

Florida Department of Revenue



Construction/ Real Property Contractor Standard Industry Guide



PURPOSE

This guide provides an auditor with information on the subject industry. This information will assist an auditor in recognizing areas to test for compliance with Florida sales and use tax laws.

After reviewing this guide, an auditor will be better able to understand issues involving:

- Tax implications affecting the subject industry;
- Sales tax issues likely to surface relating to the subject industry; and
- Relevant statutes, rules, court cases and other technical documents

Helpful tax publications provided by the Department of Revenue available online (See hyperlinks):

Industry Specific:

[Building Contractors](#)

[Mobile and Prefabricated Homes](#)

[Repair of Tangible Personal Property](#)

General:

[Guide for Business Owners](#)

[Audit Information](#)

[Florida Sales and Use Tax](#)

[Discretionary Sales Surtax](#)

These reference materials and the technical documents cited herein have been provided as informational guidelines for performing tax audits and are intended to be used as internal management memoranda. They are not rules, orders, or policy statements of general applicability, and as such, do not represent the formal position of the Florida Department of Revenue. No representation is made regarding the Department's opinion of the precedential value of the court cases cited herein. They are provided for informational purposes only. Statutes, rules, court cases, or other technical documents subject to change are current as of the publication date of this document. Refer to the Tax Law Library for an updated listing of such documents. The Tax Law Library can be accessed through the Department of Revenue web site:

<http://dor.myflorida.com/dor/> or directly at <https://taxlaw.state.fl.us/>

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OVERVIEW OF METHODS OF OPERATION

General Overview

Generally speaking, a contractor is in the business of making improvements and/or repairs to real property or to tangible personal property or both. Improvement usually consists of building a permanent structure on unimproved land, while repairs are made to existing structures. The tax applications of transactions involving real and tangible personal property are distinctly different. It is therefore important that the auditor be able to distinguish between realty and personalty based on the circumstances of the taxpayer under audit. It is not always easy to make the distinction, so the auditor should pay particular attention to the discussion of this topic in the Special Considerations section of this guide. The following paragraphs describe in general how contractors operate.

Usually a property owner has plans and specifications drawn up outlining exactly what work is to be accomplished. The owner then invites general contractors to bid on the project. This invitation to bid usually specifies how the bid will be prepared, the type of contract to be written, the work to be performed, the closing date for submitting bids, and the timetable for performance of certain portions of the contract. At a specified date and time, the property owner reviews the bids and selects a contractor. The plans, specifications, and contractor's bid are then incorporated into a contract between the two parties. If necessary during the performance of the contract, change orders may be negotiated between the parties resulting in adjustments to the original contract. A review of these contracts should be performed by the auditor to determine if the contractor is consistent in the method of writing contracts.

Some construction projects may have contract provisions for draws, or progress payments, over the course of the contract. Contract provisions may also specify that the owner retain a percentage of these draws until the project is satisfactorily completed and accepted.

A general contractor often invites bids from subcontractors prior to submitting a bid to the project owner. For instance, a building contractor may invite bids from land and site developers, plumbing contractors, asphalt and paving contractors, landscape contractors, and others prior to submitting a bid to the owner. The contractor and subcontractors' bids should be included in a job or project file with the original contract and any applicable change orders. Each contractor or subcontractor is responsible for paying any applicable tax on purchases made in connection with that person's portion of the contract.

Most construction labor is expended directly at the job site. But, in the case of contractors who perform such contracts as sheet metal, roofing, glass, or septic tank, to name a few, it may be more economically feasible to fabricate these components at an off-site shop and deliver the finished or partially finished tangible personal property to the job site.

A contractor may operate a plant to manufacture tangible personal property for use in performing contracts, as well as for sale to others. The manufacturing plant may be at a fixed location (permanent) or mobile, for ease of moving from job site to job site (temporary). Contractors operating plants of a temporary nature are most likely to be in the asphalt/paving, concrete, or sheet metal business. Direct labor incurred by the contractor operating a temporary plant at a single job site is not included as a taxable element when calculating “fabricated cost” for use tax purposes. By definition, a temporary plant is restricted for use in completing one job contract at one job site. If a contractor uses a plant at one job site to manufacture tangible personal property for use at another job site or sites, the plant would be considered permanent in nature and the direct labor exemption on all jobs would be lost. The contractor must then include direct labor in calculating fabricated cost for use tax purposes.

Some contractors may purchase materials needed to complete the project and have them delivered directly to the job site. Other contractors, such as plumbing, electrical, or sheet metal, may draw supplies from an inventory maintained by them for use in contracts.

A contractor may invest in large construction equipment. Some of the equipment may be purchased from out-of-State dealers who are not registered to collect Florida taxes. The equipment may be obtained by purchase, lease, or lease-purchase agreement. The repair of a contractor’s equipment or even that of others may be performed in the contractor’s own equipment repair facilities. A large contractor may establish a subsidiary or division to handle a pool of equipment, with the allocated costs for each project being billed to the appropriate entity. In such instances, it is important to determine whether the amount billed is actually rent (and subject to tax) or a cost allocation.

The delivery point of materials and equipment is important when auditing both in-State and out-of-State contractors. If delivery of materials is accepted in Florida, these materials are subject to Florida tax regardless of the location of the job site. If delivery of materials occurs outside the State, they are only subject to Florida tax to the extent the Florida tax rate exceeds the tax rate of the State of initial delivery, assuming tax was paid in that State.

