

House Bill 375

By: Representative O`Neal of the 146<sup>th</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Part 2 of Article 1 of Chapter 8 of Title 48 of the Official Code of Georgia  
2 Annotated, relating to imposition, rate, collection, and assessment of sales and use taxes, so  
3 as to further define the obligation for the payment of sales and use taxes by contractors  
4 furnishing tangible personal property and services; the duties of sellers of tangible property  
5 to such contractors; to provide for procedures, conditions, and limitations; to provide an  
6 effective date; to repeal conflicting laws; and for other purposes.

7 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

8 **SECTION 1.**

9 Part 2 of Article 1 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated,  
10 relating to imposition, rate, collection, and assessment of sales and use taxes, is amended by  
11 revising Code Section 48-8-63, relating to sales and use tax provisions dealing with  
12 contractors, to read as follows:

13 "48-8-63.

14 (a) As used in this Code section, the term:

15 (1)(A) 'Fixture' means an item that is an accessory to a building, other structure, or to  
16 land, that retains its separate identity upon installation, but that is permanently attached  
17 to real property. Fixtures include such items as wired lighting, kitchen or bathroom  
18 sinks, furnaces, central air-conditioning units, elevators or escalators, or built-in  
19 cabinets, counters, or lockers.

20 (B) In order for an item to be considered a fixture, it is not necessary that the owner of  
21 the item also own the real property to which the item is attached. A retained title  
22 provision in a sales contract or in an agreement that is designated as a lease but is in  
23 substance a conditional sales contract is not determinative of whether the item involved  
24 is or is not a fixture. Similarly, the fact that a lessee or licensee of real property rather  
25 than the lessor or owner of real property enters into a contract for an item to be

26 permanently attached to the real property does not prevent that item from being  
27 classified as a fixture.

28 (C) The determination of whether an item is a fixture depends upon a review of all the  
29 facts and circumstances of each situation. Among the relevant factors that determine  
30 whether a particular item is a fixture are:

31 (i) The method of attachment. Items that are screwed or bolted in place, buried  
32 underground, installed behind walls, or joined directly to a structure's plumbing or  
33 wiring systems are likely to be classified as fixtures. Attachment in such a manner  
34 that removal is impossible without causing substantial damage to the underlying real  
35 property indicates that an item is a fixture;

36 (ii) Intent of the property holder in having the item attached. If the property holder  
37 who causes an item to be attached to real property intends that the item will remain  
38 in place for an extended or indefinite period of time, that item is more likely to be a  
39 fixture. That intent may be determined by reviewing all of the property holder's  
40 actions in regard to the item, including how the item is treated for purposes of ad  
41 valorem and income tax purposes, including whether a property owner reports the  
42 value of the item for purposes of ad valorem taxation of real property and depreciates  
43 the item for tax and financial accounting purposes as real property;

44 (iii) Real property law. If an interest in an item arises upon acquiring title to the land  
45 or building, the item is more likely to be considered a fixture;

46 (iv) Customization. If items are custom designed or custom assembled to be attached  
47 in a particular space, they are more likely to be classified as fixtures. Customization  
48 indicates an intent that the items are to remain in place following installation;

49 (v) Permits and licensing. If installation of an item requires a construction permit or  
50 licensing of the contractor under statutes or regulations governing the building trades,  
51 that item is more likely to be regarded as a fixture; and

52 (vi) Legal agreements. The terms of any purchase agreement, deed, lease, or other  
53 legal document pertaining specifically to an item may be relevant in determining  
54 whether that item is a fixture of real property.

55 (D) The term 'fixture' does not include the following items, whether or not such items  
56 are attached to real property in a permanent manner:

57 (i) Titled property; or

58 (ii) Machinery or equipment.

59 (2)(A) 'Machinery or equipment' means property that is intended to be used in  
60 manufacturing, processing, fabricating, packaging, moving, or otherwise handling  
61 tangible personal property for sale or other commercial use, in the performance of  
62 commercial services, or for other purposes not related to a real property improvement

63 and may, by its nature, be attached to the real property but which does not lose its  
 64 identity as a particular piece of machinery and equipment.

