

## SUMMARY

**QUESTION:** whether the provisions contained in the contract provided are sufficient to allow the county to take advantage of its tax-exempt status on the purchase of materials for use in a public works contract.

**ANSWER:** the county's procedures *do not* satisfy the foregoing requirements for exemption of transactions as sales to a governmental entity. the county will issue its own purchase orders directly to the vendor of the materials, and it will issue payment for the materials directly to the vendor. the county also assumes title to the materials at the time they are delivered to the job site. however, it is not clear that the vendors will issue invoices directly to the county. and the procedures are silent on the requirement to issue a certificate of entitlement to the vendors.

January 13, 2012

Re: Technical Assistance Advisement - TAA 12A-002  
Sales and Use Tax – Public Works Contracts  
Subsection: 212.08(6), Florida Statutes (F.S.)  
Rules: 12A-1.038, 12A-1.094, Florida Administrative Code (F.A.C.)  
Petitioner XXX [hereinafter “County”]

Dear:

This letter is a response to your petition dated XXX, for the Department's issuance of a Technical Assistance Advisement ("TAA") concerning the above referenced party and matter. Your petition has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, Florida Administrative Code. This response to your request constitutes a TAA and is issued to you under the authority of Section 213.22, F.S.

### Issue

Whether the provisions contained in the contract provided are sufficient to allow the County to take advantage of its tax-exempt status on the purchase of materials for use in a public works contract.

### Presented Facts

The County's petition states that it is “in the process of working with a contractor to commence with bidding the public works construction project know as ‘New [] County Courthouse’ . . . .” The petition includes a copy of the County's Owner Direct Purchase

Procedures, and a copy of the County's XXX Consumer's Certificate of Exemption. The procedures set forth as follows:

1. Section 3.01 A. 1. of the procedures provides that the County will deliver its own purchase order directly to the vendor of the materials.
2. Section 3.01 M. of the procedures indicates that the vendor will issue the original invoice to the Contractor with a copy going to the County
3. Section 3.01 Q. 1. of the procedures states that the County Accounting Division makes payment directly to the vendor of the materials.
4. Section 3.01 D. of the procedures states that the County will retain title to the materials despite transfer of possession of the materials to the Contractor.
5. Section 3.01 E. of the procedures states that the County will purchase and maintain Builder's Risk Insurance to protect against loss or damage "from the moment . . . County gains title of such material on delivery to the job site until such time as Owner Purchased Materials are incorporated into the Work and are accepted."
6. No section of the procedures references or incorporates the requirement to issue a Certificate of Entitlement.

#### **Applicable Authority**

Sales to governmental units are exempt from sales tax pursuant to Section 212.08(6), Florida Statutes, which provides in pertinent part:

(a) There are also exempt from the tax imposed by this chapter sales made to the United States Government, a state, or any county, municipality, or political subdivision of a state when payment is made directly to the dealer by the governmental entity. . . .

(b) The exemption provided under this subsection does not include sales of tangible personal property made to contractors employed directly to or as agents of any such government or political subdivision when such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision. A determination of whether a particular transaction is properly characterized as an exempt sale to a government entity or a taxable sale to a contractor shall be based upon the substance of the transaction rather than the form in which the transaction is cast. However, for sales of tangible personal property that go into or become a part of public works owned by a governmental entity, other than the Federal Government, a governmental entity claiming the exemption provided under this subsection shall certify to the dealer and the contractor the entity's claim to the exemption by providing the dealer and the

contractor a certificate of entitlement to the exemption for such sales. If the department later determines that such sales, in which the governmental entity provided the dealer and the contractor with a certificate of entitlement to the exemption, were not exempt sales to the governmental entity, the governmental entity shall be liable for any tax, penalty, and interest determined to be owed on such transactions. Possession by a dealer or contractor of a certificate of entitlement to the exemption from the governmental entity relieves the dealer from the responsibility of collecting tax on the sale and the contractor for any liability for tax, penalty, or interest related to the sale, and the department shall look solely to the governmental entity for recovery of tax, penalty, and interest if the department determines that the transaction was not an exempt sale to the governmental entity. The governmental entity may not transfer liability for such tax, penalty, and interest to another party by contract or agreement. . . . (Emphasis Supplied)

This statutory section was amended in the XXX Regular Session of the Florida Legislature to become effective on XXX. It was approved by the Governor on XXX

Rule 12A-1.038(4), Florida Administrative Code, contains guidelines for claiming and documenting the exemption. Governmental entities must obtain a consumer's certificate of exemption from the Department of Revenue. Vendors are required to obtain for their records proper documentation of the exempt status of the sale.