Use tax may be due when equipment is purchased or leased from out-of-State dealers, who are not registered to collect Florida taxes, when the equipment is used in Florida. Materials and equipment are subject to Florida tax if transferred into Florida within six months after acquisition. However, consideration is given when a like tax has been legally imposed in another State. [Rule 12A-1.091, F.A.C.](#), outlines that, if the legally imposed tax of another State is less than the Florida tax, the State of Florida is entitled to the difference.

In-State (Florida), contractors conducting the majority of their business in this State should maintain records pertaining to all purchases and transfers along with the purchase journal and general ledger to be used as control documents. Exemptions may result from vendors’ delivering directly to foreign jobs, or jobs involving tangible personal property. The journal and job cost records may be used as control documents to verify exemptions.

If the job cost records are verified to be complete, all invoices for a job should be examined for proper tax application.

Out-of-State contractors performing the majority of their contracts outside the State should have the records reviewed that pertain to Florida contracts and materials and/or equipment delivered into the State only. Materials and equipment shipped into the State are taxable, unless a like tax has been legally imposed by another State or these materials and/or equipment were used outside of Florida for a period of six months or longer before being delivered into this State ([Rule 12A-1.091, F.A.C.](#)).

Contractors should accrue use tax on purchases they consume, where the vendor fails to charge and collect the tax. These contractors should be registered for a use tax accrual account number.

[Section 212.14\(5\), F.S.](#), requires an Out-of-State real property contractor to register with the Department as a dealer, and post a bond prior to beginning work in Florida, unless they have held a Florida contractor's license for at least 12 months prior to the date of the contract. Upon registration, the contractor may pay the expected tax in advance in lieu of posting a bond. In the event that the contractor refuses to comply, the statute further authorizes the Department of Revenue to request the Department of Legal Affairs to obtain an injunction to stop work on the contract.

Types of Contractors

In Florida, the sale of real property is not subject to sales tax. Real property contractors and repairers purchase tangible personal property and convert it to real property. Real property contractors who operate under lump-sum, cost-plus/fixed fee or upset/guaranteed price, or time and materials contracts are actually selling real property and should not charge sales tax on their contract billings. Sales or use tax should be paid on all their material and supply purchases. The contractor is the ultimate consumer of the tangible personal property used in the performance of these contracts.

General Contractor — the party responsible for the entire construction project
A general contractor will typically enter into a contract (referred to as the prime contract) with the owner of the property to be improved and oversee the entire project, performing anywhere from a majority to none of the actual work. The portion of the work the general contractor does not perform will be “subbed” out to a qualified subcontractor. In these instances, the general contractor will enter into subcontracts with the subcontractors.

Subcontractor — A contractor with special expertise, such as electrical, mechanical, excavation, or steel erection

Defense Contractor — A contractor who performs work for the federal government

Note: defense contractors may be afforded federal tax immunity, thereby exempting them from Florida State taxation.

For a discussion and analysis of this issue, refer to Government Contracts [TAA 92A – 006, Supplementation of TAA 89A – 051](#). Also see [TAA 96A-056](#) dated November 26, 1996, [revision of TAA 92A – 006](#).

See [Section 212.08\(17\), F.S.](#), for an exemption for certain governmental contractors.

Types of Contracts

It is important to determine the type of contract being performed, as noted in [Rule 12A-1.051\(3\), F.A.C.](#) The method that contractors or subcontractors use to arrive at the total contract price charged for repair, alteration, improvement, and construction of real property or for a combination of work on both real and personal property must be determined for the purpose of ascertaining whether the receipts from sales made to or by them are taxable.

As a general rule real property contractors are ultimate consumers of materials and supplies they use to perform real property contracts and must pay tax on their costs of those materials and supplies, unless the contractor has entered a retail sale plus installation contract.

Lump Sum Contract — Contracts in which the contractor or subcontractor agrees to furnish the materials and supplies and necessary services for a “lump sum” (See [Rule 12A-1.051\(3\) \(a\), F.A.C.](#)).

Cost-Plus or Fixed Fee Contract — Contracts in which the contractor or subcontractor agrees to furnish the materials and supplies and necessary services on a cost-plus or fixed fee basis. The contractor will be paid an amount equal to costs, as defined in the contract, and specified overhead and profit rates, in a cost-plus contract. The fee or profit element may be specified as a lump sum rather than a percentage of the cost.

Some of these types of contracts may also provide for a sharing arrangement with the owner, in which case the contractor, if the contract is completed below a targeted cost, will share the savings, based on some specified ratio, with the owner (See [Rule 12A-1.051\(3\) \(b\), F.A.C.](#)).

Upset or Guaranteed Price Contract — Contracts in which the contractor or subcontractor agrees to furnish materials and supplies and necessary services with an upset or a guaranteed price that may not be exceeded (See [Rule 12A-1.051\(3\)\(c\), F.A.C.](#)).

