

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST
OF TINDALL CORPORATION
NM ID NO. 02-409628-008
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1899472384**

No. 11-09

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on September 24 -25, 2008, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen and John Wheir, Special Assistants Attorney General. On December 1, 2008, the Department filed its Proposed Finding of Facts and on December 3, 2008, Tindall Corporation (“Taxpayer”) filed its Summation and Proposed Findings of Fact. Tindall Corporation was represented by Joe Lennihan and Helen Hecht from the law firm of Sutin, Thayer & Browne. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a corporation doing business in New Mexico.
2. Taxpayer is registered as an “S” corporation, and filed under the accrual method of accounting.
3. Taxpayer is incorporated in South Carolina and does not have a retail office or any representatives or dealers located in New Mexico.
4. Taxpayer does not have a sales office in New Mexico.

5. Beginning on October 19, 2004, the Department conducted an audit of Taxpayer for gross receipts tax, compensating tax, withholding tax and income tax for tax period September 1, 1999 to August 31, 2004. Exhibit 15, page GN 2.

6. The Department assessed Taxpayer on June 30, 2005, in gross receipts tax in the amount of \$227,173.29 in principal and \$105,322.86 in interest for a total of \$332,496.15 for the tax period of December 31, 1999 through August 31, 2004. The Department elected not to assess Taxpayer for compensating tax.

7. Taxpayer's filing reports show a history of filing withholding taxes and no filing of gross receipts taxes.

8. On September 25, 2005, Taxpayer filed a written protest to the assessment, which was accepted by the Department under a retroactive extension of time granted pursuant to NMSA 1978, Section 7-1-24 (2003).

9. On January 30, 2008, the Department requested a hearing and a scheduling order. It asked that the matter be scheduled for no earlier than April or May 2008.

10. A Scheduling Order was issued and a hearing date of June 24, 2008 was set.

11. On March 25, 2008, Taxpayer requested that the Scheduling Order be amended. The Scheduling Order was amended as requested.

12. On June 9, 2008, the parties entered into a Stipulated Motion for Pre-Trial Conference and requested that the hearing be continued until September 2008.

13. A Second and Final Amended Notice of Administrative Hearing and Scheduling Order was issued on July 3, 2008 setting the hearing for September 24, 2008.

14. On December 1, 2008, the Department filed its Proposed Finding of Facts and Department's Post-Hearing Brief In Support of Assessment.

15. On December 3, 2008, Taxpayer filed its Proposed Findings of Fact and Summation.

16. Taxpayer specializes in the making of precast concrete products for a variety of purposes, such as walls, tanks, parking structures and concrete modular prison cells.

17. Taxpayer began making precast concrete modular prison cells in 1995.

18. Taxpayer designs, engineers and builds precast concrete modular prison cells "prison cells" based on a customer's needs at its plant in Conley, Georgia.

19. All the materials to design and construct the prison cells are purchased and delivered outside of New Mexico.

20. The process for constructing a prison cell requires that concrete be poured into forms and then plumbing, electrical, HVAC and other requirements are added to the prison cell. This process for constructing the prison cell occurs in Georgia.

21. Taxpayer can construct six prison cells per day at its plant in Conley, Georgia.

22. Taxpayer ships the fully designed and constructed prison cells by train or truck to its New Mexico customers.

23. The two contracts (Lincoln County and Cibola County) introduced do not provide where title passed to the prison cells. Exhibits 10 and V.

24. The contract proposal for Sandoval County states that acceptance of the prison cells occurred when the bill of lading was signed by the New Mexico customer, accordingly in New

Mexico. Exhibit I.

25. All of the New Mexico customers are local governments.

26. The bid forms for Cibola and Eddy County, the contracts with Lincoln and Cibola County and the contract proposals for Sandoval and Eddy County require that Taxpayer transport and deliver the prison cells to New Mexico from its Conley, Georgia plant. Exhibits B, I, M, and 10.

27. The cost to transport and deliver is a separately stated charge on the schedule of values for the New Mexico customers. Exhibits 8a-- Eddy County Schedule of Value; 9a—Valencia County Schedule of Value; 10b—Lincoln County Schedule of Value; 11a—Socorro County Schedule of Value; 12c—Cibola County Schedule of Values; and 13a—Sandoval County Schedule of Values.

