

Before the
Administrative Hearing Commission
State of Missouri



FENIX CONSTRUCTION COMPANY OF)
ST. LOUIS and FIVE STAR READY-MIX)
CONCRETE COMPANY and)
HORSTMAYER ENTERPRISES, INC. ,)

No. 11-2454 RS

Petitioners,)

vs.)

DIRECTOR OF REVENUE,)

Respondent.)

AMENDED DECISION

Fenix Construction Company of St. Louis (“Fenix”) is not entitled to a refund of sales tax and use tax. Five Star Ready-Mix Concrete Company (“Five Star”) is not entitled to a refund of sales tax and use tax. Horstmeyer Enterprises, Inc. (“Horstmeyer”) is not entitled to a refund of sales tax and use tax.

Procedure

On October 20, 2011, Horstmeyer filed a complaint appealing the Director of Revenue’s (“Director”) denial of its sales tax refund claim for the period from May 2008 through February 2011. We opened this under case number 11-2061 RS. On November 21, 2011, the Director filed his answer in 11-2061 RS. On October 20, 2011, Five Star filed a complaint appealing the Director’s denial of its sales tax refund claim for the period from June 2008 through July 2008.

We opened this under case number 11-2062 RS. On November 21, 2011, the Director filed his answer in 11-2062 RS. On December 29, 2011, Five Star filed a complaint appealing the Director's denial of its sales tax refund claim for the period from August 2008 through September 2008. We opened this under case number 11-2454 RS. On January 30, 2012, the Director filed his answer in 11-2454 RS. On February 6, 2012, Fenix filed a complaint appealing the Director's decision disallowing its payment of sales and use tax under protest for the period of November 2011. We opened this under case number 12-0200 RS. On March 9, 2012, the Director filed his answer in 12-0200 RS. On March 7, 2012, we consolidated 11-2061 RS, 11-2062 RS, 11-2454 RS, and 12-0200 RS into case number 11-2454 RS.

On April 30, 2012, Fenix filed a complaint appealing the Director's decision disallowing its payment of sales and use tax under protest for the period from December 2011 through February 2012. We opened this under case number 12-0683 RS. On May 31, 2012, the Director filed his answer in 12-0683 RS. On August 24, 2012, we consolidated 12-0683 RS into case number 11-2454 RS.

On August 6, 2012, Fenix filed a complaint appealing the Director's decision disallowing its payment of sales and use tax under protest for the period from April 2012 through May 2012. We opened this under case number 12-1415 RS. On August 30, 2012, the Director filed his answer in 12-1415 RS. On October 15, 2012, we consolidated 12-1415 RS into case number 11-2454 RS.

On September 20, 2012, Fenix filed a complaint appealing the Director's decision disallowing its payment of sales and use tax under protest for the period June 2012 through July 2012. We opened this under case number 12-1739 RS. On October 15, 2012, the Director filed his answer in 12-1739 RS. On November 28, 2012, we consolidated 12-1739 RS into case number 11-2454 RS.

On November 30, 2012, Fenix filed a complaint appealing the Director's decision disallowing its payment of sales and use tax under protest for the period from August 2012 through September 2012. We opened this under case number 12-2101 RS. On December 26, 2012, the Director filed his answer in 12-2101 RS. On January 16, 2013, we consolidated 12-2101 RS into case number 11-2454 RS.

On February 20, 2013, we granted the Director's motion for partial summary decision and denied Five Star's request for a refund of sales tax and use tax, plus statutory interest, from August 2008 through September 2008 because the complaint for this refund request, the original complaint opened under 11-2454 RS, was filed more than sixty days after issuance of the Director's final decision.

On April 29, 2013, this Commission convened a hearing on the remaining complaints consolidated into 11-2454 RS. Lamar E. Ottsen of Ottsen, Leggat & Belz, L.C. represented the Fenix, Five Star, and Horstmeyer. Stephen P. Sullivan, Senior Counsel, represented the Director.