Retail Sale Plus Installation or “(3) (d)” Contracts— Contracts in which the contractor or subcontractor repairs, alters, improves or constructs real property and wherein the contractor agrees as a part of the original contract to sell specifically described and itemized materials and supplies at an agreed price or at the regular retail price and to complete the work either for an additional agreed price or on the basis of time consumed. A “time and Materials contract is not a (3) (d) contract. The attachment of an itemized list of materials to an invoice after work has been performed does not create a (3) (d)

contract. Contractors who perform retail sale plus installation contracts do sell tangible personal property and they should register as dealers and provide a copy of their Annual Resale Certificate to the selling dealer to purchase tax exempt materials that are itemized and resold, (See [Rule 12A-1.051\(3\)\(d\), F.A.C.](#), and [Sears Roebuck & Co. v. Florida Dept. of Revenue.](#)¹)

Time and Materials Contracts—Contracts in which the contractor agrees to complete a job (e.g., replace a hot water heater) and charges an amount for materials and an additional amount (usually in increments of time required to complete the job). Time and materials contracts differ from “(3) (d)” contracts because the materials are not completely identified, itemized, and priced in the contract in advance and because the property owner is contracting for a finished job rather than the purchase of materials.

Pursuant to this Rule and court decisions, a class 3(d) contract must:

- itemize each and every separate item of tangible personal property used in fulfilling the contract;
- itemize each and every separate item’s price;
- be issued in writing, expressing the necessary itemization in advance of the work performed; and
- pass ownership of the materials directly to the customer upon delivery, along with all the risks and responsibilities of ownership.

A detailed invoice issued upon completion of service on real property does not constitute a class 3(d) contract. For example, service jobs on HVAC systems which involve a detailed billing after the work is completed, but which do not involve the preparing of a contract, setting forth the materials to be used and the price thereof, in advance of the work are considered time and material jobs, not 3(d) contracts. Due to these requirements, it is difficult for a contractor to enter into a 3(d) contract.

In cases where a transaction involves a contract falling under [Rule 12A-1.051\(3\)\(d\), F.A.C.](#), the contractor is selling tangible personal property and should charge the appropriate tax on the customers’ invoice. Keep in mind that the original contract must have been entered into as this type of contract and it is not based only on how the contractor bills their customer.

ACCOUNTING SYSTEMS

In general, a contractor’s accounting system must meet the following three objectives:

- To ascertain cost and profit on each project with a minimum of effort and expense and a maximum of information;

¹ *Sears Roebuck & Co. v. Florida Department of Revenue*, Case No. 92-1080 (Fla. 2nd Circuit Court, 1994). In this case it was determined that although Sears invoices for installation of garage door openers, water heaters, built-in ovens, ranges, dishwashers, and central air conditioning units, etc. contained some itemization, they were not “specifically described and itemized” within the meaning of Rule 12A-1.051(2)(c), F.A.C.

- To compare properly the bid estimates on awarded contracts with actual costs; and
- To enable the contractor to submit financial statements to bonding companies on short notice.

A well-managed construction company must have adequate systems to accumulate all costs directly identifiable with specific contracts. In addition, indirect costs incurred in completing construction projects must be allocated on some rational basis to each contract. The sum of the direct and allocated indirect costs, matched against contract revenue, allows management to properly assess the profitability of each contract.

These are the general accounting principles for construction costs:

- All direct costs such as materials, labor, and subcontracting costs should be included;
- Indirect costs that are incurred generally to complete projects are allocable to contracts;
- Methods of allocating indirect costs should be systematic and rational;
- Selling, general, and administrative costs should be charged to expense as incurred;
- Costs under cost-type contracts should be included as contract costs in the same manner as costs under other types of contracts;
- Estimates of gross profits or losses on contracts should be based on cost to completion that reflects all costs generally included in contract costs;
- Inventorial costs should never be greater than the estimated realizable value of the related contracts; and
- Interest costs may be capitalized or may be charged to expense.

The accounting systems of real property contractors tend to be job cost systems that match costs to the specific job. The accounting systems of tangible personal property contractors are varied. Contractors who deal with large projects tend to use a job cost system; those that deal in smaller jobs group expenses by type rather than by the jobs the expenses are associated with. Some contractors may group their records both ways, with the actual invoices filed one way and copies of the invoices filed the other.

When performing an audit of a contractor who performs jobs both within and without Florida, a review of the job cost file will identify the Florida jobs. Selected individual expense accounts from all jobs performed within Florida should be examined for proper sales tax payment or accrual.

In-State contractors conducting a majority of their business in Florida should maintain all purchase invoices and inventory transfers as source documents to the purchase journal and general ledger (control records). Transactions not subject to tax may result from deliveries of materials made to jobs located out-of-State. The purchase journal, job cost records, and the depreciation records should be used as control records to verify these

types of transactions. If the job cost records are verified as complete, all invoices for a job should be examined for proper taxation.

When auditing out-of-State contractors who perform contracts mainly outside Florida, the auditor should review only the records that pertain to Florida contracts and materials/equipment delivered into Florida. Materials and equipment shipped into Florida are subject to tax unless specifically exempt by statute, or unless a like tax has been legally imposed by another State or unless these materials and/or equipment were used outside Florida for a period of six months or longer prior to being delivered into Florida (See [Rule 12A-1.091, F.A.C.](#)).

REGISTRATION

Contractors performing retail sale plus installation or “(3) (d)” Contracts should register with the Department and provide a copy of their Annual Resale Certificate to the selling dealer to purchase tax exempt materials that are itemized and resold. The Department of Revenue not only requires registration of businesses that collect sales tax, but it also determines how and when the taxes will be paid. Failure to collect or remit sales tax will result in a taxpayer owing the tax as well as penalty and interest. With these responsibilities comes an additional burden of keeping the required books and records.