28. Transportation is arranged by Taxpayer.

29. Once the prison cells arrived at their destination, Taxpayer has a crew of three to four employees who have traveled to the destination, and who have specialized training with cranes. Taxpayer's crew moves the prison cells with the cranes off of the rail cars. When the rail cars arrive at the train depot in New Mexico, they usually have three prison cells stacked on top of each other. The crew rigs up the prison cell with two lines, one line is let down as the other line holds it up to get level. A series of lines and hooks attached to a very large crane are used to move the prison cell to the truck. Then, the truck transports the prison cell to the New Mexico customer.

30. When the prison cells arrive at the New Mexico customer's jobsite, Taxpayer's crew uses very large cranes to lift the prison cell using a rigging system of four lifting points. The

prison cell is picked up and the dowel rods are screwed into the bottom. The prison cell is swung over the concrete pad and grout is poured into the dowel holes in the concrete pad. Plastic shims are used to level the prison cell. There is a separate cost associated with erecting the prison cells for each New Mexico customer. In addition to the crane, the tools needed to erect a prison cell are a 6' level, a pry-bar, a hammer and a pipe wrench.

31. When the prison cells arrive at the jobsite, they do not arrive in component parts or pieces needing assembly.

32. Taxpayer's crew members are not licensed as electricians or mechanical contractors. Taxpayer has no other employees at the New Mexico customer's job site other than the crew associated with the crane.

33. The New Mexico customer is responsible for contracting and constructing the concrete pad.

34. The prison cell is placed on top of the concrete slab and four to six --1/2" threaded dowel rods are screwed into the prison cell and then grouted into the concrete slab. The prison cell is constructed of a high-strength concrete and must meet standards for correction units. Each prison cell weighs approximately twenty-five to thirty tons.

35. The prison cell is leveled on the concrete slab with plastic 4 x 4 shims which are added on top of the concrete slab underneath the prison cell.

36. Taxpayer's crew takes usually 30 minutes to erect a prison cell.

37. The prison cell can be removed from the concrete slab without damaging the prison cell by lifting the prison cell with a crane onto a truck in around 30-45 minutes to cut the rods and

1 ½ hours to lift the prison cell with the crane.

38. In the past, Taxpayer has removed two prison cells from their concrete pads.

39. The New Mexico customer is responsible for contracting with any other trades to connect the electrical and plumbing to the prison cells.

Eddy County

40. In October 1999, Taxpayer entered into a contract with Eddy County for 26 prison cells.

41. The 26 prison cells were designed and constructed at the Conley plant in Georgia.

42. Taxpayer contracted to transport the prison cells by train to New Mexico. The cost of shipping both inside and outside New Mexico was \$38,754.00.

43. Taxpayer erected the prison cells at the jobsite for Eddy County and the cost of erecting the prison cells was \$64,103.00. This amount included incidental materials.

44. Taxpayer paid sales and use tax to the State of Georgia on the materials used in the construction of the 26 prison cells.

Valencia County

45. In July 1999, Taxpayer entered into a contract with Valencia County for 25 prison cells.

46. The 25 prison cells were designed and constructed at the Conley plant in Georgia.

47. Taxpayer contracted to transport the prison cells by train to New Mexico. The cost of shipping both inside and outside New Mexico was \$41,210.00.

48. Taxpayer erected the prison cells at the jobsite for Valencia County and the cost of

erecting the prison cells was \$53,364.00. This amount included incidental materials.

49. Taxpayer paid sales and use tax to the State of Georgia on the materials used in the construction of the 25 prison cells.

50. Taxpayer acted as a subcontractor on the Valencia County project and provided a type 6 NTTTC (nontaxable transaction certificate) to the Department. The deductions were allowed for the construction services performed.

Lincoln County

51. In June 2000, Taxpayer entered into a contract with Lincoln County for 13 prison cells.

52. The 13 prison cells were designed and constructed at the Conley plant in Georgia.

53. Taxpayer contracted to transport the prison cells by train to New Mexico. The cost of shipping both inside and outside New Mexico was \$21,523.00.

54. Taxpayer erected the prison cells at the jobsite for Lincoln County and the cost of erecting the prison cells was \$46,258.00. This amount included incidental materials.