The matter became ready for our decision on August 1, 2013, when the final written argument was filed.

Overview of Tax Periods at Issue

1. November 1, 2011 through February 29, 2012 and April 1, 2012 through September 30, 2012 for Fenix.
2. June 1, 2008 through July 31, 2008 for Five Star.
3. May 1, 2008 through February 28, 2011 for Horstmeyer.

Findings of Fact

The Parties

1. Horstmeyer is a Missouri corporation that was in good standing and duly authorized to conduct business in the state of Missouri at all relevant times.

2. Five Star is a Missouri corporation that was in good standing and duly authorized to conduct business in the state of Missouri at all relevant times.

3. Fenix is a Missouri corporation that was in good standing and duly authorized to conduct business in the state of Missouri at all relevant times.

The Director's Decisions on Petitioners'
Refund and Protest Payment Claims

4. On July 28, 2011, Horstmeyer filed a state sales tax refund claim with the Director asserting it had erroneously collected and remitted state sales tax in the amount of \$30,686.18 on its sales of reinforcing steel to Fenix during the period from May 1, 2008 to February 28, 2011. The Director issued a final decision denying Horstmeyer's refund claim on August 22, 2011.

5. On August 2, 2011, Five Star filed a state sales tax refund claim with the Director asserting it had erroneously collected and remitted state sales tax in the amount of \$4,003.79 on its sales of concrete to Fenix during the period from June 1, 2008 to July 31, 2008. The Director issued a final decision denying Five Star's refund claim on August 22, 2011.

6. On December 23, 2011, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax¹ in the amount of \$1,244.84² on purchases of the following during the period from November 1, 2011 to November 30, 2011:

- (a) Reinforcing Steel / Chairs from Tulley Steel (Tax: \$515.80); and
- (b) Concrete from Western Ready-Mix, Inc. (Tax: \$754.45).

On January 20, 2012, the Director issued a final decision that the amount paid was due.

¹ The facts are unclear as to why Fenix paid sales tax, rather than use tax, directly to the Director on purchases it made. However, these facts were stipulated by both parties and the amounts are not in dispute. We are able to analyze the legal issues without determining whether the tax at issue was appropriately labeled sales or use.

² The amount paid under protest is less than the sum of the tax amounts allocated to the purchased items below because Fenix reduced its protest payment by the 2% timely-pay discount under § 144.140. Statutory references are to RSMo 2000 unless otherwise noted.

7. On February 2, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$1,535.45³ on purchases of the following during the period from December 1, 2011 to December 31, 2011:

- (a) Reinforcing Steel / Chairs from Tulley Steel (Tax: \$904.69);
- (b) Concrete from Western Ready-Mix, Inc. (Tax: \$49.43); and
- (c) Concrete from Metro Materials, Inc. (Tax: \$612.68).

On February 28, 2012, the Director issued a final decision that the amount paid was due and owed.

8. On February 22, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$2,161⁴ on purchases of the following during the period from January 1, 2012 to January 31, 2012:

- (a) Reinforcing Steel/Chairs from Tulley Steel (Tax: \$1,087.65);
- (b) Concrete from American Ready-Mix Co. (Tax: \$191.18); and
- (c) Concrete from Metro Materials, Inc. (Tax: \$926.27).

On March 16, 2012, the Director issued a final decision that the amount paid was due and owed.

9. On March 26, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$1,532.29⁵ on purchases of the following during the period from February 1, 2012 to February 29, 2012:

- (a) Concrete from American Ready-Mix Co. (Tax: \$341.06); and
- (b) Concrete from Metro Materials, Inc. (Tax: \$1,222.50).

On April 6, 2012, the Director issued a final decision that the amount paid was due and owed.

³ Fenix's documentation submitted in support of its protest claim establishes that the amount of tax to be paid under protest should have been \$1,535.46; however, the amount actually paid under protest was only \$1,535.45.