Contractors entering into retail sale plus installation contracts should register as a dealer and charge their customers’ tax on the price paid for tangible personal property, but not on the charges for installation labor. However, contractors, manufacturers, and dealers who sell and install items of tangible personal property, including those enumerated in [Rule 12A-1.016, F.A.C.](#), must collect tax on the full selling price, including installation or other charges, even though such charge may be separately stated. The dealer is required to register for each place of business (See [Rule 12A-1.060, F.A.C.](#)).

Under [Section 212.18, F.S.](#), every person desiring to engage in or conduct business in this state as a dealer must register with the Department and obtain a separate certificate of registration for each “place of business” as that term is defined within [Rule 12A-1.060, F.A.C.](#)

A business that is required to register with the Department for the purpose of collecting and remitting sales and use tax may do so by filing a completed Application to Collect and/or Report Tax in Florida, Form DR-1. Alternatively, registration may be secured through the Department’s Internet site and following the prompts for “E-Services.” If Form DR-1 is filed, a processing fee of \$5.00 is required. No fee is required for online registration.

A business with two or more places of business may apply for authorization by the Department to file a consolidated tax return. When authorized to file a consolidated tax return, Form DR-7, the business is required to combine all of the registered location’s sales tax activities on the consolidated return. The consolidated return is filed monthly together with the tax returns for each separate registered place of business.

GENERAL TAX CONSIDERATIONS

Real Property and Tangible Personal Property

It is very important when auditing contractors to first determine whether the work they perform constitutes improvements to real property or tangible personal property. The following discussion will attempt to simplify this task.

[Section 212.02\(19\), F.S.](#), defines tangible personal property as personal property that may be seen, measured, weighed, or touched. [Section 212.06\(14\) \(a\), F.S.](#), defines real property as the surface land, improvements, and fixtures. [Section 212.06\(14\)\(b\), F.S.](#), defines fixtures as follows: items that are an accessory to a building, other structure, or land and that do not lose their identity as accessories when installed but that do become permanently attached to realty. The term does not include the following items, even if attached in a permanent manner: trade fixtures; mobile homes, unless they are assessed as real property; or machinery or equipment. For an item to be considered a fixture, it is not necessary that the owner of the item also own the real property to which it is attached (See [TAA 97A-030, 97A-037, 97A-042, 97A-053, 97A-049](#)). Also, see [Commercial Finance Co. v. Brooksville Hotel C.](#)² and [Strickland's Mayport, Inc. and BJ Strickland, Jr. v. Kingsley Bank](#)³

Sales and use tax applies to the sale, use, storage, and consumption of tangible personal property and to the lease or rental of real property, but not to the sale of real property. Accordingly, an auditor must be able to distinguish between real and personal property to correctly determine taxes due.

By definition, real property is land and permanent improvements to the land. In the application of [Chapter 212, F.S.](#), the auditor must be able to discern when tangible personal property becomes an improvement to realty and remains realty. Although the distinction would appear easy, when leasehold, store fixtures, and process machinery and equipment are considered, the distinction may be less clear due to the size, shape, and installation of the property (See [TIP 02A01-04](#)).

Where the classification of the property under consideration is not clear, the application of a few criteria may help to arrive at a defensible decision based on the facts. The following criteria should be considered:

² [Commercial Finance Co. v. Brooksville Hotel C.](#), 123 So. 814, 816 (Fla. 1929); Cross Reference: TAA 97A-042; In establishing the fact whether a given thing is or is not a fixture upon land, the intention of the owner in placing it there, to be gathered from his declarations, and from the character, relations and purpose of the property, is an important element, sometimes of controlling importance.

³ [Strickland's Mayport, Inc. and BJ Strickland, Jr. v. Kingsley Bank](#), 449 So. 2nd 928 (Fla. DCA 1984): Cross Reference: TAA 97A-042, Sets out a three-part test for determining whether an object is a fixture or personalty. 1) Is there actual annexation to the realty or something appurtenant thereto? 2) Is the item in question appropriately applied to the use or purpose of that part of realty to where it is connected? 3) Did the party making the annexation intend the items to be a permanent accession to the freehold? If the answer to these three questions is yes, the object is a fixture.

- *Size* — The physical dimensions of an improvement help in determining its classification. This is particularly true for such items as buildings, storage tanks and boilers. This criterion considered alone could prove deceiving. Size alone does not distinguish realty from personalty.
- *Installation* — The manner in which the property is attached to the land helps to classify it.

Examples: Items such as piping, wire installed within the walls of a building, and storage tanks that are buried can usually be classified as realty. Property that rests upon the ground or a support, such as fuel or water storage tanks, may be classified as personalty. Removable property such as window air conditioners is usually classified as personalty.

- *Function* — The purpose of the property and its relationship to other items in a system help to classify it. In general, machinery and equipment used in mining and manufacturing operations are classified as personalty. When property that would normally be classified as personalty becomes part of a system that is classified as realty, the property usually will assume the classification of the system.

Example: A central air conditioning unit falls into the category of realty. The compressor unit is not attached to the ground or the building in some installations, but the unit is part of a system of ducts and piping that is part of realty, and the unit can only function properly as part of that system. For these reasons, the compressor unit is also classified as an improvement to realty.

