NEBRASKA SHOULD NOT COVER THE FINANCIAL BURDEN IN THE CONSTRUCTION OF THE UNITED STATES STRATEGIC COMMAND HEADQUARTERS BY FOREGOING SALES TAX THAT CAN APPLY TO FEDERAL CONTRACTORS

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I. INTRODUCTION

In 2011 and 2012, Congress apportioned to the Department of Defense ("DoD") more than $18 billion for domestic construction projects. DoD spending can have major consequences on local economies. The DoD outsources a portion of its construction projects to contractors. States have constitutional authority to either tax or exempt federal contractors from sales tax. A state might exempt federal contractors from sales tax to entice the DoD to spend more on construction in that state.

Before the beginning of 2013 there was political confidence that the federal budget sequestration designed in the Budget Control Act of 2011 would not occur. However, the sequestration came to fruition.

1. See Office of the Under Sec'y of Def., Dep't of Def., Construction Programs (C-1), at Summary-4, -25 (2012) [hereinafter Construction 2013], available at http://comptroller.defense.gov/defbudget/fy2013/fy2013_c1.pdf (providing the amounts the DoD was apportioned for construction projects inside the United States, which totaled more than $9.921 billion in 2011 and more than $8.808 billion in 2012).


4. See United States v. New Mexico, 455 U.S. 720, 735 (1981) (stating that state immunity is not conferred simply because applied funds originated from the federal government).


and the DoD’s budget has been cut by $46 billion for the fiscal year of 2013. There is no immediate change for STRATCOM, but the military is seeking new ways to reduce spending. This Note argues that, while it is sensible to expect a tax exemption would entice federal dollars, the DoD has not established a pattern of awarding states for exempting federal contractors from sales tax.

It is true that some states apply sales tax to federal contractors, while others do not. Nebraska applies sales tax unless the contractor is a purchasing agent. The DoD is building a new facility for the United States Strategic Command (“STRATCOM”) at Offutt Air Force Base in Nebraska. Due to budget constraints, the federal government requested exemption from sales tax for the contractors. Nebraska agreed to exempt the contractors from sales tax. One purported reason for Nebraska to exempt the contractors is to attract and preserve future DoD projects in Nebraska. The DoD reports its

78073610568586532.html (reporting that President Obama was confident that the sequestration would not occur during a debate with Mitt Romney).


10. See infra notes 171-233 and accompanying text.

11. Compare HAW. REV. STAT. § 238-3 (2011) (providing that Hawaii sales tax applies to federal government contracts to the extent constitutionally possible), and R.I. GEN. LAWS § 44-18-32 (2010) (providing that contractors must pay Rhode Island sales tax for tangible personal property that is purchased as an agent of the federal government to the extent constitutionally allowable), with ILL. ADMIN. CODE tit. 86, § 130.2075(d)(1) (2012) (providing that contractors do not pay sales taxes), and 45 IND. ADMIN. CODE 2.2-3-12 (2012) (providing that contractors of exempt organizations are exempt from Indiana sales tax for materials purchased pursuant the contract).

12. See NEB. REV. STAT. § 77-2704.15(3) (2012) (stating a purchasing agent appointment is required for a government contractor to be exempt from sales tax).


14. See Change in Various Tax Provisions, supra note 5, at 27 (statement of David Press, Chief of the Military Constr. Div.) (noting that the construction budget for the new STRATCOM facility had been exhausted, and the Air Force base would have fewer redundancies, such as having additional backup power or a backup cooling system, if the contractors were not exempted from paying state tax).

15. See id. at 31 (statement of Neb. Sen. Heath Mello) (discussing Commissioner Ewald’s plan to exempt the contractors from sales tax); see also Paul Hammel, StratCom HQ’s Tax Problem Solved, OMAHA WORLD HERALD (Apr. 4, 2012), http://www.omaha.com/article/20120403/NEWS01/712149995 (explaining that KiewitPhelps would be exempt from sales tax).

annual construction budget, so it is possible to ascertain whether the DoD has a history of rewarding states that exempt federal contractors from sales tax with more projects.17

This Note will review the constitutionality of states applying sales tax to federal contractors as the issue is presented in the construction project at Offutt Air Force Base.18 Next, this Note will review how each state approaches the taxation of federal contractors.19 This Note will compare DoD spending in states that apply sales tax to federal contractors with states that do not.20 Drawing on that comparison, this Note will argue that no state should expect to be rewarded with more DoD construction projects in response to the state exempting federal contractors from sales tax.21 This Note will further argue that it is in Nebraska's best interest to apply sales tax to federal contractors.22

II. BACKGROUND

A. NEBRASKA IS COVERING SOME OF THE FINANCIAL BURDEN IN THE CONSTRUCTION OF THE UNITED STATES STRATEGIC COMMAND HEADQUARTERS BY FOREGOING SALE TAX APPLIED TO FEDERAL CONTRACTORS

The United States Strategic Command ("STRATCOM") Headquarters, located at Offutt Air Force Base, planned to build a new facility to house STRATCOM Headquarters, replacing its fifty-five-year-old facility.23 The old facility has experienced flooding on occasion and was built in 1957.24 The United States Department of Defense's ("DoD") 2013 budget proposal contained funds apportioned for construction of the new facility at Offutt Air Force Base.25 Congress approved the expenditure on a phase-in basis, allocating $120 million to begin construction of the facility and incremental funds to be apportioned in future fiscal years.26 KiewitPhelps, a contractor and private joint venture, bid on and won the contract to build the new

17. See infra Figure 1.
18. See infra notes 23-93 and accompanying text.
19. See infra notes 94-111 and accompanying text.
20. See infra notes 141-70 and accompanying text.
21. See infra notes 141-86 and accompanying text.
22. See infra notes 141-86 and accompanying text.
24. Hammel, supra note 15.
25. See Construction 2013, supra note 1, at State-73 (demonstrating that $564 million has been authorized for Offutt Air Force Base as of February 2012).
26. See Change in Various Tax Provisions, supra note 5, at 9 (statement of U.S. Sen. Ben Nelson) (stating that the funding will be phased in for each fiscal year).
The STRATCOM facility. The new facility will cost approximately $524.4 million.

Nebraska taxes the purchases made by a private contractor who builds for the federal government unless the federal government certifies the contractor as a purchasing agent. The contractor becomes a purchasing agent once the federal government has issued a Purchasing Agent Appointment and Delegation of Authority for Sales and Use Tax, known as Form 17 ("Form 17") to the contractor. As the purchasing agent, the contractor then has authority to purchase and pay for building materials tax-free if the materials will be annexed to real estate for the tax-exempt construction project. If a contractor is not a purchasing agent, Nebraska sales taxes apply to the contractor's purchases.

The United States Army Corps of Engineers ("Army Corps") will oversee the work of the private contractors hired to construct the new STRATCOM facility. The Army Corps had concerns about exposing the government to liability created by assigning the contractor as a purchasing agent. The Federal agencies chose not to sign Form 17, which caused a delay in construction. The Army Corps received bids from contractors, which matched the project's spending limit. In order to meet budget, the Army Corps had to either remove redundancies from the project or exempt their contractors from Nebraska sales tax. The budget problem delayed the start of the project by four months.