55. Taxpayer paid sales and use tax to the State of Georgia on the materials used in the construction of the 25 prison cells.

Socorro County

56. In December 2000, Taxpayer entered into a contract with Socorro County for 12 prison cells.

57. The 12 prison cells were designed and constructed at the Conley plant in Georgia.

58. Taxpayer contracted to transport the prison cells by train to New Mexico. The cost

of shipping both inside and outside New Mexico was \$34,533.00.

59. Taxpayer erected the prison cells at the jobsite for Socorro County and the cost of erecting the prison cells was \$25,268.00. This amount included incidental materials.

60. Taxpayer paid sales and use tax to the State of Georgia on the materials used in the construction of the 12 prison cells.

Cibola County

61. In September 2002, Taxpayer entered into a contract with Cibola County for 15 prison cells.

62. The 15 prison cells were designed and constructed at the Conley plant in Georgia.

63. Taxpayer contracted to transport the prison cells by train to New Mexico. The cost of shipping both inside and outside New Mexico was \$45,251.00.

64. Taxpayer erected the prison cells at the jobsite for Cibola County and the cost of erecting the prison cells was \$28,043.00. This amount included incidental materials.

65. Taxpayer paid sales and use tax to the State of Georgia on the materials used in the construction of the 15 prison cells.

Sandoval County

66. Sometime around September 22, 2003, Taxpayer entered into a contract with Sandoval County for 60 prison cells.

67. The 60 prison cells were designed and constructed at the Conley plant in Georgia.

68. Taxpayer contracted to transport the prison cells by train to New Mexico. The cost of shipping both inside and outside New Mexico was \$174,653.00.

69. Taxpayer erected the prison cells at the jobsite for Sandoval County and the cost of erecting the prison cells was \$63,118.00. This amount included incidental materials.

70. Taxpayer paid sales and use tax to the State of Georgia on the materials used in the construction of the 15 prison cells.

71. The New Mexico customer, Sandoval County, added buildings onto the existing prison cells at Sandoval County Detention Center. The contractor and subcontractor on the Sandoval County addition were not in any way affiliated with Taxpayer.

72. The Department's witness, Victor Joseph Chavez of Chavez Grieves Consulting Engineers, Inc., who is a structural engineer, testified that when he inspected the Sandoval County Detention Center in the spring of 2008, he inspected the entire Sandoval County Detention Center. He did not inspect any of the other New Mexico customer jobsites.

DISCUSSION

The issue to be determined is whether Taxpayer performed a construction service in New Mexico or whether there was a sale of tangible personal property. The Department takes a number of positions. Its first position is that Taxpayer sold prefabricated buildings to New Mexico customers (Eddy County, Valencia County, Lincoln County, Socorro County, and Cibola County, Sandoval County) and the sale of the prefabricated buildings constituted a construction service performed in New Mexico. The Department argued in the alternative that even if the Hearing Officer finds that Taxpayer sold tangible personal property, the sale of the property is really the sale of construction materials to the New Mexico customers and as such is not deductible under Section 7-9-54(A)(2). Thirdly, the Department argues that there should be no apportionment of

costs between in-state and out-of-state sales. Taxpayer should be taxed on the full value of the receipts from the sale of the tangible personal property, regardless if the sale occurred outside of New Mexico.

Taxpayer argued that while its modular or portable buildings were made of concrete, the buildings qualify under the Department's regulation that modular or portable buildings are tangible personal property and not construction service. Taxpayer argued that it is entitled to treat the sale of the modular or portable buildings as the sale of tangible personal property for which the receipts are deductible under NMSA 1978, Section 7-9-54 (2003). In the alternative, Taxpayer argued that if the Hearing Officer finds that Taxpayer sold tangible personal property, then it is entitled to allocate costs between in-state and out-of-state costs accordingly.

Burden of Proof.

NMSA 1978, Section 7-1-17 (2007) provides that any assessment of taxes made by the Department is presumed to be correct. Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). Accordingly, it is Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308.

Prefabricated or Portable Buildings.

The first issue to be addressed is whether Taxpayer is selling a construction service. A construction service is defined as:

...construction activities and all tangible personal property that will become an ingredient or component part of a construction project.