⁴ The amount paid under protest is less than the sum of the tax amounts allocated to the purchased items below because Fenix reduced its protest payment by the 2% timely-pay discount under § 144.140.

⁵ *Id.*

10. On May 22, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$1,919.41⁶ on purchases of the following during the period from April 1, 2012 to April 30, 2012:

- (a) Reinforcing Steel / Chairs from Tulley Steel (Tax: \$1,494.24);
- (b) Concrete from Western Ready-Mix, Inc. (Tax: \$4.77);
- (c) Foam Embeds from Foam Products Corp. (Tax: 61.38);
- (d) Metal embeds from Inventory Sales Co. (Tax: \$398.19).

On June 11, 2012, the Director issued a final decision that the amount paid was due and owed.

11. On June 21, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$3,097.82⁷ on purchases of the following during the period from May 1, 2012 to May 31, 2012:

- (a) Reinforcing Steel/ Chairs from Tulley Steel (Tax: \$1,211.36);
- (b) Foam embeds from Foam Products Corp. (Tax: \$36.99);
- (c) Metal embeds from inventory Sales Co. (Tax: \$258.57);
- (d) Concrete from Kienstra Concrete, Inc. (Tax: \$376.81);
- (e) Concrete from BMC Enterprises, Inc. (Tax: \$1,277.31).

On June 29, 2012, the Director issued a final decision that the amount paid was due and owed.

12. On July 30, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$5,440.97⁸ on purchases of the following during the period from June 1, 2012 to June 30, 2012:

- (a) Reinforcing Steel /Chairs from Tulley Steel (Tax: \$1,184.94):
- (b) Concrete from Metro Materials, Inc. (Tax: \$205.84):
- (c) Metal embeds from Carter Waters Construction (Tax: \$27.39):
- (d) Concrete from Breckenridge of Illinois LLC (Tax: \$41.35):
- (e) Metal embeds from Inventory Sales Co. (Tax \$341.86):
- (f) Concrete from BMC Enterprises, Inc. (Tax: \$562.29):
- (g) Foam and other embeds from White Cap (Tax: \$3,188.34).

On August 14, 2012, the Director issued a final decision that the amount paid was due and owed.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

13. On August 21, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$3,084.84⁹ on purchases of the following during the period from July 1, 2012 to July 31, 2012:

- (a) Concrete from BMC Enterprises, Inc. (Tax: \$16.61);
- (b) Rubber embeds from Carter Waters Construction (Tax: \$81.34);
- (c) Foam embeds from Foam Products Corp., (Tax: \$60.32);
- (d) Adhesive rebar anchoring from Hilti, Inc. (Tax: \$59.65);
- (e) Metal embeds from Inventory Sales Co. (Tax: \$3.86);
- (f) Reinforcing Steel / Chairs from Tulley Steel (Tax: \$1,136.07);
- (g) Composite and other embeds from White Cap (Tax: \$2,048.52).

On August 31, 2012, the Director issued a final decision that the amount paid was due and owed.

14. On September 25, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$2,710.42¹⁰ on purchases of the following during the period from August 1, 2012 to August 31, 2012:

- (a) Concrete from BMC Enterprises, Inc. (Tax: \$1,944.53);
- (b) Metal embeds from Inventory Sales Co. (Tax: \$347.05);
- (c) Composite fiber embeds from White Cap (Tax: \$10.99);
- (d) Concrete from Metro Materials, Inc. (Tax: \$8.31);
- (e) Reinforcing Steel from Tulley Steel (Tax: \$454.85).

On October 9, 2012, the Director issued a final decision that the amount paid was due and owed.

15. On November 6, 2012, Fenix filed a Sales Tax Protest Payment Affidavit with the Director stating it was paying under protest state sales tax in the amount of \$732.51¹¹ on purchases of the following during the period from September 1, 2012 to September 30, 2012:

- (a) Concrete from BMC Enterprises, Inc. (Tax: \$21.14);
- (b) Metal embeds from Inventory Sales Co. (Tax: \$162.80);
- (c) Foam embeds from Foam Products Corp. (Tax: \$35.17);
- (d) Reinforcing Steel from Tulley Steel (Tax: \$528.35).