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27. Hendee, supra note 13.
29. See NEB. REV. STAT. § 77-2704.15(3) (2012) (stating a purchasing agent appointment is required for a government contractor to be exempt from sales tax).
30. 316 NEB. ADMIN. CODE § 1-17.08A(3) (2012).
31. See id. (stating that once the contractor has been appointed as the purchasing agent, the contractor may purchase building materials that will become part of the structure without paying state tax on those materials).
32. See NEB. REV. STAT. § 77-2704.15(3) (stating a purchasing agent appointment is required for a government contractor to be exempt from sales tax).
34. Id.
35. Id.
36. See Change in Various Tax Provisions, supra note 5, at 15 (statement of Bob Hinson, retired U.S. Air Force Lieutenant) (stating that it was his understanding the bids received for the construction project met or exceeded the spending limit).
37. See id. at 27 (statement of David Press, Colonel, U.S. Army Corps of Eng’rs) (responding that if the tax exemption occurred the project would include more redundancies, such as having additional backup power or a backup cooling system).
38. Id. at 21 (statement by Larry Sand, Project Manager, U.S. Army Corps of Eng’rs).
Building the new facility is important because STRATCOM Headquarters has a major impact on the Nebraska economy. Offutt Air Force Base, the STRATCOM Headquarters, has an economic impact of more than $1.7 billion annually. Offutt Air Force Base employs about 10,000 military personnel and 22,000 private contractors. Nebraska politicians were concerned about their ability to attract future DoD spending if Nebraska continued to tax federal contractors.

Contractors are generally subject to Nebraska sales taxes. Not taxing a particular class of governmental contractor purchases is deemed a tax expenditure. A tax expenditure is tax revenue available to a sovereign which it has legislatively decided not to pursue. Failure to tax federal contractors can cost a state substantial potential income.

If Nebraska taxed the purchases of KiewitPhelps, Nebraska would raise an estimated $3.5 million in revenue per year during the life of the project. Construction of the new facility is expected to span from 2012 to 2016. The Nebraska legislature decided to exempt KiewitPhelps, from sales taxes that would have accrued in the construction of the new facility. One Nebraska state senator offered an amendment that would have exempted DoD contractors from sales

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39. See id. at 1 (statement of Neb. Sen. Heath Mello) (stating that Offutt Air Force base is a major economic development engine in Nebraska).

40. See BACON, supra note 2, at 14 (providing that Offutt Air Force Base has an annual local economic impact $1.775 billion).


43. See NEB. REV. STAT. § 77-2703 (2012) (stating sales tax in Nebraska is applied to the sale of all tangible personal property).

44. See DOUG EWALD, NEB. DEPT. OF REVENUE, STATE OF NEBRASKA: 2012 TAX EXPENDITURE REPORT, at iii (2012), http://www.revenue.ne.gov/tax_exp/2012/4-731-2012.pdf (defining a tax expenditure as a reduction in revenue that results when an exemption, exclusion, deduction, tax deferral, preferential rate, or credit is applied to a state or a political subdivision's existing tax structure).

45. Id.

46. See id. § A, at 11 (stating that Nebraska failed to collect $34,763,000 in possible sales tax revenue from federal contractors designated as federal purchasing agents in 2012).

47. See Hammel, supra note 15 (stating Nebraska would experience an estimated loss of $3.5 million in revenue per year if federal contractors are not taxed).

48. See Hansen, supra note 28 (stating that KiewitPhelps broke ground in 2012 and is expected to complete construction by 2016).

49. See Change in Various Tax Provisions, supra note 5, at 31 (statement of Neb. Sen. Heath Mello) (discussing the tax commissioner's proposal to exempt the project from state sales tax); see also Hammel, supra note 15 (stating that tax form 17 was altered in order to exempt federal contractors).
taxes in Nebraska. After a hearing on the issue the state senator withdrew that amendment and the Nebraska’s tax commissioner offered a different solution. The tax commissioner redefined purchasing agent as required by Form 17 so that the agency agreement excluded the liabilities the Army Corps did not wish to create. The legislature accepted the solution and moved the project forward.

B. United States v. New Mexico: The United States Supreme Court Determined Which Federal Contractors Are Constitutionally Immune From State Sales Tax

In United States v. New Mexico (Los Alamos Contractors III), the United States Supreme Court concluded that tax immunity for an agent of the federal government is necessary only when the United States itself is the actor at issue, or an agent is the actor at issue and the connection between the agent and the United States is so close that it is unrealistic to view the two as separate entities. In Los Alamos Contractors III, the United States sued New Mexico in the United States District Court for the District of New Mexico for improper taxation. New Mexico imposed both a compensating use tax and a gross receipts tax on those engaging in business in New Mexico. The Atomic Energy Commission (“AEC”), now the Department of Energy (“DOE”), wanted to utilize the private industry’s expertise in the production of fissionable materials in New Mexico. As a result the AEC entered into complex contracts with three private entities for the construction, maintenance, and management of research facility. The contracts specified different duties for each contractor
but each contract transferred title of all tangible property purchased by a contractor to the AEC.\textsuperscript{60}

The AEC sought a declaratory judgment against New Mexico arguing that New Mexico incorrectly taxed advanced funds as gross receipts to the contractors.\textsuperscript{61} In addition, the AEC asserted New Mexico incorrectly taxed the receipts of tangible property purchases the AEC made through its contractors.\textsuperscript{62} Finally, the AEC claimed government-owned property used by contractors was not subject to New Mexico's compensating use tax.\textsuperscript{63}

The district court granted summary judgment in favor of the AEC.\textsuperscript{64} The district court relied on \textit{Kern-Limerick, Inc. v. Scurlock}\textsuperscript{65} to determine the crucial issue of whether the contractors were the AEC's procurement agents.\textsuperscript{66} The district court reasoned that the contractors were procurement agents because the AEC maintained control over operations under the contracts.\textsuperscript{67} Thus, the district court held that this application of the state tax was unconstitutional.\textsuperscript{68} The district court noted the federal government must be allowed to protect its sovereignty whenever a state taxes it.\textsuperscript{69}