Example: A pump is usually classified as personalty, but when the pump is attached to a well, it becomes part of a water system that is classified as realty. The pump then assumes the classification of the system.

- *Treatment for Other Tax Purposes* — If the owner depreciates property for income tax purposes as tangible personal property, that indicates the item is not a fixture that has become part of realty. Similarly, real property additions should be reported as such for ad valorem purposes.
- *Intent* — The intent of the owner of an installed item is crucial. A real property improvement or fixture is intended to remain in place for a long period of time or indefinitely. A temporary fence installed by a contractor for protecting materials during construction but intended to be removed when the project is completed is tangible personal property. A permanent fence to provide security for an apartment parking lot is real property.

Caution and good judgment must be exercised when using these criteria and tests. Ownership of the property must be considered first. After ownership, the remaining criteria must be considered together.

The sale of real property is not subject to sales tax. Real property contractors and repairmen purchase tangible personal property and convert it into real property. Real property contractors who operate under lump sum, cost-plus/fixed fee, or guaranteed price contracts are actually selling real property and should not charge sales tax on their contract billings. Such contractors should pay use tax on all their material purchases as they are considered to be the ultimate consumer of the tangible personal property used in the performance of these contracts.

Fill Materials

The use of rock, shell, fill dirt, or similar materials, by a real property contractor is subject to tax based on the cost of rock, shell, fill dirt, or similar materials used by the contractor to perform a real property contract for another person.

If the contractor acquires the materials from a location owned or leased by the contractor, the contractor must remit use tax based on one of the following methods:

- The fair market value, which means either the price the contractor would have to pay on the open market or the price at market or the price at which the contractor would sell the materials to a third party; or
- The cost of the land plus all cost of clearing, excavating, and loading the materials, including labor, power blasting, and similar costs.

This does not apply to a person or a corporation or affiliated group as defined by [Section 220.03\(1\) \(b\) or \(e\), F.S.](#), that secures such materials from a location that he, she, or it owns for use on his, her or its own property.

If the contractor purchases the materials as part of the agreement excavates and removes them from the sellers land (including State owned submerged land), the taxable cost is the purchase price paid to the seller plus all the cost incurred by the contractor in clearing, excavating, and removing the materials, including labor.

Fill-dirt, shell, and rock used by a contractor in the performance of a road project is taxable to the road contractor, unless borrow materials are used that are provided at no charge by the Department of Transportation. This includes materials extracted from pits that are provided at no charge by DOT.

Sand, mud and other soil dug or dredged from the bottom of Florida owned waterways are taxable if used to build new lands. The tax base is the amount charged to the contractor by the Department of Environmental Protection and any cost the contractor incurs in removal (See [Rule 12A-1.051\(13\), F.A.C., TAA 93A-038, TIP 01A-029](#)).

Equipment Rentals

The rental of equipment without the operator being provided is taxable as a bare rental, but if the owner of the equipment provides an operator, the transaction is considered a service, and not subject to tax, unless the lessee has control over its operation.

When a piece of equipment is occasionally rented to others, tax is due on both the purchase of the equipment and on each rental payment, since the equipment is not purchased for exclusive rental purposes. When the contractor rents such equipment to others, he qualifies as a dealer and must register as a dealer and collect tax on the rental proceeds. Note: The future sales of this equipment would be taxable because the contractor is also an equipment dealer (a sale is not occasional or isolated when sold by a dealer of the product).

However, if the contractor does not rent his equipment and is not registered with the Department, he may sell the equipment as an occasional or isolated sale without being required to collect tax (provided the equipment is not a motor vehicle requiring a title document transfer).

Contractors often enter into lease purchase agreements when buying heavy equipment. The lease purchase agreement establishes a purchase price should the contractor decide to execute his purchase option. The contract also establishes a rental rate for the period of the lease. This will state that all, or a portion, of the lease payment will be applied toward the purchase price. The vendor should charge and collect sales tax on the lease payments and on the payoff balance if the contractor executes the option.

A transaction may appear to be a lease or a lease purchase agreement, when, in fact, it is an installment sales contract. Factors to consider in making this determination are:

- Lessee is obligated to pay the entire amount of the contract;
- Lessee obtains title to the property (immediately or at end of the lease term);
- Lessee takes a depreciation expense; or
- Lessee's purchase option amount does not exceed \$100 or 1 percent of the total contract price.

These are normally valid, but not conclusive, indicators (See [Rule 12A-1.071, F.A.C.](#), [TAA 95A-022](#), and [Warning Safety Lights of Georgia, Inc. v. Department of Revenue⁴](#) and [New Sea Escape Cruises, Ltd. v. Department of Revenue⁵](#)).

⁴ [Warning Safety Lights of Georgia, Inc. v. Department of Revenue](#), 678 So. 2d 1377 (1996), addressed the taxability of DOT subcontracts for temporary traffic control devices and permanent signs and road markings. In that case, *Warnings Safety Lights of Georgia, Inc.* ("WSL") had asked the Department for a declaratory statement that its subcontracts were service transactions rather than rentals. The Department concluded WSL was renting the temporary traffic control devices and must collect and remit tax on the proceeds from that portion of the contract. WSL appealed that determination. The court agreed with WSL's characterization of the transaction as the providing of a service. The court described WSL's obligations under the contract as construction of the temporary traffic control pattern, continuous maintenance and adjustment of the pattern, and then installation of permanent road striping, signs, and traffic control

Fabricated Cost

When a contractor operates a manufacturing plant in which he manufactures tangible personal property for use in the performance of contracts, the tangible personal property manufactured is subject to tax at the manufactured or fabricated cost, as outlines in [Rules 12A-1.043 and 12A-1.051, F.A.C.](#)

“Fabricated cost “means the cost to a real property contractor of fabricated items.