NMSA 1978, 7-9-3(M) (2007). Included within the definition of a *construction service* is the act of constructing of or the building of any structure or building. NMSA 1978, 7-9-3.4(A) (1) (b) (2003). Included within the definition of building is the assembling of any prefabricated building which is designed to be permanently affixed to the land and manufactured in components or subassemblies, and then assembled at the building site. Regulation 3.2.1.11(F) (1) NMAC. Thus, the regulation provides that the definition of construction service includes the assembly of any structure that is both affixed to the land **and** that is delivered in components or subassemblies **and** is assembled at the jobsite.

Excluded from the definition of building and therefore *construction service* is any “portable” or “modular” building. Regulation 3.2.1.11(F)(2) NMAC. Regulation 3.2.1.11(F)(2) provides that a portable or modular building is designed to be relocatable **and** when delivered *generally requires only* blocking, leveling and joining of modules. The Department’s own regulation excludes from the definition of *construction service* the setting down or the erection of any structure that is both relocatable and when delivered requires minimal installation. The Department’s own regulation only requires the building be *designed* to be relocatable. There is no requirement that the purchaser of a portable or modular cannot alter the structure of the building to

make it affixed to the land. Expressly stated within the regulation is the understanding that once the structure is placed on something, like a concrete slab, then some blocking, leveling or joining occurs.

Both of these regulations provide that the buildings are manufactured off-site. The two inquiries that need to be made in determining whether the building is portable or not, is whether the *design* of the building requires the building to be affixed, hence no assembly is required at the site, and whether the building is assembled on the jobsite. Regulation 3.2.1.11(F)(2) permits some installation to erect or install the structure. One indication of whether the building is constructed or assembled on site is whether the building is delivered in parts or components.

In reviewing the evidence, Taxpayer overwhelmingly proved that the prison cells it sold to its New Mexico customers did not come in components. Mr. Bryant Allen Zavitz, Vice President of Product and Process Development for Taxpayer, testified that the prison cells sold to New Mexico customers were cement boxes, 15 ' x 15', which were comprised of four exterior walls, a couple of interior walls, an integral ceiling or roof, and a fabricated floor; all constructed in its plant in Conley, Georgia. The prison cells were delivered as one unit with no assembly required. The Department did not present any testimony that the concrete forms were assembled at the jobsite; instead it relied entirely on whether the prison cells were movable or affixed to the ground.

In reviewing the Department's use of the words "portable" or "modular" building within the regulation, the definition only requires the building to be *designed to be relocatable* and Regulation 3.2.1.11(F)(2) states that the structure is portable if when delivered, it generally requires only blocking, leveling and joining of modules. In contrast, the regulation defining a

prefabricated building provides that the building is prefabricated if the building is designed to be permanently affixed to the land. There was no expert testimony or any other type of testimony by the Department indicating the prison cells were designed to be affixed to the land or they were designed not to be portable. Taxpayer had several witnesses, Mr. Zavitz, who is a structural engineer by profession, and Mr. Jerry Long, employed as a crane operator, erector and rail supervisor, testify about the design and the process of delivering the prison cells. Mr. Zavitz testified that the prison cells were designed to be sold and transported across the country. Mr. Long testified about the process to install or erect the prison cells on a concrete slab and if necessary remove the prison cells.

In this case, the Department argues that because the prison cells are made of concrete and therefore very heavy, they are impossible to be relocatable or impossible not to be affixed to the land. The Department reads into the regulation words that are not present and neglects to apply the second portion of the prefabricated building test that requires the delivery of the components and the assembly of those components on the jobsite. First, there is nothing within Regulation 3.2.1.11(F) (2) that mentions that heavier buildings or buildings made of concrete, by their very nature, must be excluded from the definition of a portable building. In addition, there was no testimony presented by the Department indicating that the prison cells are heavier or lighter than any typical modular building.

The Department also argues that because some of the prison cells cannot be moved, that they were not designed to be relocatable. Again, the Department is reading into the regulation words that are not present. Regulation 3.2.1.11(F) (2) provides that “(a) portable building or a

modular relocatable building is a building manufactured (usually off-site) which is designed to be relocatable ...” The regulation provides that the building must only be *designed* to be relocatable. The regulation further provides that some installing or erecting, specifically blocking, leveling or joining of modules is permissible. NMAC Regulation 3.2.1.11(F)(2).