New Mexico appealed to the United States Court of Appeals for the Tenth Circuit.\textsuperscript{70} New Mexico argued that the contractors were not procurement agents.\textsuperscript{71} New Mexico also argued that advanced fund-

\begin{itemize}
  \item \textsuperscript{60} See \textit{id.} at 723-25 (describing details to the contracts between the government and the three contractors). The contracts were funded with an accounting technique known as advanced funding. \textit{Id.} at 725. Advanced funding required a three-party contract between the AEC, the contractor it chooses, and a bank. \textit{Id.} The AEC created a letter of credit at the Federal Reserve Bank, making funds available in a specific bank account. \textit{Id.} The contractor then drew on the account, which the federal government owns, to pay for expenses and the government agrees to excuse the contractor from his duties if the account has insufficient funds. \textit{Id.}
  \item \textsuperscript{61} \textit{Id.} at 728.
  \item \textsuperscript{62} \textit{Id.}
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} \textit{Id.}
  \item \textsuperscript{65} 347 U.S. 110.
  \item \textsuperscript{66} \textit{Los Alamos Contractors III,} 455 U.S. at 728-29 (citing Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954)).
  \item \textsuperscript{67} \textit{Id.} at 729.
  \item \textsuperscript{68} See \textit{id.} (determining that the district court held that the gross receipt tax was unconstitutionally applied to contractor purchases).
  \item \textsuperscript{69} See United States v. New Mexico (\textit{Los Alamos Contractors I,} 455 F. Supp. 993, 999 (D.N.M. 1978) (stating that when states taxes might challenge the federal government sovereign constitutional rights, the federal government has standing to protect those rights in an adjudication).
  \item \textsuperscript{70} See United States v. New Mexico (\textit{Los Alamos Contractors II,} 624 F.2d 111 (10th Cir. 1980) (stating that the United States Court of Appeals for the Tenth Circuit reversed the lower court's holding in favor of New Mexico).
  \item \textsuperscript{71} See Brief of the State of New Mexico at 10, United States v. New Mexico, 455 U.S. 720 (1981) (No. 80-702), 1981 WL 390063 (arguing that the contractors were not agents under the Department of Energy contract because the contractors made the purchases in their name, not in the name of the government agency).
\end{itemize}
ing was a method of payment, not proof that agency existed.\textsuperscript{72} The Tenth Circuit reversed in favor of New Mexico.\textsuperscript{73} The Tenth Circuit highlighted that the balance between co-existing sovereignties was more important than rigidly adhering to agency law terminology.\textsuperscript{74} The Tenth Circuit further noted that contractors are entities separate from the government when the contractors remain responsible for their salaries and overhead.\textsuperscript{75} The Tenth Circuit determined that advanced funding did not transform contractors into agents.\textsuperscript{76} That is, the court explained accounting practices alone cannot create agency.\textsuperscript{77}

The AEC petitioned the United States Supreme Court, which granted certiorari.\textsuperscript{78} The AEC argued that the Supremacy Clause\textsuperscript{79} of the United States Constitution made the federal government and its agents immune from taxation by the states.\textsuperscript{80} The AEC claimed that the contractors were procurement agents and therefore immune from taxation by the state.\textsuperscript{81} The Supreme Court concluded that tax immunity for a federal contractor is appropriate only when the connection between the contractor and the government is so close that it is unrealistic to view the two as separate entities.\textsuperscript{82}

The Court discussed the supremacy of the federal government.\textsuperscript{83} The Court cited \textit{McCulloch v. Maryland},\textsuperscript{84} in which Chief Justice Marshall famously noted the destructive power imbued within the power to tax.\textsuperscript{85} However, the Court also stated that it would not needlessly alter a state's power to tax subjects with non-discriminatory laws when there was remote or no influence on the federal government's functions.\textsuperscript{86} The Court referred to this interaction between the federal immunity doctrine and a state's power to lay taxes as a clashing of sovereignties.\textsuperscript{87} The Court reminded the parties a state cannot tax

\begin{footnotesize}
\textsuperscript{72} Id. at 24-25.
\textsuperscript{73} Los Alamos Contractors III, 455 U.S. at 729.
\textsuperscript{74} Los Alamos Contractors II, 624 F.2d at 116.
\textsuperscript{75} Id. at 116-17.
\textsuperscript{76} Id. at 119.
\textsuperscript{77} Id.
\textsuperscript{78} See Los Alamos Contractors III, 455 U.S. at 729 (stating that the United States sought, and was granted, certiorari).
\textsuperscript{79} U.S. Const. art. VI, cl. 2.
\textsuperscript{81} Id. at 17-18.
\textsuperscript{82} Los Alamos Contractors III, 455 U.S. at 735.
\textsuperscript{83} Id. at 730-31 (discussing the implications of state taxation on the federal government).
\textsuperscript{84} 17 U.S. 316 (1819).
\textsuperscript{85} Los Alamos Contractors III, 455 U.S. at 730 (quoting McCulloch v. Maryland, 17 U.S. 316, 431 (1819)) (stating "the power to tax involves the power to destroy").
\textsuperscript{86} Id. at 732.
\textsuperscript{87} Id. at 735-36 (citing McCulloch, 17 U.S. at 430).
\end{footnotesize}
the federal government. When the federal government hires private contractors for government projects, traditional agency law does not resolve whether the private contractor is immune from state taxation. The Court explained that reimbursement of contractor expenses was irrelevant. The Court further acknowledged that contracting for profit is a taxable activity. Instead of relying on agency principles, the Court determined the Supremacy Clause grants immunity to a federal contractor only when the contractor stands in the shoes of the government. The Court determined that none of the contractors met that standard.

C. How The States Have Responded to Their Right to Apply Sales Tax to Federal Contractors

States can apply sales tax to federal contractors unless the contractor stands in the shoes of the government. States are torn on whether to tax federal contractors. In 2011 and 2012, the Department of Defense (“DoD”) spent more than $19 billion on domestic construction. The federal government outlaid more than $3.6 trillion for each of those years. By comparison, Nebraska raised a total of about $3.5 billion in tax revenue for fiscal year 2010-2011 and an estimated $3.6 billion in tax revenue for fiscal year 2011-2012. Federal spending can have a huge economic impact on a state. Exempting federal contractors from sales tax might attract more future federal

88. Id. at 733 (quoting Mayo v. United States, 319 U.S. 441, 447 (1943)).
89. See id. at 736 (quoting City of Detroit v. Murray Corp., 355 U.S. 483, 503 (1958)) (stating that in order to avoid state taxation a private contractor must stand in place of the federal government).
90. Id. at 734 (citing Alabama v. King & Boozer, 314 U.S. 1, 9 (1941)).
91. Id. at 734-35 (quoting United States v. Boyd, 378 U.S. 39, 44 (1964)).
92. See id. at 736 (quoting Murray Corp., 355 U.S. at 503) (stating that in order to avoid state taxation a private contractor must stand in place of the federal government).
93. See id. at 744 (concluding that the contractors were not protected by the constitutional guarantee of federal supremacy).
95. See supra note 11 and accompanying text.
96. See supra note 1 and accompanying text.
spending to the state. However, sales tax can be a substantial source of income for a state.\footnote{101}

States approach this problem differently.\footnote{102} Twenty-six states apply sales-and-use taxes to federal contractors.\footnote{103} Five states


101. See, e.g., State of Neb., supra note 98, at 18 (showing Nebraska's sales and use tax accounted for approximately 39.2% of both actual 2011 general fund revenues ($1,372,784,033 divided by $3,499,655,092) and estimated 2012 general fund revenues ($1,428,000,000 divided by $3,643,000,000)).