“Fabricated items”, means items contractors manufacture for their own use in performing contracts for improvements to real property. The term applies only to items the contractor manufactures at a plant or shop maintained by the contractor.

When a temporary manufacturing plant is set up at the site (house construction site) to perform a specific job at the site, the direct labor incurred by the contractor manufacture tangible personal property for their own use at the site is not subject to tax (as long as the plant retains its classification as temporary).

The elements of fabricated cost include the materials, labor, service, or transportation costs that are directly attributable to manufacturing, producing, compounding, or fabricating and article of tangible personal property for one’s own use that are properly chargeable to the cost of the product (See [TAA 96A-022, 00A-046, 06A-014](#)). Also see [TIP 03A01-21](#) for the Application of Discretionary Sales Surtax for Fabrication and Construction projects and [Housing by Vogue Inc. v. Department of Revenue](#)⁶.

Elements of Fabricated Cost

Material cost includes the following:

- All direct materials and related freight cost that are physically observable as being identified to the finished tangible personal property, that are consumed in producing the property, or that become a component or ingredient of the finished property;

devices. All equipment provided by WSL remained under WSL’s “continuous control and supervision.” WSL asserted that its entire business, including construction and maintenance of temporary traffic control patterns, was a nontaxable service, and that the Department could not classify the provision of temporary traffic control devices as a taxable rental.

⁵ [New Sea Escape Cruises, Ltd. v. Department of Revenue](#), 823 So.2d 161, (Fla. App. 4 Dist, 2002). Distinguished its facts from [Warning Safety Lights of Georgia](#), because the party that operates the gambling concession on the vessel does not own the equipment. Rather, both the vessel and gambling equipment are tangible personal property.

⁶ [Housing by Vogue, Inc. v. Department of Revenue](#), 422 So. 2d3 (Fla. 1982); Cross Reference: TAA 97A-023; 1) Component parts fabricated by a contractor are properly classified as items of tangible personal property; 2) Lump sum contractors that fabricate, construct or install tangible personal property into real property are classified as ultimate consumer of their products; 3) As ultimate consumers of tangible personal property they produce, these contractors are subject to taxation on the manufactured cost of their products; 4) Public works contractors are liable for tax on materials they purchase to incorporate into public works, regardless of whether the contract is for real property improvement or for tangible personal property.

- Material handling and warehousing of direct materials and goods in process; and
- Manufacturer's excise taxes on materials.

Labor cost includes the following:

- Total direct labor costs for employees or contract labor that are allocable to the production of the finished property, Including the entire amount of payroll burden, which includes but is not limited to overtime premium, vacation and holiday pay, sick leave pay, shift differential, payroll taxes, payments to a supplemental unemployment benefit plan, and employee fringe benefits;
- Compensation of officers, to the extent it is allocated to production and not administrative functions; and
- Cost of service, engineering, design or other support employees allocated to production.

Service cost includes the costs of non-employee services that are allocated to the production of the tangible personal property, such as engineering, design or similar consulting or professional services.

Asphalt Contractors

If asphalt contractors manufacture asphalt for their own use, tax should be computed by using the following method:

- The cost of materials which become component part or which are the ingredient of the finished product should be multiplied by 6%, plus;
- The cost of transportation of such components and ingredients to the plant site should be multiplied by 6 %, plus;
- Either an indexed tax of:
 - 67 cents per ton July 1, 2009 through June 30, 2010
 - 63 cents per ton July 1, 2008, through June 30, 2009
 - 62 cents per ton July 1, 2007 through June 30, 2008
 - 58 cents per ton July 1, 2006 through June 30, 2007
 - 54 cents per ton July 1, 2005 through June 30, 2006
 - 50 cents per ton July 1, 2003 through June 30, 2005
 - 49 cents per ton July 1, 2000 through June 30, 2003
 - 48 cents per ton July 1, 1998 through June 30, 2000
- Or an indexed tax on public works projects of:
 - 30 cents per ton July 1, 2001 through June 30, 2005
 - 29 cents per ton July 1, 2000 through June 30, 2001
 - 38.4 cents per ton July 1, 1999 through June 30, 2000

The indexed tax represents all other cost associated with the manufacture of the asphalt. The indexed tax rate is linked to the producer price index, as calculated and published by the United States Department of Labor, Bureau of Statistics, and is adjusted annually on July 1. The per ton indexed tax is in addition to any taxes

required to be paid on the purchase of overhead items, including boiler fuels (See [TIP 88A-08](#), [TIP 91A-01-06](#), [TIP 90A01-07](#), [Southern Paving Co. v. State, Department of Revenue](#)⁷ and [Asphalt Pavers v. Department of Revenue](#)⁸).

Prefabricated Building Contractors

When a contractor/manufacturer prefabricates a building to be used in the performance of real property contract, tax is due only on the cost price of the materials consumed in the manufacture of such a building. These buildings may sometimes be referred to as factory built.