By its terms, Section 212.08(6), Florida Statutes, exempts only direct purchases by governmental entities. The exemption does not apply when a contractor, employed by a governmental entity, purchases tangible personal property that is to be incorporated into public works owned by the entity. Administrative guidelines governing the taxability of materials purchased for public works contracts, such as those involved in the instant situation, are contained in Rule 12A-1.094, Florida Administrative Code, which provides in pertinent part:

(1) This rule shall govern the taxability of transactions in which contractors manufacture or purchase supplies and materials for use in public works contracts

. . . .

(2) The purchase or manufacture of supplies or materials by a public works contractor, when such supplies or materials are purchased for the purpose of going into or becoming part of public works, whether the purchase or manufacture occurs inside or outside Florida, is taxable to the public works contractor if the public works contractor also installs such supplies or materials, since the public works contractor is the ultimate consumer of such supplies or materials. Public works contractors that purchase or manufacture such supplies and materials in Florida are liable for sales tax or use tax on such purchases and manufacturing costs. A public works contractor that purchases supplies or materials that may be sold as tangible personal property or may be incorporated into a public works project may purchase such supplies or materials without tax

by issuing a copy of the contractor's Annual Resale Certificate and accrue and remit tax upon withdrawing such supplies or materials from inventory to go into or become a part of public works. Public works contractors that purchase or manufacture such materials outside the State of Florida are liable for use tax, subject to credit for any sales or use tax lawfully imposed and paid in the state of purchase or manufacture.

(3) The purchase or manufacture of tangible personal property for resale to a governmental entity is exempt from tax, provided this exemption shall not include sales of tangible personal property made to, or the manufacture of tangible personal property by, public works contractors when such tangible personal property goes into or becomes a part of public works.

(4)(a) The exemption in Section 212.08(6), F.S., is a general exemption for sales made directly to the government. A determination whether a particular transaction is properly characterized as an exempt sale to a governmental entity or a taxable sale to or use by a contractor shall be based on the substance of the transaction, rather than the form in which the transaction is cast. The Executive Director or the Executive Director's designee in the responsible program will determine whether the substance of a particular transaction is a taxable sale to or use by a contractor or an exempt direct sale to a governmental entity based on all of the facts and circumstances surrounding the transaction as a whole.

(b) The following criteria that govern the status of the tangible personal property prior to its affixation to real property will be considered in determining whether a governmental entity rather than a contractor is the purchaser of materials:

1. Direct Purchase Order. The governmental entity must issue its purchase order directly to the vendor supplying the materials the contractor will use and provide the vendor with a copy of the governmental entity's Florida Consumer's [Certificate] of Exemption.

2. Direct Invoice. The vendor's invoice must be issued to the governmental entity, rather than to the contractor.

3. Direct Payment. The governmental entity must make payment directly to the vendor from public funds.

4. Passage of Title. The governmental entity must take title to the tangible personal property from the vendor at the time of purchase or delivery by the vendor.

5. Assumption of the Risk of Loss. Assumption of the risk of damage or loss by the governmental entity at the time of purchase is a paramount consideration. A governmental entity will be deemed to have assumed the risk of loss if the governmental entity bears the economic burden of obtaining insurance covering

damage or loss or directly enjoys the economic benefit of the proceeds of such insurance.

(c)1. To be entitled to purchase materials tax exempt for a public works project, a governmental entity is required to issue a Certificate of Entitlement to each vendor and to the governmental entity's contractor to affirm that the tangible personal property purchased from that vendor will go into or become a part of a public work. This requirement does not apply to any agency or branch of the United States government.

2. The governmental entity's purchase order for tangible personal property to be incorporated into the public works project must be attached to the Certificate of Entitlement. The governmental entity must issue a separate Certificate of Entitlement for each purchase order. Copies of the Certificate may be issued.