102. See supra note 11 and accompanying text.

103. See Cal. Rev. & Tax. Code § 6007.5 (West 1998) (providing that California sales tax is applied to contractors purchasing goods to be used for federal contracts); Fla. Stat. Ann. § 212.08(17)(c) (West Supp. 2013) (providing that real property construction contractors are not exempt from Florida sales tax); Haw. Rev. Stat. § 238-3 (West Supp. 2012) (providing that Hawaii sales tax applies to federal government contracts to the extent constitutionally possible); Minn. Stat. Ann. § 297A.70(2)(b)(1) (West Supp. 2013) (providing that construction contracts are not exempt from Minnesota sales tax); Miss. Code Ann. § 27-65-105(a) (West Supp. 2012) (providing that Mississippi sales tax exemption does not apply to materials purchased by contractors performing contracts for the federal government); Nev. Rev. Stat. Ann. § 372.340 (LexisNexis 2011) (imposing Nevada sales tax on contractors using tangible property pursuant to a contract with a government entity); N.M. Stat. Ann. § 7-9-14 (West 2012) (stating that contractors working on construction in New Mexico are not exempt from taxation); Okla. Stat. Ann. tit. 68, § 1356 (West Supp. 2013) (indicating contractors performing contracts for the federal government are not exempt from Oklahoma sales tax for materials purchased); R.I. Gen. Laws § 44-18-32 (2010) (providing that contractors must pay Rhode Island sales tax for tangible personal property that is purchased as an agent of the federal government to the extent constitutionally allowable); 006.05.009 Ark. Code R. § 8-74-47 (LexisNexis 2013) (providing that contractors are the ultimate consumers of tangible personal property, even if purchased for a federal government contract, and thus such contractors are not exempt from Arkansas sales tax); Ga. Comp. R. & Regs. 560-12-2-.106(2)(c) (2013) (excluding government construction contracts from the federal exception to Georgia sales tax); Idaho Admin. Code r. 35.01.20.012 (2013) (explaining that Idaho applies sales tax to federal government contractors); Ky. Admin. Regs. 30:235(5) (2013) (providing that contractors may not claim the federal exemption from Kentucky sales tax); Md. Code Regs. 03.06.01.19 (2013) (proving that any material purchased pursuant to a contract with the federal government is subject to sales tax); Mich. Admin. Code r. 205.71 (2013) (proving that contractors are the taxable consumers of materials they use in construction under Michigan law, unless the material are used in the construction of a non-profit hospitals or a non-profit housing entities); 17 N.C. Admin. Code 7B.1701 (2013) (stating the North Carolina exemption to sales tax does not apply to contractors for materials used in federal contract); N.D. Admin. Code 81-04.1-02-02 (2013) (stating the North Dakota exemption to sales tax does not apply to contractors for materials used in federal contracts); 61 Pa. Code § 32.22(b) (2013) (providing that real estate improvements and construction activities are taxed to the contractor under Pennsylvania code); S.D. Admin. R. 44:07:01:15 (2013) (providing that contractors pay South Dakota sales tax even if they never have title, so long as contractor acts as contractor in federal project); Tenn. Comp. R. & Regs. 1320-05-01.58 (2013) (providing that contractors are not exempt from Tennessee sales and use tax when doing contract work with the federal government); Utah Admin. Code r. 865-195-58(2)(b) (2013) (providing that contractors are the consumers of, and as such must pay Utah sales tax on, material purchased for contracts with the federal government); 20 Va. Admin. Code § 10-210-410(j) (2013) (proving government contractors must be sub-
will immunize the contractor from taxes if the government designates the contractor as a federal agent.\textsuperscript{104} Fourteen states specifically exempt federal contractors from sales taxes when the contractors are working for the federal government.\textsuperscript{105} Lastly, five

\textsuperscript{104} See Neb. Rev. Stat. § 77-2704.15 (2012) (exempting contractors from Nebraska sales tax if the contractor is appointed as a purchasing agent of the federal government); Ala. Admin. Code r. 810-6-3-.69.02 (2013) (providing Alabama tax exemption for contractors, but only with appointment of purchasing agent); Iowa Admin. Code r. 701-19.12(422,423) (2013) (stating that an exempt entity's contractor would become a purchasing agent under Iowa law and establishing that contractors are only exempt if they are designated purchasing agent); La. Admin. Code tit. 61, § 4301 (2013) (requiring a contractor to be designated as an agent of the governmental entity to receive the exemption); 34 Tex. Admin. Code § 3.322(c) (2013) (exempting contractors from sales tax if the contractor is explicitly designated an agent of the federal government).

states do not have any sales-and-use taxes, so the issue does not arise.106

After identifying the states’ respective sales tax choices, one should also identify federal dollars initially apportioned for construction and the number of citizens that each states’ tax choice inevitably affects.107 Table 1 and Table 2 display how much the DoD apportioned for construction in states that do and do not apply sales tax to federal contractors, pairing the states that require an agency designation with states that apply sales tax to federal contractors.108 Table 3 displays the population of the states divided by whether the state does or does not apply sales tax to federal contractors.109


108. See infra Tables 1 and 2.

**TABLE 2. AMOUNT (IN THOUSANDS OF DOLLARS) APPORTIONED FOR DOD CONSTRUCTION TO STATES THAT APPLY SALES TAX TO FEDERAL CONTRACTORS.**

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111. See supra note 110.
TABLE 3. 2010 STATE POPULATIONS AND WHETHER OR NOT THE STATE APPLIES SALES TAX TO FEDERAL CONTRACTORS.\textsuperscript{112}

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D. HOW THE DEPARTMENT OF DEFENSE APPROACHES DOMESTIC CONSTRUCTION CONTRACTS

Tax consequences for federal contractors vary from state to state.\textsuperscript{113} The Federal Acquisition Regulation ("FAR") was established to create uniform procedures for acquisitions by executive agencies.\textsuperscript{114} FAR specifically regulates acquisitions by the Department of Defense, NASA, and the General Service Administration.\textsuperscript{115} FAR operates as a

\textsuperscript{112} See Resident Population Data, supra note 109; see also supra note 110 and accompanying text.
\textsuperscript{113} See supra note 11 and accompanying text.
\textsuperscript{114} 48 C.F.R. § 1.101 (2012).
\textsuperscript{115} Id. § 1.301(d).
blueprint for federal agents to follow.\textsuperscript{116} FAR provides sample contract clauses and solicitation provisions.\textsuperscript{117} FAR also has provisions explaining how to handle local regulations.\textsuperscript{118}

FAR dictates how federal agents handle the local laws of taxation applying to federal contractors in two relevant sections.\textsuperscript{119} First, when operating under FAR, federal agents are directed to take advantage of all beneficial tax treatments available to the government.\textsuperscript{120} Second, the agents are required to limit liability by not normally assigning contractors as agents of the government.\textsuperscript{121}

The United States Army Corps of Engineers is operating under FAR as it oversees the construction of the new facilities at Offutt Air Force Base.\textsuperscript{122} As agents operating under FAR, the Army Corps must take advantage of all beneficial tax treatments available and limit the government’s liability by not assigning contractors as agents of the government.\textsuperscript{123} The Army Corps received bids from contractors that matched the project’s spending limit.\textsuperscript{124} Recall, however, that Nebraska law requires the federal government to assign the contractor as an agent in order for the contractor to receive sales tax exemption.\textsuperscript{125} Thus, in order to meet budget constraints, the Army Corps had to either remove redundancies from the project or get a sales tax exemption for the contractor.\textsuperscript{126} The Nebraska legislature decided to exempt the contractor, Kiewit Phelps, from sales taxes that would have accrued during the course of the project.\textsuperscript{127}