In reviewing the two contracts introduced into evidence, both contracts refer to “mobilizations”. Exhibit V, Article 9. The contract with Cibola County states that Taxpayer shall include “one (1) mobilization to erect the precast modules. If for any reason other than Contractor’s, additional mobilizations are necessary, Contractor will be reimbursed for the additional mobilization(s).” Exhibit V, Article 9.1. The contract proposals have similar language as in the two contracts. Exhibit I, paragraph 18 of Contract Proposal with Sandoval County. This language implies that Taxpayer would pay the cost of installing or erecting the prison cells one time. If the customer wanted the prison cells removed, then the New Mexico customer would be responsible for the cost of erecting the prison cell. Thus, the “one mobilization” language in the contracts and the contract proposals indicate that the prison cells were relocatable.

Taxpayer had a very credible witness, Mr. Jerry Long, testify that he had worked for Taxpayer for 15 years. Mr. Long was employed as a crane operator, erector and rail supervisor for Taxpayer. During the audit period in question, Mr. Long was the rail supervisor for Taxpayer and was assigned the task to install or erect the prison cells for New Mexico customers. Mr. Long testified that he was sent to the jobsites with three to four men. Once the prison cells arrived at their destination, Taxpayer had a crew of three to four employees who traveled to the jobsite, and who have specialized knowledge and training of installing and erecting the prison cells.

Mr. Long testified that his crew usually arrived at the location of the rail cars in New Mexico and they removed the prison cells with a crane onto a truck. He testified that when the rail cars arrived, they usually had three prison cells stacked on top of each other. He described in detail how the crew removed the prison cells from the rail cars. He testified that the crew rigged up the prison cell with two lines, one line was let down as the other line was held up to get level. A series of lines and hooks attached to a very large crane and were used to move the prison cell to the truck. The truck, then, transported the prison cell to the New Mexico customer.

Mr. Long testified that when they arrived at the New Mexico customer's jobsite, the crew lifted with the very large crane, the prison cell off of the truck using a rigging system of four lifting points. The prison cell was picked up and the dowel rods were screwed into the bottom. The prison cell was swung over the concrete pad and grout was poured into the dowel holes in the concrete pad. Plastic shims were used to level the prison cell. In addition to the crane, the tools used to install or erect a prison cell were a 6' level, a pry-bar, a hammer and a pipe wrench. Mr. Long further testified that it took 30 minutes to place the prison cell on the concrete pad and maybe 30-45 minutes to detach the prison cell from the concrete slab, and maybe another 1 ½ to remove the prison cell. This testimony was uncontroverted and persuasive.

The Department's witness, Victor Joseph Chavez of Chavez Grieves Consulting Engineers, Inc., who is a structural engineer, testified that the prison cells had been incorporated into a larger project at the Sandoval County Detention Center. His testimony related to only one New Mexico customer, Sandoval County. The Department's witness testified that when he inspected the Sandoval County Detention Center in the spring of 2008, he observed that the prison

cells had been structurally altered. He testified that his firm worked on the Bernalillo County Detention Center, the Las Cruces prison and the Los Lunas prison. He said that his company had worked on the Sandoval County Detention Center. Mr. Chavez testified that that some of the Sandoval County Detention Center walls were made of cast-in-place concrete, which is formwork and that a host of other types of construction had occurred at the Sandoval County Detention Center. Mr. Chavez further testified that the prison cells at the Sandoval County Detention Center could not be moved.

In general, the testimony of the Department's witness was not persuasive or relevant. Mr. Chavez' inspection of the Sandoval County Detention Center occurred well after, five years after, the prison cells were delivered to the Sandoval County Detention Center. The issue for purposes of determining whether the structure is a prefabricated building or a portable building is whether the prison cells were designed to be relocatable and whether upon delivery, there were component pieces that needed assembly or whether the structure only needed leveling. In this case, the testimony was uncontroverted that the prison cells were not delivered at the jobsite in component pieces or parts. The only parts at the jobsite were the 6' level, a pry-bar, a hammer, a pipe wrench, shims, dowel rods and grout.