⁹ *Id.* The protest payment was also reduced by \$258.57 to reflect an adjustment to the June 2012 return that overstated tax by that amount.

¹⁰ The amount paid under protest is less than the sum of the tax amounts allocated to the purchased items below because Fenix reduced its protest payment by the 2% timely-pay discount under § 144.140.

¹¹ *Id.*

On November 21, 2012, the Director issued a final decision that the amount paid was due and owed.

16. The total dollar amounts of taxes at issue are: \$30,686.18 (Horstmeyer), \$4,003.79 (Five Star), and \$23,459.55 (Fenix).

Activities of Fenix Company of St. Louis

17. At all relevant times, Fenix maintained various business licenses to conduct its business.

18. At all relevant times, Fenix placed bids for the concrete work related to construction projects.

19. During the period of the refund and protest claims at issue, Fenix had 195 bids for concrete work accepted. Of those bids, seven were for Fenix to do only tilt-up construction; 46 were for Fenix to do tilt-up construction as well as other concrete construction; and 142 were for Fenix to do footing, floor slab, site work, or miscellaneous other concrete construction, but not any tilt-up construction.

20. At all relevant times, Fenix generally entered into a written agreement with the general contractor of the construction project upon winning a concrete construction bid.

Overview of Tilt-Up Construction and Wall Panels

21. Tilt-up construction is performed at the site of a building's construction. It is a technique for casting concrete elements in a horizontal position. These horizontal elements are wall panels that are vertically tilted up to construct buildings.

22. The buildings primarily constructed by tilt-up wall panels include warehouses, distribution centers, office buildings, retail structures, correctional facilities, schools, industrial and manufacturing projects, recreational facilities, churches, and housing.

23. In other ways, tilt-up construction is unique because tilt-up wall panels will only be handled once during construction, tilt-up wall panels are tilted up into place, and are of a size and weight so large that they must be constructed on site where they are to be used.

Fenix's Role in Building Construction Projects

24. General contractors invited bids from various subcontractors, including Fenix, for concrete work related to construction projects. When Fenix chose to place a bid, it would first obtain the plans and specifications needed from the general contractor and then submit a price for the project. Then the general contractor would inform Fenix whether its bid was accepted.

25. The bids placed by Fenix included several types of construction services, including the construction of tilt-up wall panels. Fenix's obligations on accepted bids are to furnish and provide all of the work, labor, materials, supplies, and any other items required to complete the described construction services.

26. The originally accepted price on these projects may be adjusted based on project modifications. Fenix is sometimes paid incrementally, based on the amount of work completed by a certain period of time.

Construction of Tilt-Up Wall Panels

27. After a general contractor accepts a bid by Fenix, there are meetings to discuss the schedule for the construction project.

28. Fenix's engineer will use the future building's architectural drawings to develop drawings of the tilt-up wall panels to be constructed by Fenix.

29. Fenix will then order rebar, embeds,¹² and other items needed for the construction project.

¹² Embeds can include a variety of items that are ultimately embedded into the concrete wall panel. They are described in more detail below.

30. After the aforementioned preliminary matters are complete, Fenix will begin construction of the wall panels at the construction site. The wall panels are constructed at the construction site because it is cost prohibitive to construct them in a separate location and transport them later to the construction site.

31. The wall panels are constructed by being cast on floor slabs. These floor slabs can either be the building's floor slabs or they can be separate floor slabs outside the building that were created specifically for casting wall panels.

32. Prior to pouring the wall panel, Fenix develops a panel layout to determine where each wall panel should be formed and cast. Fenix pours each wall panel in as close proximity to the ultimate location within the building structure as possible to minimize the distance the wall panel will need to be moved, to minimize the size of the crane necessary for the move, and to minimize the risk of damage to the wall panel.