65 (B) 'Machinery or equipment' generally does not include junction boxes, switches,  
 66 conduits, wiring, valves, pipes, and tubing incorporated into the electrical, cabling,  
 67 plumbing, or other structural systems of fixed works, buildings, or other structures,  
 68 whether or not such items are used solely or partially in connection with the operation  
 69 of machinery and equipment.

70 (C) 'Machinery or equipment' serves a particular commercial activity that is carried on  
 71 at a location rather than serving general uses of land or a structure and generally  
 72 includes items such as conveyor systems, printing presses, drill presses, or lathes.

73 (D) 'Machinery or equipment' does not include items such as heating and  
 74 air-conditioning system components or water heaters because they are integrated into  
 75 the structure or real property and retain their usefulness no matter what activity is  
 76 carried on at the site.

77 (3) 'Nonresident ~~nonresident~~ subcontractor' means a person who does not have a bona  
 78 fide place of business in Georgia through the maintaining of a permanent domicile or  
 79 business facility engaged in contracting real property work and who contracts with a  
 80 prime or general contractor to perform all or any part of the contract of the prime or  
 81 general contractor or who contracts with a subcontractor who has contracted to perform  
 82 any part of the contract entered into by the prime or general contractor.

83 (4) 'Real property' means land, improvements to land, and fixtures.

84 (5)(A) 'Real property contract' means an agreement, oral or written, whether on a lump  
 85 sum, time and materials, cost plus, guaranteed price, or any other basis, to:

86 (i) Erect, construct, alter, repair, or maintain any building, other structure, road,  
 87 project, development, or other real property improvement;

88 (ii) Excavate, grade, or perform site preparation for a building, other structure, road,  
 89 project, development, or other real property improvement; or

90 (iii) Furnish and install tangible personal property that becomes a part of or is directly  
 91 wired or plumbed into the central heating system, central air-conditioning system,  
 92 electrical system, plumbing system, or other structural system that requires  
 93 installation of wires, ducts, conduits, pipes, vents, or similar components that are  
 94 embedded in or securely affixed to the land or a structure thereon.

95 (B) The term 'real property contract' does not include:

96 (i) A contract for the sale or for the sale and installation of tangible personal property  
 97 such as machinery and equipment; or

98 (ii) A contract to furnish tangible personal property that will be installed or affixed  
99 in such a way as to become a fixture or real property improvement if the person  
100 furnishing the property has not also contracted to affix or install it.

101 (C) A contract is a real property contract if described in subparagraph (A) of this  
102 paragraph, whether or not such agreement also involves providing property or services  
103 that would not be considered improvements to real property. See subsection (h) of this  
104 Code section for a discussion of such mixed contracts.

105 (D) A contract contains the terms of the agreement between the contractor and the  
106 owner or other interest holder of the real property and is entered into in advance of any  
107 work being undertaken. A proposal prepared by a contractor prior to entering an  
108 agreement is not a contract. Statements, invoices, or other billings submitted after work  
109 has begun are not contracts.

110 (6) 'Real property improvement' includes the activities of building, erecting,  
111 constructing, altering, improving, repairing, or maintaining real property.

112 (7) 'Titled property' means property that must be registered, licensed, titled, or  
113 documented by Georgia or by the United States, such as airplanes, boats, and motor  
114 vehicles. Houseboats and mobile homes, even if permanently located and used as a  
115 primary residence, are titled property and are classified as a separate and distinct class of  
116 tangible property.

117 (b) The taxability of purchases and sales by real property contractors is determined by the  
118 pricing arrangement in the contract. Contracts generally fall into one of the following  
119 categories:

120 (1) Lump sum contracts are contracts in which a contractor or subcontractor agrees to  
121 furnish materials and supplies and necessary services for a single, stated lump sum price;

122 (2) Cost plus or fixed fee contracts are contracts in which the contractor or subcontractor  
123 agrees to furnish the materials and supplies and necessary services in exchange for  
124 reimbursement of cost plus a fee that is fixed in advance or calculated as a percentage of  
125 the cost;

126 (3) Upset or guaranteed price contracts are contracts in which the contractor or  
127 subcontractor agrees to furnish materials and supplies and necessary services based on  
128 cost plus fees but with an upset or guaranteed maximum price which may not be  
129 exceeded;