Other than the testimony provided regarding the Sandoval County Detention Center, there was no other testimony provided regarding whether any of the other prison cells delivered to New Mexico customers had been structurally altered in some way. In conclusion, the evidence supports Taxpayer's position that under a plain reading of the regulation, the prison cells are portable or modular buildings, and are tangible personal property.

Construction Materials.

The Department argues in the alternative that even if the Hearing Officer finds that Taxpayer did not provide a service in New Mexico, then Taxpayer sold tangible personal property, and those prison cells are still taxable because the prison cells are construction materials sold to New Mexico customers. The Department's position is somewhat confusing, but pursuant to NMSA 1978, Section 7-9-54 (2003), receipts from the sale of tangible personal property to government subdivisions that are construction material are taxable and not deductible.

Taxpayer argues that the Department's argument is unfair because the Department did not take this position that the sale of the prison cells was the sale of construction materials until right before the hearing. In reviewing the audit, the audit refers to the Taxpayer's business as Taxpayer "...contracted directly with the various counties in New Mexico for six contracts for the construction of detention centers and was a subcontractor for the construction of a mental health facility." Exhibit 15, Audit Narrative page GN4. This statement may be interpreted to mean that the Department considered that the receipts from the sale of the prison cells might be construction materials. To be sure, it is not clear from the audit narrative whether the Department took multiple positions regarding the taxability of the transactions.

Regardless, this issue will be addressed. Section 7-9-3.4(B) defines *construction materials* as

tangible personal property that becomes or is intended to become an ingredient or component part of a construction project...

NMSA 1978, Section 7-9-3.4(B)(2003). The construction materials must become or there must be

an intent that the construction materials become an ingredient or component of a construction project.

In reviewing the testimony, there was no testimony presented by the Department that at any time during the contract process with any of the New Mexico customers, that the prison cells were supposed to become or there was any intent that the prison cells became part of an overall *construction project*. The Department did not present any evidence that general contractors were employed by the New Mexico customers on a *construction project*. The Department offered no contracts into evidence between any general contractor and any of the New Mexico customers or between any general contractors and Taxpayer for any *construction project*.

Instead while there are numerous documents presented into evidence by the Department, that support Taxpayer's argument rather than the Department's. The evidence consists of: bid forms, two contracts and multiple applications for payments from Taxpayer and copies of checks.

Exhibit B (bid form to Cibola County);
Exhibit M (bid form to Eddy County);

Exhibit V (contract between Cibola County and Taxpayer);
Exhibit 10 (contract between Lincoln County and Taxpayer);

Exhibit I (contract proposal with Sandoval County);
Exhibit M (contract proposal with Eddy County);

Exhibits 13 and G – Sandoval County (copy of a check from Sandoval County Treasurer) (Sandoval Application and Certificate for Payment for \$27,346 dollars) (copies of checks from Bernalillo County) (Sandoval Application and Certificate for Payment for \$187,959 dollars) (Sandoval Application and Certificate for Payment for \$70,380 dollars) (Sandoval Application and Certificate for Payment for \$10,000 dollars) (Sandoval Application and Certificate for Payment for \$5,399 dollars) (Sandoval Application and Certificate for Payment for \$651,589,000

dollars-2 copies) (Sandoval Bill of Sale for Stored Materials \$646,909-2 copies) (Sandoval Application and Certificate for Payment for \$31,591 dollars) (copies of checks from Sandoval County) (Sandoval Application and Certificate for Payment for \$15,795 dollars) (Sandoval Application and Certificate for Payment for \$54,981 dollars) and (Sandoval Application and Certificate for Payment of \$197,740 dollars);

Exhibits 8(b) and N -- Eddy County (Eddy County Application and Certificate for Payment of \$31,070 dollars) (check from Eddy County to Taxpayer) (Eddy County Application and Certificate for Payment of \$498,111 dollars) and (Eddy Application and Certificate for Payment of \$28,900 dollars);

Exhibit 9(b)—Valencia County (Valencia County Application and Certificate for Payment);

Exhibit 10(c)—Lincoln County (Lincoln County Application and Certificate for Payment);

Exhibit 11(b)—Socorro County (Socorro County Application and Certificate for Payment); and

Exhibit 12(d)—Cibola County (Cibola County Application and Certificate for Payment).

Exhibit O—Cibola County (copies of checks from Cibola County).