\textsuperscript{116} See 48 C.F.R. § 1.304(a) (2012) (providing guidelines for agencies to use when making contracts).
\textsuperscript{118} See 48 C.F.R. §§ 29.302, 29.303 (describing the application of state and local to the federal government and describing the application of state and local taxes to federal government contractors).
\textsuperscript{119} Id.
\textsuperscript{120} Id. § 29.302(b).
\textsuperscript{121} Id. § 29.303(a).
\textsuperscript{123} See 48 C.F.R. §§ 29.302(b), 29.303(a) (mandating that federal government agents must take advantage of tax benefits and contractors will not normally be delegated as agents of the government).
\textsuperscript{125} NEB. REV. STAT. § 77-2704.15 (2012).
\textsuperscript{126} See id. (responding that if the tax exemption occurred the project would include more redundancies, such as having additional backup power or a backup cooling system).
\textsuperscript{127} See Change in Various Tax Provisions, supra note 5, at 31 (statement of Neb. Sen. Heath Mello) (stating his appreciation for resolving the tax dilemma); see also Hammel, supra note 15 (stating that tax form 17 was altered for the project).
III. ARGUMENT

A. NEBRASKA ARBITRARILY FORGOES A SOURCE OF REVENUE WHEN IT EXEMPTS FEDERAL CONTRACTORS FROM STATE SALES TAX

Nebraska needs revenue to operate the state.\textsuperscript{128} Nebraska's revenue changes from year to year.\textsuperscript{129} Nebraska relies on data from previous years to predict future revenue streams and relies on those estimates when determining which projects are affordable.\textsuperscript{130}

In 2012, sales tax accounted for approximately thirty-eight percent of Nebraska's income.\textsuperscript{131} Nebraska exempts certain sales from taxation.\textsuperscript{132} Whenever Nebraska does not collect a tax it could have collected, it incurs a tax expenditure, which is a lost opportunity for revenue.\textsuperscript{133} The goal of many tax expenditures is to make Nebraska more appealing to certain businesses.\textsuperscript{134} The Department of Defense ("DoD") spends billions of dollars annually on domestic construction.\textsuperscript{135} Nebraska politicians want to attract DoD spending.\textsuperscript{136} Nebraska is not applying sales tax to the contractors building the new United States Strategic Command ("STRATCOM") facility.\textsuperscript{137} However, historically, Nebraska has collected sales tax from federal contractors.\textsuperscript{138}

This Argument will demonstrate that the DoD does not appear to award more federal construction projects to states that have tax ex-


\textsuperscript{129} See \textit{id.}

\textsuperscript{130} See \textit{id.} at 14 (providing the methodology that the Legislative Fiscal Office uses to predict Nebraska's revenue).

\textsuperscript{131} See \textit{id.} at 14 tbl.4 (noting that in 2010 sale tax accounted for $1,372,784,033 of Nebraska's $3,499,655,092 revenue).

\textsuperscript{132} See Ewald, supra note 44, at 9-34 (listing the sales that were exempt from Nebraska sales tax).

\textsuperscript{133} See \textit{id.} at 3 (defining a tax expenditure as a reduction in revenue that results when an exemption, exclusion, deduction, tax deferral, preferential rate, or credit is applied to a state or a political subdivision's existing tax structure).

\textsuperscript{134} See \textit{id.} (providing that tax expenditures create indirect subsidies for sectors of Nebraska's economy).

\textsuperscript{135} See supra Table 1, Table 2 (displaying amounts apportioned for domestic construction).


\textsuperscript{137} Hammel, supra note 15 (stating that tax form 17 was altered for the project).

\textsuperscript{138} See Neb. Rev. Stat. § 77-2704.15 (2012) (exempting contractors from Nebraska sales tax only if the contractor is appointed as a purchasing agent of the federal government).
emptions favoring the federal government. This Argument will illustrate that because the DoD has not increased construction in states that exempt federal contractors, Nebraska should not expect an increase in DoD spending because it exempted STRATCOM contractors from sales tax. Therefore, this Argument shows that it is in Nebraska's best interest to resume applying sales tax on federal contractors going forward.

B. The Department of Defense Is Unlikely to Spend More Money on Construction in Nebraska Because of a Sales Tax Exemption for Federal Contractors in Nebraska

Nebraska recently considered whether it would apply sales tax to the purchases of federal contractors. Nebraska decided to exempt the contractors building the new United States Strategic Command ("STRATCOM") facility from sales taxes. Not taxing federal contractors constitutes a tax expenditure for Nebraska. When Nebraska decided not to apply sales tax to the purchases of contractors building the new STRATCOM facility, Nebraska helped the Department of Defense ("DoD") financially. Therefore, Nebraska incurred a tax expenditure that benefits the DoD.

States generally have constitutional authority to impose sales tax on the purchases of federal contractors. The only exception is when the contractor is so closely intertwined with a federal agency that it is

139. See infra notes 142-71 and accompanying text.
140. See infra notes 142-71 and accompanying text.
141. See infra notes 172-87 and accompanying text.
143. See Hammel, supra note 15 (stating that tax form 17 was altered for the project).
144. See Ewald, supra note 44, at 3 (defining a tax expenditure as a reduction in revenue that results when an exemption, exclusion, deduction, tax deferral, preferential rate, or credit is applied to a state or a political subdivision's existing tax structure).
145. See Change in Various Tax Provisions, supra note 5, at 15 (statement by Bob Hinson, retired U.S. Air Force Lieutenant) (explaining that a tax exemption allows the DoD to build a better facility with more redundancies).
146. Compare Change in Various Tax Provisions, supra note 5, at 15 (statement by Bob Hinson, retired U.S. Air Force Lieutenant) (explaining that a tax exemption allows the DoD to build a better facility with more redundancies), with Ewald, supra note 44, at 3 (defining a tax expenditure as a reduction in revenue that results when an exemption, exclusion, deduction, tax deferral, preferential rate, or credit is applied to a state or a political subdivision's existing tax structure).
147. See United States v. New Mexico (Los Alamos Contractors III), 455 U.S. 720, 735, 36 (1981) (determining that the Supremacy Clause of the Constitution is not violated when a state applies sales tax to a federal contractor).
impractical to treat the contractor and federal agency separately.\textsuperscript{148} States decide whether to apply sales tax to federal contractors.\textsuperscript{149} Some states apply sales tax to federal contractors' purchases.\textsuperscript{150} Other states exempt federal contractors.\textsuperscript{151} States that exempt federal contractors from sales tax have forgone revenue, while states that tax federal contractors collect revenue.\textsuperscript{152} Nebraska has a tax expenditure that other states in the same situation would not have.\textsuperscript{153} However, DoD spending plays a big role in Nebraska's economy.\textsuperscript{154}

Annually, the DoD spends billions on domestic construction.\textsuperscript{155} The DoD publicly reports spending to the oversight committee of Congress.\textsuperscript{156} The DoD organizes the report itemizing construction expenses by the state in which the construction occurred.\textsuperscript{157} This itemization makes it possible to compare the DoD's domestic construction spending habits over a series of years.\textsuperscript{158} Figure 1 displays the average amount of money the DoD apportioned to states that tax federal contractors and states that exempt federal contractors over a fifteen year period.\textsuperscript{159}

\textsuperscript{148.} See Los Alamos Contractors III, 455 U.S. at 735 (concluding that tax immunity for a federal contractor is appropriate only when the connection between the contractor and the government is so close that it is unrealistic to view the two as separate entities).