130 (4) Retail sale plus installation contracts are contracts for improvements to real property  
131 in which the contractor or subcontractor agrees to sell specifically described and itemized  
132 materials and supplies at an agreed price or at the regular retail price and to complete the  
133 work either for an additional agreed price or on the basis of time consumed. In order for  
134 a contract to fit in this category, all the materials that will be incorporated into the work

135 must be itemized and priced in the contract before work begins. If a contract itemizes  
 136 some materials but does not itemize other materials that will be incorporated into the  
 137 work, the contract is not included in this category. Because the sale of the materials is  
 138 a separable transaction from the installation, the purchaser must assume title to and risk  
 139 of loss of the materials and supplies as they are delivered, rather than accepting title only  
 140 to the completed work. The contractor may remain liable for negligence in handling and  
 141 installing the items; or

142 (5) Time and materials contracts are contracts in which the contractor or subcontractor  
 143 agrees to furnish materials and supplies and necessary services for a price that will be  
 144 calculated as the sum of the contractor's cost or a marked up cost for materials to be used  
 145 plus an amount for services to be based on the time spent performing the contract. These  
 146 contracts are similar to cost plus or fixed fee contracts, because the final price to the  
 147 property holder will be determined based on the cost of performance. A time and  
 148 materials contract may or may not also have a guaranteed or upset price clause. Time and  
 149 materials contracts differ from contracts described in paragraph (4) of this subsection,  
 150 because the materials are not completely identified, itemized, and priced in the contract  
 151 in advance and because the property owner is contracting for a finished job rather than  
 152 the purchase of materials.

153 ~~(b)~~(c) Each person who orally, in writing, or by purchase order contracts to furnish  
 154 tangible personal property and to perform services under the contract within ~~this state~~  
 155 Georgia shall be deemed to be the consumer of the tangible personal property and shall pay  
 156 the sales tax imposed by this article at the time of the purchase unless the contractor has  
 157 entered into a retail sale plus installation contract as described in paragraph (4) of  
 158 subsection (b) of this Code section. Any person so contracting who fails to pay the sales  
 159 tax at the time of the purchase or at the time the sale is consummated outside ~~the limits of~~  
 160 ~~this state~~ Georgia shall be liable for the payment of the sales or use tax. This Code section  
 161 shall not relieve the dealer who made the sale from such dealer's liability to collect and pay  
 162 the tax on purchases by a contractor. Contractors performing only contracts described in  
 163 paragraph (1), (2), (3), or (5) of subsection (b) of this Code section do not resell the  
 164 tangible personal property used but instead use the property themselves to perform services  
 165 under the contract. Such contractors should pay sales tax to the selling dealer on all  
 166 purchases. They should also pay tax on all materials they manufacture or fabricate for their  
 167 own use in performing such contracts, as discussed in subsection (1) of this Code section.  
 168 They should collect no sales tax from their customers, regardless of whether they itemize  
 169 charges for materials and labor in their proposals or invoices, because they are not engaged  
 170 in selling tangible personal property. Such contractors should not register as dealers unless

171 they are required to remit tax on the fair market value of items they manufacture or  
172 fabricate to use in performing contracts.

173 ~~(c)~~(d) Each person who contracts to perform services in ~~this state~~ Georgia and who is  
174 furnished tangible personal property for use under the contract by the person, or such  
175 person's agent or representative, for whom the contract is to be performed, when a sales or  
176 use tax has not been paid to ~~this state~~ Georgia by the person supplying the tangible personal  
177 property, shall be deemed to be the consumer of the tangible personal property so used and  
178 shall pay a use tax based on the fair market value of the tangible personal property so used  
179 irrespective of whether any right, title, or interest in the tangible personal property becomes  
180 vested in the contractors.

181 ~~(d)~~(e) Each person who orally, in writing, or by purchase order contracts to perform any  
182 service the principal part of which is the furnishing of machinery which will not be under  
183 the exclusive control of the contractor shall be liable to collect a sales tax on the rental  
184 value of the machinery so used. If labor and other charges are not separated from the rental  
185 charge, the person so contracting shall be liable to collect a sales tax on the entire contract  
186 price.

