the amount received by the Contractors from the United States for the projects,

including materials and labor and the fixed-fee, at the contractors' rate of l½%. That the gross income tax must be paid by Federal contractors was stated in Op. Atty. Gen. (1939) No. 1704, which relies upon James v. Dravo Contracting Company, 302 U.S. 134. It should be noted that the Supreme Court of the United States in that case stated that even upon the supposition of increase of costs to the Government on account of the gross receipts tax there involved, the tax was valid. There is nothing in the opinion which suggests that a cost plus contract would lead to a result different from a contract at a lump sum price. On the contrary, the Court takes pains to state with regard to the cases such as Panhandle Oil Co. v. Miss. 277 U.S. 218, which involve taxes on sales to the United States, that "these cases have been distinguished and must be deemed to be limited to their particular facts." The disposition of the Court therefore was against any extension of such cases.

That the Dravo case applies to a cost plus contract seems to be admitted by the United States by Article 27 (0) of the contract, wherein provision is made for payment to the Contractors of any taxes that they may be required to pay on account of the contract "on or for any plant, equipment, process, organization, materials or personnel under any applicable valid law." This plainly contemplates that the Contractors may be subjected to tax on account of the materials and labor furnished

under the contract, and the United States undertakes to reimburse the Contractors therefor. Reimbursement for taxes to contractors working on a cost plus basis is in no way unique. 16 Comp.Gen. 672. The fact that reimbursement by the Government to the purchaser is contemplated does not stamp the transaction as a Government purchase. Op. Let. Atty. Gen. (Dec. 11, 1935) L.F. 46, NO. 1527.

Insofar as the gross income tax applies to the fixed-fee the United States of course has no interest in that matter directly or indirectly and the gross income tax applies beyond question. Even Federal employees are not exempt from tax under the present state of the law. Graves v. N.Y. ex rel O'Keefe, 306 U.S. 466.

I understand that the Bureau of Internal Revenue has ruled that sales to the Contractors under Contract NOy-3550 are not subject to the taxes imposed by Chapter 29 of the Internal Revenue Code. Section 3442, I.R.C. provides that no tax under that chapter shall be imposed with respect to the sale of any article “for the exclusive use of the United States.” The ruling that such sales were exempt from tax under Chapter 29, I.R.C., was based upon the theory that the equipment and materials were being furnished “for the exclusive use of the United States” and there is nothing in the opinion which holds

that the Contractors are mere purchasing agents of the United States. On the contrary, it is assumed that the materials and equipment involved are sold to the Contractors. The distinction is important because the Hawaiian law only exempts gross income derived from sales made to the United States Government and only to the extent that such sales are exempted from taxation under the Constitution of the United States or the Organic Act of the Territory. We have no statutory or constitutional exemption or immunity from taxation governing goods sold "for the exclusive use of the United States." See 17 Comp. Gen. 992, 1000.

As to the extent of the exemption which does exist under the Hawaiian law which, as noted, rests entirely upon constitutional immunity from taxation, that matter is not the subject of this opinion. It is unnecessary to state here whether or not the supply houses would be exempted from taxation if they actually were selling to the United States through the medium of the Contractors acting as purchasing agents, since that is not the case.

In conclusion, it is my opinion that both the supply houses and the Contractors are liable for gross income tax, at the applicable rates, excluding however, from the tax upon the Contractors so much of the proceeds of the contract as is derived from or relates to the projects on Midway and Johnston Islands.

It should be noted, also, that this opinion does not

cover equipment purchased for the United States Government and not incorporated into the contract job. The contract did contemplate the purchase of such equipment for the Government and, in turn, the furnishing by the Government of equipment and other facilities owned by it for use in connection with the contract, Articles 7 and 27 (a). All Government owned plant and equipment is to be under the control of the Contracting Officer at the completion of the work, Article 7. Such items of plant and equipment therefore are different from materials incorporated in the contract job as a part of the Contractors' undertaking to furnish such materials and to complete the job, and without any provision in the contract that the United States may itself furnish materials. Since the rubber stamp to which reference has been made in this opinion only covers purchases of materials, we are not informed as to what procedure was followed in purchasing items of plant and equipment for the Government. The contract provided for approval by the Contracting Officer of such purchases and it may be that the procedure followed was such as to constitute such purchases of equipment true purchases for the account of the Government. The facts upon this point are insufficient.

Respectfully,

Rhoda V. Lewis

Rhoda V. Lewis
Deputy Attorney General

APPROVED:

Attorney General