\textsuperscript{149.} See id. (determining that the Supremacy Clause of the Constitution is not violated when a state applies sales tax to a federal contractor).

\textsuperscript{150.} See supra note 103 and accompanying text.

\textsuperscript{151.} See supra note 105 and accompanying text.

\textsuperscript{152.} Compare, e.g., HAW. REV. STAT. § 238-3 (West Supp. 2012) (providing that Hawaii sales tax applies to federal government contracts to the extent constitutionally possible), with ILL. ADMIN. CODE tit. 86, § 130.2075(d)(1) (2013) (providing that contractors do not pay sales taxes), and EWALD, supra note 44, at 3 (defining a tax expenditure as a reduction in revenue that results when an exemption, exclusion, deduction, tax deferral, preferential rate, or credit is applied to a state or a political subdivision's existing tax structure).

\textsuperscript{153.} Compare R.I. GEN. LAWS § 44-18-32 (2010) (providing that contractors must pay Rhode Island sales tax for tangible personal property that is purchased as an agent of the federal government to the extent constitutionally allowable), with Change in Various Tax Provisions, supra note 5, at 31 (statement of Heath Mello, Neb. Sen.) (explaining that contractors for STRATCOM will not be taxed), and EWALD, supra note 44, at 3 (defining a tax expenditure as a reduction in revenue that results when an exemption, exclusion, deduction, tax deferral, preferential rate, or credit is applied to a state or a political subdivision's existing tax structure).

\textsuperscript{154.} See supra note 144 and accompanying text; see also BACON, supra note 2, at 14 (providing that Offutt Air Force Base has an annual local economic impact $1.775 billion).

\textsuperscript{155.} See supra note 110 and Table 1, Table 2.

\textsuperscript{156.} CONSTRUCTION 2013, supra note 110, at i.

\textsuperscript{157.} See, e.g., id. at ii (providing a table of contents and identifying those pages where summary data is provided by state and country across multiple fiscal years).

\textsuperscript{158.} See supra note 110 and Table 1, Table 2.

\textsuperscript{159.} See infra Figure 1; see also supra Table 1, Table 2 (displaying which states apply sales tax to purchases made by federal contractors and how much the DoD apportions for construction in those states).
As is evident in Figure 1, the DoD actually spends more money per state on construction in states that tax federal contractors than in states that do not tax federal contractors. One alleged reason to exempt federal contractors from sales tax is to attract more DoD business to the exempting state. However, states that tax federal contractors attracted more DoD construction business per state from 1999 to 2011, as shown in Figure 1. Therefore, from 1999 to 2011, the DoD did not apportion more construction funds to states that exempt contractors from sales tax. Based on that thirteen-year sample size, a state exempting federal contractors from sales tax is unlikely to receive an increase in the amount of DoD construction spending. This is further demonstrated by Figure 2.

160. Compare supra Table 1 (displaying average amount DoD spends on construction in states that do not apply sales tax to federal contractors), with supra Table 2 (displaying average amount DoD spends on construction in states that do apply sales tax to federal contractors); see also supra Figure 1 (graphing the DoD's construction apportionment from 1999 to 2011). Notice that neither Table 1 nor Table 2 exclude sales tax from the amount apportioned to the states. See supra Table 1, Table 2 (displaying the total amount the DoD apportioned to each state).


162. Compare supra Table 1 (displaying average amount DoD spends on construction in states that do not apply sales tax to federal contractors), with supra Table 2 (displaying average amount DoD spends on construction in states that do apply sales tax to federal contractors); see also supra Figure 1 (graphing the DoD's construction apportionment from 1999 to 2011).

163. Compare supra Table 1 (displaying average amount DoD spends on construction in states that do not apply sales tax to federal contractors), with supra Table 2 (displaying average amount DoD spends on construction in states that do apply sales tax to federal contractors); see also supra Figure 1 (graphing the DoD's construction apportionment from 1999 to 2011).

164. Compare supra Table 1 (displaying average amount DoD spends on construction in states that do not apply sales tax to federal contractors), with supra Table 2
Figure 2 displays the percent of DoD construction spending in states that tax federal contractors and in states that do not tax federal contractors.\textsuperscript{166} States that tax federal contractors account for sixty-two percent of all states.\textsuperscript{167} States that do not tax federal contractors account for thirty-eight percent of all states.\textsuperscript{168} Figure 2 displays states that tax federal contractors and states that do not tax federal contractors accounted for approximately sixty-seven percent and thirty-three percent of DoD construction spending, respectively in 2011.\textsuperscript{169} Over the thirteen-year timespan, the percentages are trend-

\textsuperscript{165} See infra Figure 2. Market share in Figure 2 for 1999 is calculated by adding the columns “1999” in Table 1 and Table 2. See supra Table 1, Table 2 (displaying the amount apportioned to states that tax and do not tax federal contractors). Dividing the summation of Table 1 by the summation of both calculates the market share for non-taxing states in 1999. See supra Figure 2 (displaying the summation of the 1999 column in Table 1, divided by the summation of the 1999 column in Table 1 and Table 2). This is repeated for each year. See infra Figure 2 (displaying the summation of the each column in Table 1, divided by the summation of the corresponding columns in Table 1 and Table 2).

\textsuperscript{166} See supra Figure 2.

\textsuperscript{167} See supra Table 2 (listing 31 states that tax federal contractors).

\textsuperscript{168} See supra Table 1 (listing 19 states that do not tax federal contractors).

\textsuperscript{169} See supra Figure 2.
ing away from each other slightly. The rate of this trend is 1.01% per year.

C. Going Forward, Nebraska Should Apply Sales Tax to Federal Contractors

States have authority to apply sales tax to federal contractors. A state that does not tax contractors incurs a tax expenditure. If the goal of the tax expenditure is to attract more Department of Defense ("DoD") construction business, the policy is unlikely to be successful. Nebraska should not expect any change in how much money the DoD apportions to Nebraska because of a shift in Nebraska law exempting federal contractors from sales tax.