187 (f) Contractors who perform retail sale plus installation contracts as described in  
188 paragraph (4) of subsection (b) of this Code section are engaged in selling tangible personal  
189 property. They should register as dealers and provide a Georgia Dealer or Purchaser Sales  
190 and Use Tax Certificate of Exemption (Form ST-5) to the selling dealer when purchasing  
191 materials that will be itemized and resold under retail sale plus installation contracts. They  
192 should not provide the Georgia Dealer or Purchaser Sales and Use Tax Certificate of  
193 Exemption (Form ST-5) when purchasing items that they use themselves rather than  
194 reselling, such as hand tools, shop equipment, or office supplies. They must collect sales  
195 tax from their customers on the sales price of the itemized tangible personal property, but  
196 not on the separately stated charges for installation labor.

197 (g) Contractors, manufacturers, or dealers who sell and install items of tangible personal  
198 property, including but not limited to those items listed in subsection (j) of this Code  
199 section, must collect tax on the full sales price, excluding any installation charges, if such  
200 charges are separately stated. These items are tangible personal property even after  
201 installation, and their sale with installation is not classified as a real property contract.  
202 Contractors, manufacturers, or dealers who sell property over the counter without  
203 performing installation services must collect tax on the full sales price of such items, even  
204 though those items will become improvements to real property upon installation by the  
205 purchaser. At the time they are sold in over the counter transactions, those items are  
206 tangible personal property.

207 (h)(1) A real property contract may also include materials and labor that are not real  
208 property improvements. A contract that includes both real property work and tangible  
209 personal property is a mixed contract. A mixed contract is not the same as a retail sale  
210 plus installation contract, as described in paragraph (4) of subsection (b) of this Code  
211 section, which deals with a real property contract in which the contractor separately  
212 itemizes and prices all the materials that will be incorporated as part of the real property.  
213 A mixed contract is one that involves a real property improvement, maintenance, or  
214 repair and also involves providing tangible personal property that remains tangible  
215 personal property and does not become part of the real property. In the case of a mixed  
216 contract, taxability depends upon the predominant nature of the work performed under  
217 the contract and upon the contract terms.

218 (2) If the predominant nature of a mixed contract is a contract for a real property  
219 improvement, taxability of the contract will be determined as if the contract were entirely  
220 for real property, and no sales tax shall be collected from the property owner, even  
221 though some tangible personal property is included in the project.

222 (3) If the predominant nature of a mixed contract is a contract for tangible personal  
223 property, taxability of the contract will be determined as if the contract were entirely for  
224 tangible personal property, and the contractor should purchase any equipment and  
225 materials tax exempt by providing a Georgia Dealer or Purchaser Sales and Use Tax  
226 Certificate of Exemption (Form ST-5) to the selling dealer and charge tax on the full  
227 price charged to the customer.

228 (4) The determination of the predominant nature of a contract will depend upon the facts  
229 and circumstances of each case. Consideration will be given to the description of the  
230 project and the responsibilities of the contractor as set forth in the contract.  
231 Consideration will also be given to the relative cost of performance of the real property  
232 and tangible personal property components of the contract.

233 (5) If a mixed contract clearly allocates the contract price among the various elements  
234 of the contract, and such allocation is bona fide and reasonable in terms of the cost of  
235 materials and nature of the work to be performed, taxation will be in accordance with the  
236 allocation. The contractor should pay tax on the materials used for the real property part  
237 of the contract and not charge tax to the customer on the related charge. The customer  
238 should pay tax on the rest of the contract price allocable to the conveyor machinery itself.

239 (i) Contractors who are engaged in the following activities are generally considered to be  
240 real property contractors, although any particular job may be determined not to involve a  
241 real property improvement based on the criteria set forth in paragraphs (1), (2), (4), (5), (6),  
242 and (7) of subsection (a) of this Code section.