33. After establishing the wall panel layout, a chemical, known as a bond breaker, is sprayed on the slab to prevent concrete poured later – to construct the wall panel – from adhering to the slab.

34. Next, Fenix snaps blue lines on the slab to lay out the exact dimensions of the wall panel, the window openings in the wall panel, and where the embeds are to be placed. Fenix then sprays another coat of bond breaker on the slab to prevent the wall panel from adhering to the blue lines, and to seal the blue lines in place in the event of rain.

35. Fenix uses wood to build a form of the wall panel into which concrete will be poured. Next, any unique aesthetic architectural features of the building, if any, are placed in the form first because they will become the wall panel's exterior.

36. Next, Fenix places reinforcing steel rebar and rebar chairs into position. The amount of reinforcing steel depends upon the size of the building and the specifications for the

strength of the wall panels required by the owner or general contractor. The rebar chairs are used to keep the reinforcing steel at the proper elevation during the pouring of concrete.

37. Next, a variety of embeds are placed in the wall panel form. These embeds include those used to connect to the bracing that holds up the tilt-up wall panel until the structural steel is attached to the building or embeds that provide lifting loops to be used with the crane that lifts the wall panel into place. In addition, steel embedment plates are used so that a wall panel may attach to other building components such as the roof, floor framing members, other wall panels, or other parts of the structural steel. Insulation embeds may also be placed by sandwiching them between two layers of concrete used in constructing the wall panel.

38. Next, the concrete is poured into the wall panel form. The concrete is then finished to a hard trowel finish by using machines driven by Fenix's employees on top of the backs of wall panels.

39. All wood forms are removed the following day and the concrete is given three to seven days to reach its full strength.

40. After the concrete reaches its full strength, the wall panel is prepared for erection by locating and cleaning the lifting and brace inserts and attaching the braces to the back of the wall panel. The back of the wall panel will eventually be the interior wall of the building.

41. The wall panels are then erected into a vertical position using cranes. Then, the bottom of the braces, the top of which would have already been screwed into the top of the wall panel, are attached to the grade slab to hold the panels up until the walls can be attached to the other building components as those components are constructed.

42. The structural steel erector builds the structural steel components of the building and attaches the walls to them. After the walls are attached to the structural steel and inspected,

Fenix removes its braces from the walls and completes any necessary patching to the walls and floors.

43. Every wall panel made by Fenix is custom constructed for the specific job in accordance with the detailed specifications of the customer. Because each wall panel is designed for a particular building, it cannot be sold to any other person and has value only to the specific customer for whom the job was performed.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions.¹³ Our duty is not merely to review the Director's decision, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue.¹⁴ The petitioners have the burden to prove that they are exempted from sales tax and use tax and entitled to a refund of the amounts paid under protest.¹⁵

Section 144.054¹⁶ provides:

1. As used in this section, the following terms mean:

(1) "Processing", any mode of treatment, act, or series of acts performed upon materials to transform or reduce them to a different state or thing, including treatment necessary to maintain or preserve such processing by the producer at the production facility;

* * *

2. In addition to all other exemptions granted under this chapter, ***there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761***, electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy

¹³Section 621.050.1.

¹⁴*J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

¹⁵Sections 136.300.1 and 621.050.2. *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 3 (Mo. banc 2012).

¹⁶RSMo Supp. 2012.

sources, chemicals, machinery, equipment, and *materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product*, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding, mining, or producing any product. The exemptions granted in this subsection shall not apply to local sales taxes as defined in section 32.085 and *the provisions of this subsection shall be in addition to any state and local sales tax exemption provided in section 144.030*.

(Emphasis added.)

Legal Issues

1. Whether tilt-up wall panels are products under § 144.054.2.
2. Whether the construction of tilt-up wall panels constitutes manufacturing, processing, or producing under § 144.054.2.