170. See supra Figure 2. The equation for a trend is as follows: trend slope = \[
\frac{n \sum_{i=1}^{n} x_i y_i - (\sum_{i=1}^{n} x_i)(\sum_{i=1}^{n} y_i)}{n \sum_{i=1}^{n} x_i^2 - (\sum_{i=1}^{n} x_i)^2};
\]
where \( n \) = the number of data points, 
\[
\sum_{i=1}^{n} x_i y_i
\]
= the summation of the products of the x value and the y value for each data point, 
\[
\sum_{i=1}^{n} x_i
\]
= the summation of all x values, 
\[
\sum_{i=1}^{n} y_i
\]
= the summation of all y values, and 
\[
\sum_{i=1}^{n} x_i^2
\]
= the summation of all squared x values. J. K. Sharma, Business Statistics 558 (2d ed. 2007). In Figure 2, the x values are years and the y values are percentages. See supra Figure 2. The Figure 2 tax contractor regression slope is \((13)(16176.49633) - (26065)(8.067163367) / (13)(52260507) - (679384225) = 0.010075719. See supra Figure 2.

171. See supra Figure 2 (demonstrating that the slope for the states taxing contractors is .0101).

172. See United States v. New Mexico, 455 U.S. 720, 735-36 (1981) (determining that the Supremacy Clause of the Constitution is not violated when a state applies sales tax to a federal contractor).

173. See Ewald, supra note 44, at 3 (defining a tax expenditure as a reduction in revenue that results when an exemption, exclusion, deduction, tax deferral, preferential rate, or credit is applied to a state or a political subdivision’s existing tax structure).

174. See supra Figure 1, Figure 2 (demonstrating that the DoD spends more on construction in states that tax federal contractors).

175. Compare Neb. Leg., Floor Deb., 102d Leg., 2d Sess., at 74 (2012) (statement of Neb. Sen. Heath Mello) (arguing that a policy of taxing federal contractors endangers future federal projects in Nebraska), with supra Figure 1, Figure 2 (demonstrating that the DoD spends more on construction in states that tax federal contractors).
Admittedly, however, the DoD is under pressure to reduce spend­
ing.176 This is because sequestration to reduce the federal budget has
applied across the board.177 When this Note was written there was
political confidence that the sequestration would not occur.178 It now
appears that the DoD’s budget for the 2013 fiscal year may be reduced
by $46 billion.179 STRATCOM has yet to feel the consequences of se­
questration.180 STRATCOM’s long term budget could potentially be
reduced.181

Nebraska is not applying sales tax to the contractors building the
new STRACOM facility.182 An exemption results in a tax expendi­
ture.183 A tax expenditure indirectly subsidizes a type of economic ac­
tivity because the activity is no longer taxed.184 Nebraska reviews its
tax expenditures so it knows which attract new business.185 From
1999 to 2011, states that did not apply sales tax to federal contractors
received less DoD construction apportionment than states that taxed
the contractors.186 Therefore, it is unlikely that a permanent sales
tax exemption for federal contractors will convince the DoD to spend
more on construction in Nebraska.187

D. State Population Should be Considered When Comparing
How Much Money Is Apportioned For Construction
in Each State

The Department of Defense (“DoD”) apportions more money for
construction to populous states.188 Nebraska is the thirty-eighth most

176. See Roulo, supra note 8 (stating that the DoD’s budget will likely be reduced by
$46 billion for the 2013 fiscal year).
177. See Paletta, supra note 7 (reporting that the spending cuts will be both domes­
tic and military).
178. See id. (reporting that President Obama was confident sequestration would not
occur during a debate with Mitt Romney).
179. See Roulo, supra note 8 (stating that the DoD’s budget will likely be reduced by
$46 billion for the 2013 fiscal year).
180. Everstine, supra note 9.
181. Id.
182. Hammel, supra note 15 (stating that tax form 17 was altered for the project).
183. See Ewald, supra note 44, at 3 (defining a tax expenditure as a reduction in
revenue that results when an exemption, exclusion, deduction, tax deferral, preferential
rate, or credit is applied to a state or a political subdivision’s existing tax structure).
184. Id.
185. See id. (explaining why the Nebraska Tax Commissioner reviews tax expendi­
tures on even numbered years).
186. See supra Figure 1.
Sen. Heath Mello) (arguing that a policy of taxing federal contractors endangers future
federal projects in Nebraska), with supra Figure 1, Figure 2 (demonstrating that the
DoD spends more on construction in states that tax federal contractors).
188. See infra notes 189-214 and accompanying text.
The DoD might never apportion more money to Nebraska than it apportions to the most populous states. Figure 1 compares the amount apportioned to all of the states. Nebraska legislature might best serve the state if they, unlike Figure 1, compare Nebraska only to states with similar populations.

Figure 1 is a comparison between average DoD construction apportionment in states that apply sales tax to federal contractors, and states that do not apply sales tax to federal contractors. In Figure 1 each state is counted as an equal unit. This means that in Figure 1, California and Vermont are treated as equal units. In 2010, California had a population of 37,253,956 people. In 2010, Vermont had a population of 625,741 people. Thus, by size of population, California and Vermont are far from equal. Likewise, when the DoD apportions money for construction, it does not treat them as equals.

The DoD spends different amounts on construction in California and Vermont. In 2010 the DoD spent $1,665,788,000 on construction in California and $7,996,000 on construction in Vermont. California applies sales taxes to federal contractors while Vermont does not. In Figure 1, California is counted as one state that taxes and Vermont is counted as one state that does not tax. In 2010, the

189. See supra Table 3 (providing that Nebraska had a 2010 population of 1,826,341).
190. Compare supra Table 2 (providing that in 2010 the DoD apportioned $844,346,000 to Texas for construction), with supra Table 2 (providing that in 2010, the DoD apportioned $36,900,000 to Nebraska for construction).
191. See supra Figure 1.
192. See infra notes 193-214 and accompanying text.
193. See supra Figure 1 (depicting average DoD apportionment between states that apply state sales tax to federal contractors and states that do not).
194. See supra Figure 1 (treating each state as an individual unit by taking an average of all states, not a weighted average).
195. See supra Figure 1 (treating each state as an individual unit by taking an average of all states, not a weighted average).
196. See supra Table 3.
197. See supra Table 3.
198. See supra Table 3.
199. Compare supra Table 1 (providing that the DoD apportioned $1,665,788,000 on construction in California in 2010), with supra Table 2 (providing that the DoD apportioned $7,996,000 on construction in Vermont in 2010).
200. See supra Table 1, Table 2.
201. See supra Table 1, Table 2.
202. See supra Table 1, Table 2; see also CAL. REV. & TAX. CODE § 6007.5 (West 2013) (providing that California sales tax is applied to contractors purchasing goods to be used for federal contracts); VT. STAT. ANN. tit. 32, § 9743(4) (Supp. 2012) (stating that sales of materials to be used in construction of projects for governmental bodies are exempt from Vermont sales tax).
203. See supra Table 1 (displaying amount of DoD funds apportioned to states that exempt federal contractors from state sales tax); supra Table 2 (displaying amount of DoD funds apportioned to states that exempt federal contractors from state sales tax);
three most populous states were California, Texas, and New York.\textsuperscript{204} In 2010, the DoD spent $1,665,788,000, $844,346,000, and $118,150,000 on construction in California, Texas, and New York, respectively.\textsuperscript{205} In 2010, the three least populous states were Wyoming, Vermont, and North Dakota.\textsuperscript{206} In 2010, the DoD spent $10,600,000, $7,996,000, and $25,500,000 on construction in Wyoming, Vermont, and North Dakota respectively.\textsuperscript{207} Figure 1 is misleading if a disproportionate number of larger states apply sales tax to federal contractors because population clearly affects how much money the DoD apportions to a state for construction.\textsuperscript{208}