Factory built building means a structure manufactured in a manufacturing facility for installation or erection as a finished building including, but not limited to, residential, commercial, institutional, storage and industrial structures (See [Rule 12A-1.043\(3\), F.A.C.](#), and [TAA 97A-023](#)).

Carpet Contractors

Generally, if the wall-to-wall carpet is attached to the floor with tack board, glue, nails, etc., and becomes part of a finished floor, the transaction is considered an improvement to realty, and exempt from sales tax. Such contractors should pay use tax on the purchase of the carpet and other tangible personal property used in performing the contract (See [TAA 01A-071](#), [TAA 98A-007](#), [TIP 03A01-03](#)).

Concrete Contractors

A concrete contractor may subcontract with another firm to furnish, install and remove necessary concrete forms. These are considered service contracts, and the tax is due from the service provider when these forms, materials, and equipment are purchased. If a concrete finishing contractor installs and removes the forms rented from others, the rental of the forms is a taxable transaction to the contractor.

Time and Material Contractors

A repairman of real property usually operates under the same methods as the general contractor except on a much smaller scale. These repairmen may include plumbers, roofers, electricians, painters, etc.

A real property repairman may or may not write lump sum, cost plus or fixed fee, upset/guaranteed price or retail sales plus installation type contracts under [Rule 12A-1.051 \(3\)\(a\),\(b\),\(c\),or \(d\), F.A.C.](#), but may use another common method of billing for the real property repairs, found under [Rule 12A-1.051\(3\)\(e\), F.A.C.](#) This type of billing is called time and materials. Such method of billing is used simply to justify the repairman's charge to the customer. Generally, before work is begun, the repairman will

⁷ [Southern Paving Co. v. State, Department of Revenue](#), 399 So 2d 11 (1981 Fla. 1DCA 1592)(1990); The intercompany transfer of asphalt between two wholly owned subsidiaries is subject to tax on its full-fabricated cost regardless of the cost price shown on the books.

⁸ [Asphalt Pavers v. Department of Revenue](#), 584 So.2d 55, 16 FLW D1862 (1991 Fla 1DCA 3048), the exemption for oil by products does not apply to liquid asphalt and construction materials.

have no idea of how much labor or material will be required to complete the job, therefore he will itemize on his billing(s) all the material used, as well as a separate amount for labor (usually based on an hourly rate). This type of billing is not to be classified as a 3(d) contract. Thus, materials and supplies purchased by the repairman are taxable to him at the time of purchase and are exempt to the customer.

Mixed Contractors

A mixed contract is one that involves a real property improvement, maintenance, or repair and also involves providing personal property that remains tangible personal property and does not become part of the real property. In the case of a mixed contract, taxability depends upon the predominant nature of the work performed under the contract and upon the contract terms.

If the predominant nature of a mixed contract is a contract for real property improvements, taxability will be determined as if the contract were entirely for real property.

If the predominant nature of a mixed contract is a contract for tangible personal property, taxability of the contract will be determined as if the contract were entirely for tangible personal property.

If a mixed contract clearly allocates the contract price among the various elements of the contract, and such allocation is bona fide and reasonable in terms of the costs of materials and nature of the work to be performed, taxation will be in accordance with the allocation (See [TAA 07A-028, 04A-066, 04A-040](#)).

[Rule 12A-1.051\(8\)\(e\), F.A.C.](#), provides that when machinery or equipment that qualifies for tax exemption under a temporary tax exemption permit in [Chapter 212, F.S.](#), is included in a mixed contract that is:

1. Predominantly real property, the contractor is entitled to purchase the qualified machinery or equipment tax-exempt. The property owner must obtain a Temporary Tax Exemption Permit from the Department that authorizes the contractor to purchase the machinery and equipment tax exempt. The property owner must provide the authorized permit to the contractor who then issues the permit to the selling dealer. This exemption is not permitted for holders of Consumer's Certificate of Exemption. It applies only to machinery or equipment that is specifically exempt based on its use.
2. Predominantly tangible personal property, the contractor is entitled to purchase the qualified machinery or equipment tax exempt by issuing a copy of the contractor's Annual Resale Certificate to the selling dealer and accept the property owner's authorized permit provided by the Department in lieu of charging tax on the sale on the machinery or equipment to the property owner.

OTHER TAX CONSIDERATIONS

Materials, supplies and repair parts, such as paint, thinner, wire and electrical parts, nuts, bolts, screws, pipe, wood, etc., which are actually incorporated into the real property being repaired, are taxable to the repairman when used in the performance of a lump sum, cost plus or fixed fee, or guaranteed price contract. The repairman is the ultimate consumer of the tangible personal property.

When the items are sold directly to the customer by the repairman prior to using them to perform the contract, the sales charges become taxable to the customer as expressed in [Rule 12A-1.051\(3\)\(d\), F.A.C.](#) The customer is the ultimate consumer of the materials and supplies sold directly to them. In this type of contract, the repairman is selling specifically described and itemized materials and supplies and the title for such materials passes to the customer prior to their installation.

Materials and supplies used by the repairman in performing real property repairs, and which do not become a component part of the real property repaired, are taxable to the repairman as overhead items. The overhead items may include tools, flux, sand paper, detergents, paint cleaners, brushes, pails, etc.

When Real Property Becomes TPP

When real property is removed from the site it becomes tangible personal property. Repairs to real property items, such as hot water heaters, elevator components, central heating/air conditioners, fire alarm systems, built-in water fountains, etc., may be taxable to the customer in some situations and exempt for the same type of repairs in other situations.