In reviewing the exhibits, the bid forms provide that Taxpayer bid on the manufacture and delivery of modular cells to Cibola County and Eddy County. There is no reference in the bid forms to a construction project or a contractor who is ultimately responsible for a construction project. The contract proposals for Eddy County and Sandoval County are identical and indicate that Taxpayer “proposes to deliver and erect the precast cell modules” to the county. Exhibits I and M.

The contracts introduced between Taxpayer and Lincoln and Cibola County, once again, do not refer to any *construction project*. They generally provide that the parties to the contract are

Lincoln or Cibola County and Taxpayer. Exhibits 10 and V. It states that the Architect/Engineer of record is Nims, Clavani & Associates. Exhibit 10, page 1; and Exhibit V, page 1. The work to be completed as described in the Lincoln County contract as the “Fabrication, Delivery and Installation of Pre-cast Concrete Modular Cells to Include Furnishings, Plumbing Fixtures, Finishes in Cell Units, Erection of Cells including Threaded Rods, Shim Stacks and Grout Pack.” Exhibit 10, page 2. The Cibola County contract is very similar. Exhibit V, page 1. The Lincoln County contract provides that Taxpayer is required to apply for payment and once the architect certifies that work has been completed, Lincoln County is required to make the payment on the application. Exhibit 10, Article 5, page 2. Nothing within the Lincoln County contract suggests that Lincoln County purchased the prison cells to become an ingredient or component part of a *construction project*. There was no testimony offered why an architect was necessary to certify that the work had been completed.

In reviewing the numerous applications and certificates for payment from Taxpayer to the New Mexico customers, they indicate that Taxpayer had to seek approval of the work from an architect prior to being paid for the work completed. Exhibits 8b, 9b, 10c, 11b, 12d, 13 and G. There was no testimony that the Architect/Engineer firm was supervising a larger construction project. There is no evidence that Taxpayer was the general contractor for the larger Sandoval County Detention Center Complex or that it sold the prison cells to a general contractor for the purpose of incorporating the prison cells into a larger project at Sandoval County. The copies of checks introduced into evidence indicate that Sandoval County paid the amounts that Taxpayer requested pursuant to the Application and Certificate for Payment and there was no contractor

involved in the payment of the work performed. Exhibit G.

The Department's witness, Mr. Chavez testified that the prison cells became an ingredient or component part of a *construction project* for the Sandoval County Detention Center. Mr. Chavez testified that he had done a site inspection in the spring of 2008. His company had worked on the Sandoval County Detention Center and that there had been structural alterations to Taxpayer's prison cells. (It was not clear when his firm had done work for the Detention Center.) He testified that a number of structural changes had been made to the prison cells at the Sandoval County Detention Center and that the prison cells could not be moved because of those changes. Mr. Chavez testified that he did not speak or consult with the general contractor for the San Sandoval County Detention Center and that he spoke with the architect for the Center after he completed his report. Department Exhibit X. Mr. Chavez had no information regarding when the structural changes to the prison cells occurred or whether the prison cells were part of the original project. Mr. Chavez's testimony was not persuasive because he was unable to provide any information regarding the nature and timing of the construction project as it related to the purchase and installation of the prison cells.

Taxpayer argued that it did not intend for the prison cells to be incorporated into a construction project. The testimony of Ms. Cheryl Lang and Mr. Zavitz was that the prison cells were sold as separate units and that Taxpayer had no control over what occurred after the prison cells were sold to New Mexico customers. Mr. Zavitz testified that he did not know who added masonry between the prison cells at the Sandoval County Detention Center. The two contracts introduced, along with the contract proposals, support Taxpayer's position insofar as they

describe, the contractual obligations of the parties as being only for the sale of prison cells.

The evidence is clear that the receipts from the sale of the prison cells to the New Mexico customers are not taxable as construction material that became or were intended to become an ingredient or component of a construction project. The sale of the prison cells is tangible personal property and because the sale of the prison cells were to governmental subdivisions, the receipts are deductible pursuant to NMSA 1978, Section 7-9-54(A) (2003).

Unfair Business Practice.