In order to qualify for the exemption of sales tax and use tax and receive a refund of taxes paid under protest, the petitioners must meet their burden on both issues: that tilt-up wall panels are products *and* their construction constitutes either manufacturing, processing, or producing.¹⁷ In the preceding findings of fact, we described the process by which Fenix constructs tilt-up wall panels. Five Star and Horstmeyer sold materials to Fenix for construction of these tilt-up wall panels and seek a refund of taxes paid under protest for these materials. Therefore, all three petitioners' claims for tax exemption are based on whether Fenix's construction of tilt-up wall panels meets both legal issues.

Issue 1: Whether Tilt-Up Wall Panels are Products under § 144.054.2

The Director argues that tilt-up wall panels are not products because they can only be used on the building for which they were constructed. The Director goes on to argue that the

¹⁷ *E & B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314, 316-317 (Mo. banc 2011).

practical inability of the tilt-up wall panels to be moved to another location renders them without value other than to the individual that contracted with Fenix for their construction.

The petitioners argue that tilt-up wall panels are similar to the raw granite slabs that were processed into countertops in *E & B Granite*. In *E & B Granite*, the taxpayer bought raw granite slabs and used them to manufacture countertops that were installed in customers' homes. The issue the Supreme Court examined in *E & B Granite* was whether fixtures, such as installed countertops, were products, and the court concluded they were.¹⁸ These countertops could have easily been moved from one customer to another customer, prior to installation. The issue decided in *E & B Granite* is not the issue before us, which is whether the tilt-up wall panels are a product when they are useful to only the individual for whom they were specifically constructed.

In *Mid-America Dairymen, Inc. v. Director of Revenue*,¹⁹ the Supreme Court held:

Implicit in the use of the term ***“product” is an output with a market value*** because the economic purpose of manufacturing or processing a product is to market the product. ***That is not to say, however, that the taxpayer must actually market the product in order to qualify for the exemption. It is sufficient if the product, although marketable, is used instead by the same manufacturer or processor as an ingredient or base for yet another product.*** In this regard, we emphasize that it is incumbent on the taxpayer to prove the existence of a market, whether or not the product is actually marketed by the taxpayer.

(Emphasis added.) There is no market for tilt-up wall panels. While these panels have an output that is useful for the individual for whom they were constructed, “it is incumbent on the taxpayer[s] to prove the existence of a market[.]”²⁰ At the hearing, Steve Ladenberger, the founder of Fenix, testified on cross-examination:

Q. [by Stephen P. Sullivan] Now, given that each wall panel is designed for a particular building, you can't sell that wall panel to any other person, could you?

¹⁸ *Id.* at 317.

¹⁹ 924 S.W.2d 280, 283 (Mo. banc 1996).

²⁰ *Id.*

A. No.

Q. And there is no market of people going – somebody doesn't drive to your site and look at [the] left corner of that building and say that's amazing. I'll offer you double what the contractor is paying you for that panel?

A. That's never happened.

Q. And it really is unlikely to happen, isn't it, because that panel is designed for that particular building, isn't it?

A. Yes.^[21]

We interpret Ladenberger's testimony as admitting that there was not a discrete market for tilt-up wall panels. Furthermore, the petitioners provided no additional evidence to prove the existence of a market for the tilt-up wall panels at issue. Accordingly, we conclude Fenix's tilt-up wall panels are not products.

Issue 2: Whether the Construction of Tilt-Up Wall Panels Constitutes Either: Manufacturing, Processing, or Producing under § 144.054.2.

Because the petitioners were unable to prove that tilt-up wall panels are products, the issue of whether their construction constitutes manufacturing, processing, or producing is moot. Without finding in favor of the petitioners on both issues, we are unable to grant the relief they request.

Summary

We deny Fenix's request for a refund of sales tax and use tax. We deny Five Star's request for a refund of sales tax and use tax. We deny Horstmeyer's request for a refund of sales tax and use tax.

SO ORDERED on January 15, 2014.

\s\ Karen A. Winn
KAREN A. WINN
Commissioner

²¹Tr. at 66.