3. The governmental entity will also affirm that if the Department determines that tangible personal property sold by a vendor tax-exempt pursuant to a Certificate of Entitlement does not qualify for the exemption under Section 212.08(6), F.S., and this rule, the governmental entity will be liable for any tax, penalty, and interest determined to be due.

4. The following is the format of the Certificate of Entitlement to be issued by the governmental entity:

#### CERTIFICATE OF ENTITLEMENT

The undersigned authorized representative of \_\_\_\_\_ (hereinafter "Governmental Entity"), Florida Consumer's Certificate of Exemption Number \_\_\_\_\_, affirms that the tangible personal property purchased pursuant to Purchase Order Number \_\_\_\_\_ from \_\_\_\_\_ (Vendor) on or after \_\_\_\_\_ (date) will be incorporated into or become a part of a public facility as part of a public works contract pursuant to contract # \_\_\_\_\_ with \_\_\_\_\_ (Name of Contractor) for the construction of \_\_\_\_\_.

Governmental Entity affirms that the purchase of the tangible personal property contained in the attached Purchase Order meets the following exemption requirements contained in Section 212.08(6), F.S., and Rule 12A-1.094, F.A.C.:

*You must initial each of the following requirements.*

\_\_\_\_ 1. The attached Purchase Order is issued directly to the vendor supplying the tangible personal property the Contractor will use in the identified public works.

\_\_\_\_ 2. The vendor's invoice will be issued directly to Governmental Entity.

\_\_\_\_ 3. Payment of the vendor's invoice will be made directly by Governmental Entity to the vendor from public funds.

\_\_\_ 4. Governmental Entity will take title to the tangible personal property from the vendor at the time of purchase or of delivery by the vendor.

\_\_\_ 5. Governmental Entity assumes the risk of damage or loss at the time of purchase or delivery by the vendor.

Governmental Entity affirms that if the tangible personal property identified in the attached Purchase Order does not qualify for the exemption provided in Section 212.08(6), F.S., and Rule 12A-1.094, F.A.C., Governmental Entity will be subject to the tax, interest, and penalties due on the tangible personal property purchased. If the Florida Department of Revenue determines that the tangible personal property purchased tax-exempt by issuing this Certificate does not qualify for the exemption, Governmental Entity will be liable for any tax, penalty, and interest determined to be due.

I understand that if I fraudulently issue this certificate to evade the payment of sales tax I will be liable for payment of the sales tax plus a penalty of 200% of the tax and may be subject to conviction of a third degree felony.

Under the penalties of perjury, I declare that I have read the foregoing Certificate of Entitlement and the facts stated in it are true.

_____	_____
Signature of Authorized Representative	Title
_____	_____
Purchaser's Name (Print or Type)	Date

Federal Employer Identification Number: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

You must attach a copy of the Purchase Order to this Certificate of Entitlement.

Do not send to the Florida Department of Revenue. This Certificate of Entitlement must be retained in the vendor's and the contractor's books and records.

- (d) Sales to contractors, including subcontractors, are subject to tax.
- (e) The governmental entity may not transfer liability for such tax, penalty, and interest to another party by contract or agreement. . . .
- (5) Contractors, including subcontractors, that manufacture, fabricate, or furnish tangible personal property that the contractor incorporates into public works are liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C. The contractor and subcontractors, not the governmental entity, are

deemed to be the ultimate consumers of the articles of tangible personal property they manufacture, fabricate, or furnish to perform their contracts and may not accept a Certificate of Entitlement for these articles. . . . (Emphasis Supplied)

### **Determination**

Rule 12A-1.038(4)(b), Florida Administrative Code, states that in order for a sale to a state or local governmental entity to be tax exempt, "[p]ayment for tax exempt purchases . . . must be made directly to the selling dealer by the . . . political subdivision of a state. . . ." Rule 12A-1.094(2) and (3), Florida Administrative Code, state that the purchase of materials for public works contracts is taxable to the contractor as the ultimate consumer where the contractor is deemed to be the purchaser. If the purchaser of the materials is the governmental entity, however, the transaction is exempt. For there to be an exempt transaction, the governmental entity must directly purchase, hold title to, and assume the risk of loss of the tangible personal property from the time of delivery to the jobsite, and satisfy various factors contained in Rule 12A-1.094, Florida Administrative Code.