243 (1) Awning installation;

- 244 (2) Block, brick, and stone masonry;  
245 (3) Bridge construction;  
246 (4) Burglar and fire alarm system installation;  
247 (5) Cabinetry (built-in only);  
248 (6) Carpentry;  
249 (7) Carpeting installed with tacks, glue, or other permanent means and serving as the  
250 finished floor;  
251 (8) Cement and concrete work;  
252 (9) Closet system installation;  
253 (10) Dock, pier, seawall, and similar construction, maintenance, or repair;  
254 (11) Door and window installation or repair;  
255 (12) Driveway installation or repair;  
256 (13) Electrical system installation and repairs, including structural wiring and cabling,  
257 meter boxes, switches, receptacles, wall plates, and similar items;  
258 (14) Elevator and escalator installation and maintenance;  
259 (15) Fencing and gates installation intended for permanent use;  
260 (16) Flooring;  
261 (17) Foundations;  
262 (18) Glass and mirror installation if permanently installed;  
263 (19) Heating, ventilating, and air-conditioning system work;  
264 (20) Insulation of structures or structural components;  
265 (21) Iron work, such as railings, banisters, and stairs, incorporated into buildings;  
266 (22) Landscaping work, including walls, walkways, permanent structures such as  
267 greenhouses, arbors, or gazebos, and permanent plantings such as trees, perennial shrubs,  
268 and lawns;  
269 (23) Lathing;  
270 (24) Painting of buildings, decks, and other real property structures;  
271 (25) Paving and surfacing work, including driveways, parking lots, patios, roadwork, and  
272 sidewalks;  
273 (26) Plastering;  
274 (27) Plumbing work;  
275 (28) Radio and telephone transmission towers;  
276 (29) Roofing work;  
277 (30) Septic tank installation or maintenance;  
278 (31) Sheet metal/ductwork;  
279 (32) Siding installation;  
280 (33) Site work, including clearing, grading, demolition, and excavation;

- 281 (34) Signs that are permanently attached to real property;  
282 (35) Solar systems;  
283 (36) Sprinkler system installation for lawn and garden irrigation or for fire prevention;  
284 (37) Stucco work;  
285 (38) Structural steel and concrete installation;  
286 (39) Swimming pool installation, including accessories and parts that are permanently  
287 attached or are plumbed or wired into plumbing or electrical systems;  
288 (40) Tile work;  
289 (41) Utility poles and lines installation and maintenance;  
290 (42) Wallpaper installation;  
291 (43) Water, sewer, and drainage systems;  
292 (44) Waterproofing of structures, decks, driveways, and other real property components;  
293 and  
294 (45) Well drilling and installation.
- 295 (j) The sale, installation, maintenance, or repair of the following items is not considered  
296 to be a real property contract:
- 297 (1) Area rugs and carpets;  
298 (2) Art work (paintings, statuary);  
299 (3) Cabinets and shelving (freestanding);  
300 (4) Computer system components;  
301 (5) Drapes, curtains, blinds, shades, etc.;  
302 (6) Entertainment system components (e.g., stereo systems, home theater systems);  
303 (7) Furniture;  
304 (8) Household appliances (unless built in and directly wired);  
305 (9) Lawn markers;  
306 (10) Mail boxes;  
307 (11) Mirrors (freestanding);  
308 (12) Radio and television antennas;  
309 (13) Sprinkler systems for lawns or gardens if comprising unburied hoses or tubing and  
310 movable sprinkler heads;  
311 (14) Stepping stones;  
312 (15) Equipment used to provide communications services that is installed on a customer's  
313 premises;  
314 (16) Temporary fencing and gates (e.g., for construction sites); and  
315 (17) Window air-conditioning units.
- 316 (k) Contractors who perform lump sum, cost plus, guaranteed price, or time and materials  
317 contracts for entities that are exempt from sales taxes, such as private schools, hospitals,

318 or churches, are taxable on materials the contractor purchases for use in performing those  
 319 contracts. Such contractors are not permitted to use the certificate of exemption issued to  
 320 the exempt entity in order to purchase materials for the contract exempt from taxes. The  
 321 entity's exempt status is irrelevant, because it applies only to sales of tangible personal  
 322 property to the entity, not to the contractor. The contractor, not the exempt entity, is the  
 323 taxable consumer of the materials the contractor purchases to use in performing that  
 324 contract. The fact that an exempt entity will bear the economic burden of the taxes paid  
 325 by the contractor in the form of a higher contract price does not change the contractor's tax  
 326 liabilities.

327 (l) Contractors may maintain shops, plants, or similar facilities where they manufacture  
 328 or fabricate items for their own use in performing contracts. Contractors are required to  
 329 pay use tax on the fair market value of the manufactured or fabricated items. In the case  
 330 of real property contractors, the taxable cost of an item manufactured or fabricated for use  
 331 in performing a contract does not include labor that occurs at the job site where the item  
 332 will be incorporated into a real property improvement or transportation from the plant  
 333 where an item was fabricated to the job site. Real property contractors that are required to  
 334 remit use tax on manufactured or fabricated items must register as dealers for purposes of  
 335 remitting such tax if they are not already registered as dual operators.