Offutt Air Force Base has a large economic impact regionally.\textsuperscript{209} Figure 1 demonstrates averages apportioned by the DoD to each state.\textsuperscript{210} Figure 1 also considers DoD apportionment at a national level.\textsuperscript{211} In the past, the DoD cut apportionment in Nebraska while simultaneously increasing total apportionment throughout the United States.\textsuperscript{212} This could conceivably happen again.\textsuperscript{213} An increase in national DoD apportionment does not help Nebraska's economy if it is paired with reduction in the DoD apportionment for Nebraska.\textsuperscript{214}

\textit{see also supra} Figure 1 (comparing the apportionment of DoD funds to states for construction projects per year).

204. \textit{See supra} Table 3 (providing population for California at 37,253,956, Texas at 25,145,561, and New York at 19,378,102).

205. \textit{See supra} Table 1, Table 2.

206. \textit{See supra} Table 3 (providing population for Wyoming at 563,626, Vermont at 625,741, and North Dakota at 672,591).

207. \textit{See supra} Table 1, Table 2.

208. \textit{Compare supra} Figure 1 (treating every state as an equal unit), \textit{with supra} Table 3 (providing population for California, Texas, and New York, the three most populous states; and Wyoming, Vermont, and North Dakota, the three least populous states), \textit{and supra} Table 1, Table 2 (providing that in 2010 the DoD spent $1,665,788,000, $844,346,000, and $118,150,000 on construction in California, Texas, and New York, respectively; and spent $10,600,000, $7,996,000, and $25,500,000 on construction in Wyoming, Vermont, and North Dakota, respectively).

209. \textit{See Bacon, supra} note 2, at 14 (providing that Offutt Air Force Base has an annual local economic impact $1.775 billion); \textit{see also} \textit{OFFUTT AIR FORCE BASE, supra} note 2 (indicating that Offutt Air Force Base employs more than 10,000 people).

210. \textit{See supra} Figure 1 (comparing the average amount spent in states that apply sales tax to federal contractors with states that do not).

211. \textit{See supra} Figure 1.

212. \textit{Compare supra} Figure 1 (demonstrating an increase in average spending for both groups of states in 2009), \textit{with supra} Table 2 (providing a decrease in spending in Nebraska from 2008 to 2009).

213. \textit{See supra} Table 2 (providing a decrease in spending in Nebraska from 2008 to 2009).

E. THE DEPARTMENT OF DEFENSE SPENDS MORE PER CITIZEN ON CONSTRUCTION IN STATES THAT APPLY SALES TAX TO FEDERAL CONTRACTORS COMPARED TO STATES THAT DO NOT APPLY SALES TAX TO FEDERAL CONTRACTORS

As of 2010, states that apply sales tax to federal contractors are not disproportionately populous compared with the states that do not apply sales tax to federal contractors.\textsuperscript{215} In 2010, thirty-one of the fifty states applied sales tax to federal contractors.\textsuperscript{216} That means sixty-two percent of states apply sales tax to federal contractors and thirty-eight percent do not.\textsuperscript{217} The sixty-two percent of states that apply sales tax to federal contractors account for sixty-six percent of the population of all the states.\textsuperscript{218} Figure 3a displays the population split between the states that apply sales tax to federal contractors, and the states that do not.\textsuperscript{219}

\textbf{FIGURE 3A. Aggregate State Populations (2010 U.S. Census) by States' Tax Policy}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{figure3a.png}
\caption{States taxing contractors (34\%) vs. States not taxing contractors (66\%)}
\end{figure}

In 2010, the Department of Defense ("DoD") apportioned $8,854,797,000 for construction in states that applied sales tax to federal contractors.\textsuperscript{220} That same year the DoD apportioned $2,136,501,000 on construction in states that did not apply sales tax to federal contractors.\textsuperscript{221} Figure 3b displays the split in DoD spending

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{215} See supra Table 3 (providing that the 2010 total population for states that apply sales tax to federal contractors is 204,413,307 people, and the 2010 total population for states that do not apply sales tax to federal contractors is 103,730,508 people).
\item \textsuperscript{216} See supra Table 2 (providing data for states that do not tax federal contractors).
\item \textsuperscript{217} See supra Table 2 (indicating that 31 of 50 states apply state sales tax to purchases made by federal contractor); see also supra Table 1 (indicating 19 of 50 states do not apply state sales tax to purchases made by federal contractor).
\item \textsuperscript{218} See supra Table 3 (providing state populations as of 2010).
\item \textsuperscript{219} See infra Figure 3a.
\item \textsuperscript{220} See supra Table 2 (providing how much the DoD spent in states that apply sales tax to federal contractors).
\item \textsuperscript{221} See supra Table 1 (providing how much the DoD spent in states that do not apply sales tax to federal contractors).
\end{enumerate}
\end{footnotesize}
between states that did and did not apply sales tax to federal contractors in 2010.\footnote{222}

**FIGURE 3B. DoD Construction Apportionments by States' Tax Policy, 2010**

![Diagram showing 19% of states taxing contractors and 81% not taxing contractors.]

By comparing Figures 3a and 3b, it is apparent that the DoD apportioned more money per citizen in states that applied sales tax to federal contractors.\footnote{223} Figure 3c displays this disparity.\footnote{224}

**FIGURE 3C. DoD Construction Budget Per State Citizen by States' Tax Policy, 2010**

![Bar chart showing $20.60 for states not taxing contractors and $43.32 for states taxing contractors.]

As Figure 3c demonstrates, in 2010, the DoD apportionment amounted to $20.60 per citizen on construction projects in states that

\footnote{222. \textit{See infra} Figure 3b.}
\footnote{223. \textit{Compare supra} Figure 3a (displaying the population split between the states that applied sales tax to federal contractors and the states that did not), \textit{with infra} Figure 3b (displaying the split in DoD spending between states that did and did not apply sales tax to federal contractors in 2010).}
\footnote{224. \textit{See infra} Figure 3c (contrasting how much money the DoD spent per citizen on construction in states that tax federal contractors with states that do not tax federal contractors).}
as well, regardless of whether Nebraska applied sales tax to KiewitPhelps.\textsuperscript{245}

The DoD has an important job and manages a substantial annual budget. Protecting the United States has many considerations. If the DoD considers whether a state applies sales tax to federal contractors when it decides where to build, the consideration must be such a low priority that it does not manifest itself in the results. Until the DoD proves that it pays attention to whether states tax federal contractors, states should ignore requests to exempt federal contractors. Going forward, Nebraska should reaffirm its past policy of applying sales tax to federal contractors.

Brandon McAnally – ’13

\textsuperscript{245} See supra notes 215-34 and accompanying text.