Rule 12A-1.094(4), Florida Administrative Code, which sets forth the criteria that govern the status of the tangible personal property prior to its affixation to real property, will be considered in determining whether a governmental entity rather than a contractor is the purchaser of materials. These criteria include direct purchase order, direct invoice, direct payment, passage of title, and assumption of risk of loss. However, the assumption of risk of damage or loss from the time that the building materials are physically delivered to the job site is a paramount consideration. The governmental entity must assume all risk of loss or damage for the tangible personal property from the moment of acceptance of title to the materials. To establish that it has assumed that risk, the governmental entity should purchase, or be the insured party under, insurance on the building materials.

To establish that the governmental entity is entitled to the exemption, it must issue a Certificate of Entitlement to the vendors, and to the contractors, with each purchase order. A copy of the governmental entity's Consumer's Certificate of Exemption must be attached to the Certificate of Entitlement. The Certificate of Entitlement sets forth the requirements of making tax-exempt direct purchases and notes the governmental entity's acknowledgement that it is responsible for tax, penalty, and interest on material purchases that do not meet the exemption criteria. By statute, the governmental entity is prohibited from assigning liability of the tax, penalty, and interest to another party by contract or agreement. A suggested format of the certificate is found in Rule 12A-1.094(4)(c), Florida Administrative Code.

As stated, the statutory section requiring the Certificate of Entitlement was amended in the XXX Regular Session of the Florida Legislature to become effective on XXX. It was approved by the Governor on XXX. Additionally, Rule Development Workshops and Rule Hearings were held by the Department of Revenue during the summer of XXX to amend Rule 12A-1.094, Florida Administrative Code.

To summarize, the conditions that must be met to satisfy the requirements of Rule 12A-1.094, Florida Administrative Code, and establish that the governmental entity rather than the contractor is the purchaser of materials, include:

1. The governmental entity must execute the purchase orders for the tangible personal property involved in the contract to the materials vendors. The contractor may present the governmental entity's purchase orders to the vendors of the tangible personal property;
2. The governmental entity must acquire title to and assume liability for the tangible personal property at the point in time when it is delivered to the job site;
3. Vendors must directly invoice the governmental entity for supplies;
4. The governmental entity must directly pay the vendors for the tangible personal property; and
5. The governmental entity must assume all risk of loss or damage for the tangible personal property involved in the contract, as indicated by the entity's acquisition of, or inclusion as the insured party under, insurance on the building materials.
6. The governmental entity must issue a Certificate of Entitlement with each purchase order, along with a copy of its Consumer's Certificate of Exemption, to each vendor, as well as to the contractor. The governmental entity is responsible for payment of tax, penalty, and interest on any purchases that are not found to be in compliance with the procedures for tax-exempt direct purchase of materials.

The County's procedures *do not* satisfy the foregoing requirements for exemption of transactions as sales to a governmental entity. The County will issue its own purchase orders directly to the vendor of the materials, and it will issue payment for the materials directly to the vendor. The County also assumes title to the materials at the time they are delivered to the job site. However, it is not clear that the vendors will issue invoices directly to the County. And the procedures are silent on the requirement to issue a Certificate of Entitlement to the vendors.

Please note a contractor that manufactures or fabricates its own materials, as specified in Rule 12A-1.094(5), Florida Administrative Code, does not qualify for inclusion in direct purchase programs. Under the rule, the contractor and subcontractors, not the government entity, are deemed to be the ultimate consumers of the articles of tangible personal property they manufacture or fabricate to perform their contracts. As such, the contractor and subcontractors are subject to use tax on the full cost of the manufactured or fabricated articles, as detailed in Rule 12A-1.051(10), Florida Administrative Code.

#### **Closing Statement**

This response constitutes a Technical Assistance Advisement under Section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in



the request for this advice, as specified in Section 213.22, F.S. Our response is predicated upon those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment from that which is expressed in this response.

You are further advised that this response, your request, and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of Section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses, and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 10 days of the date of this letter.

Sincerely,

Gary L. Gray  
Revenue Program Administrator I  
Technical Assistance and Dispute Resolution

GLG/sdf

Control # 109510