336 ~~(e)(1)~~(m)(1) Any subcontractor who enters into a construction contract with a general  
 337 or prime contractor shall be liable under this article as a general or prime contractor. Any  
 338 general or prime contractor who enters into any construction contract or contracts with  
 339 any nonresident subcontractor, where the total amount of such contract or contracts  
 340 between such general or prime contractor and any nonresident subcontractors on any  
 341 given project equals or exceeds \$250,000.00 shall withhold up to 4 percent of the  
 342 payments due the nonresident subcontractor in satisfaction of any sales or use taxes owed  
 343 ~~this state~~ Georgia.

344 (2) The prime or general contractor shall withhold payments on all contracts that meet  
 345 the criteria specified in paragraph (1) of this subsection until the nonresident  
 346 subcontractor furnishes such prime or general contractor with a certificate issued by the  
 347 commissioner showing that all sales taxes accruing by reason of the contract between the  
 348 nonresident subcontractor and the general or prime contractor have been paid and  
 349 satisfied. If the prime or general contractor for any reason fails to withhold up to 4  
 350 percent of the payments due the nonresident subcontractor under their contract, such  
 351 prime or general contractor shall become liable for any sales or use taxes due or owed ~~this~~  
 352 state Georgia by the nonresident subcontractor.

353 ~~(f)(n)~~ Whenever a nonresident subcontractor holding a contract with a general or prime  
 354 contractor has posted with the commissioner either a good and valid bond with a surety

355 company authorized to do business in ~~this state~~ Georgia or legal securities in an amount of  
 356 not less than \$5,000.00 nor more than \$50,000.00, as determined by the commissioner,  
 357 conditioned that all sales and use taxes which may accrue to ~~this state~~ Georgia on account  
 358 of the execution of contracts that meet the criteria established in paragraph (1) of  
 359 subsection ~~(e)~~ (m) of this Code section by nonresident subcontractors will be paid when  
 360 due, no general or prime contractor shall withhold any sums due the nonresident  
 361 subcontractor under their contract with respect to sales and use taxes.

362 ~~(g)~~(o) Nothing contained in this Code section shall be construed to impose any sales or use  
 363 tax with respect to the use of tangible personal property owned by the United States in the  
 364 performance of contracts with the United States when the property is not actually used up  
 365 and consumed in the performance of the contract. Tangible personal property incorporated  
 366 into real property construction which loses its identity as tangible personal property shall  
 367 be deemed to be used up and consumed within the meaning of this subsection.

368 ~~(h)~~(+)(p)(1) Nothing contained in this Code section shall be construed to impose any  
 369 sales or use tax with respect to the use of tangible personal property owned by the State  
 370 of Georgia, the University System of Georgia, or any county, municipality, local board  
 371 of education, or other political subdivision of ~~this state~~ Georgia in the performance of  
 372 contracts with such entities when the property is not actually used up and consumed in  
 373 the performance of the contract. Tangible personal property incorporated into real  
 374 property construction which loses its identity as tangible personal property shall be  
 375 deemed to be used up and consumed within the meaning of this subsection. Any  
 376 governmental entity which furnishes tangible personal property to a contractor for  
 377 incorporation into a construction, renovation, or repair project conducted pursuant to a  
 378 contract with such governmental entity shall issue advance written notice to such  
 379 contractor of the amount of tax owed for such tangible personal property. The failure of  
 380 the governmental entity to issue such advance written notice to the contractor of such tax  
 381 liability shall render such governmental entity liable for such tax.

382 (2) This subsection shall not apply with respect to the use of tangible personal property  
 383 owned by the United States.

384 ~~(i)~~(q) The commissioner is authorized to prescribe forms and promulgate rules and  
 385 regulations deemed necessary in order to administer and effectuate this Code section."

## 386 SECTION 2.

387 This Act shall become effective on July 1, 2009.

## 388 SECTION 3.

389 All laws and parts of laws in conflict with this Act are repealed.