The Department raises an additional argument that Taxpayer is seeking a benefit that other similarly situated taxpayers in New Mexico are not entitled. This argument does not ring true. If a New Mexico taxpayer sells a portable or modular building that is **not** construction material that becomes part of a construction project, to a governmental subdivision then the transaction should not be taxable pursuant to NMSA 1978, Section 7-9-54(A) (2003). If a New Mexico taxpayer sells a portable or modular building or tangible personal property to someone who is engaged in the construction business, and that tangible personal property becomes or is intended to become part of a construction project, then the New Mexico taxpayer is entitled to deduct its receipts from the sale pursuant to NMSA 1978, Section 7-9-51(A) (2003), if he receives a nontaxable transaction certificate.

Taxpayer was able to prove through numerous witnesses that all of the prison cells sold to the New Mexico customers were not sold as components of a construction project. The Department introduced one witness who reviewed drawings for one of the New Mexico customers and had determined that at some point after the prison cells were sold to the New Mexico

customer, Sandoval County, the prison cells were altered and other construction occurred around those prison cells. This testimony was insufficient to prove that at the time the prison cells were sold to Sandoval County, the prison cells were part of an overall construction project.

Apportionment Not Available.

The Department argues that there should be no apportionment of the costs between in-state and out-of state. Taxpayer did not argue that costs should be apportioned. Taxpayer argued that the receipts of services may be allocated between in-state and out-of-state depending on where the services were performed. Taxpayer also argued that the sale of the prison cells occurred in Georgia because the New Mexico customers were encouraged to inspect the prison cells in Georgia and title for the prison cells passed in Georgia. This argument is partially reserved and does not need to be fully addressed.

In reviewing, the documents, the contracts introduced do not provide where title passed to the prison cells. It is also unclear whether the goods were insured in transit. The contract proposal for Sandoval County states that acceptance of the prison cells occurred when the bill of lading was signed by the New Mexico customer, accordingly in New Mexico. Exhibit I, page 6 and 14 of the contract proposal. In addition, the courts have held that that the destination principal applies to determine whether an interstate transaction is a taxable sale under the gross receipts tax law. Dell Catalog Sales, L.P., v. Taxation and Revenue Department, 2009 NMCA 1, ¶30, 145 N.M. 419, 425, 199 P.3d 863, 869. Since all the prison cells were shipped into New Mexico, the destination was New Mexico, and therefore the sales occurred in New Mexico, irrespective of where title passes or risk of loss occurs.

Receipts from the performance of a service are taxable in New Mexico if performed in New Mexico. Section 7-9-54(A)(4) provides that receipts from performing a service in New Mexico in conjunction with the sale of tangible personal property are not deductible from gross receipts tax. Taxpayer offered to pay gross receipts taxes on the services that were performed in New Mexico. The services that were performed in New Mexico were for the installation and erection of all prison cells for a total cost of \$280,154.¹ The testimony of Mr. Long confirmed that the services were performed in New Mexico and a review of the contract proposals also indicates that the services of installing or erecting were performed in New Mexico. Despite the Department's argument to the contrary, Taxpayer is liable for services that were performed in New Mexico.

Interest.

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Taxpayer is required to pay any interest on the recalculated principal tax due.

CONCLUSIONS OF LAW

A. Tindall Corporation filed a timely written protest to the principal and interest assessed under Letter ID L189947284, and jurisdiction lies over the parties and the subject matter

¹ Regulation 3.2.1.15(C) and (D) provides that delivery charges and freight charges that are paid by the seller are an element of the sales price of the property. Therefore, any charges related to delivery of the portable buildings are

of this protest.

B. Tindall Corporation sold tangible personal property or portable or modular prison cells to governmental subdivisions, and the receipts from the sale are deductible pursuant to NMSA 1978, Section 7-9-54(A) (2003).

C. The sale of the portable or modular prison cells was not the sale of construction materials that were components or ingredients of a construction project.

D. The portable or modular prison cells were not intended to become components or ingredients of a construction project.

E. Tindall Corporation performed installation or erection services in New Mexico in the amount of \$280,154.00. Tindall Corporation shall pay gross receipts tax on this amount, using the appropriate tax rate.

F. Interest shall be applied to the principal amount of tax due in accordance with this Decision.

For the foregoing reasons, Tindall Corporation's protest is GRANTED IN PART AND DENIED IN PART.

DATED: March 17, 2011

considered part of the deductible receipts from the sale of the prison cells.