If an HVAC repairman disassembles the main unit and cleans, lubricates, adds repair parts, and reassembles the unit on the job site, the repair work is generally considered to be repairs to realty. The type of contract used, as specified in [Rule 12A-1.051\(3\) \(a\), \(b\), \(c\), \(d\), or \(e\)](#), will determine ultimate consumer of the tangible personal property and the sales or use tax consequences. Using the same example as above, if the unit to be repaired is disassembled, and transported to the repairman's shop (removed from the premises) for repair and then returned to the site and reassembled, the total billing to the customer for the repair is taxable.

Contractors That Sell TPP

Contractors, manufacturers, or dealers who furnish and install items of tangible personal property that do not become a part of real property, must collect tax on the total contract price, including labor, installation and other charges that may occur. Contractors working under this provision may purchase materials that are incorporated into the tangible personal property tax exempt (See [Kings Bay Yacht Club, Inc. v. Green](#),⁹ and [TAA 06A-034, 05A-003](#)).

⁹ [Kings Bay Yacht Club, Inc. v. Green](#), 173 So.2d 509 (Fla 1DCA 1965); cross reference: TAA 97(A)-014; the court concluded that the contract between the yacht club and the contractor was primarily a contract for

Purchase of Construction Materials by an Exempt Entity

Contractors employed directly or as agents of government entities pay use tax on tangible personal property they purchase for incorporation into public works contracts. Such property is exempt only if purchased directly by the government entity from the supplier, as tangible personal property, under the following conditions:

- The government entity issues its own purchase orders, not the contractor's, directly to the vendors;
- The purchase orders include the government entity's consumer's certificate of exemption number;
- The vendors invoice the government entity directly;
- The government entity issues its checks to the vendors directly;
- The government entity takes title to the materials from the vendor and assumes liability for the materials when they are delivered to the job site;
- The government entity assumes risk of loss for the materials upon delivery;
- The government entity is insured against loss or damage to the county-purchased materials; and
- The remaining terms of the documents do not prevent the conclusion that the government entity rather than the contractor is in substance as well as from the purchaser of the materials.

(See [TAA's 97A-007, 97A-009, 97A-012, 97A-013, 97A-014, 97A-046, 07A-049, 07A-057, 96A-011, 96A-012, 96A-014, 96A-035, 96A-027](#)).

Trade Fixtures – Audit Procedures

From July 1, 1998 to July 1, 2002 the term “trade fixtures” was defined by statute to mean items that are attached to real property and are useful solely in connection with or to facilitate that trade or business, rather than serving functions integral to general use of land or a building. For example, if a bakery has a sign installed to identify the location by name of the business, that sign is a trade fixture. As defined “trade fixtures” were always treated as the sale of tangible personal property (See [Commercial Finance Co. v. Brooksville Hotel Co.](#)¹⁰, [Strickland's Mayport, Inc. and BJ Strickland, Jr. v. Kingsley Bank](#)¹¹, TIP 02A01-04, 03A-026).

fabricating, furnishing and supplying tangible personal property, and the yacht club was the ultimate consumer under the statute and liable for the sale tax.

¹⁰ [Commercial Finance Co. v. Brooksville Hotel Co.](#), 123 So. 814, 816 (Fla. 1929); The court set forth three requirements for an item to be considered a fixture. There must be actual annexation to the realty. The item annexed must be appropriate to the use or purpose of the portion of the realty to which it is connected. Finally, the party making the annexation must intend that the item become a permanent accession to the freehold. The court then cited an earlier case, [Seed house v. Broward](#), 16 So. 425, 429 (Fla. 1894), in noting that the intention of the owner in placing the property on his realty is an important, sometimes the controlling, factor.

¹¹ [Strickland's Mayport, Inc. and BJ Strickland, Jr. v. Kingsley Bank](#), 449 So.2d 928 (Fla. 1st DCA 1984); cited [Commercial Finance Co. v. Brooksville Hotel Co.](#), supra, stating that the Florida Supreme Court set out a three-part test for determining whether an object is a fixture or personalty: 1) Is there actual annexation to the realty or something appurtenant thereto?; 2) Is the item in question appropriately applied

The 2002 Legislature deleted “trade fixtures” as a class of items that would be treated as tangible personal property regardless of permanent attachment. The effect is that trade fixtures will be classified either as real property or as tangible personal property depending upon review of all the facts and circumstances, including method of attachment, damage upon removal, intent of the buyer, treatment for other tax and accounting purposes, treatment under real property law, contract provisions, and any other factors relevant to the determination.

MISCELLANEOUS ISSUES

Awnings, when attached, are considered to become a part of realty. As a result, tax is due on the manufactured/fabricated cost of the awnings by the contractor furnishing and installing the awnings (See [TAA 08A-012, 06A-036](#)).

Materials and labor for installation of drapery rods and draperies are taxable as tangible personal property, as they do not become a part of the real property.

Free samples that serve no useful purpose other than as a comparison of color, texture, or design, are exempt.

NEW OR EXPANDING BUSINESS

There is a unique treatment of machinery and equipment purchased for use in a new or expanding business. See [Rule 12A-1.096, F.A.C.](#), for complete treatment.

to the use or purpose of that part of the realty to which it is connected? 3) Did the party making the annexation intend the item to be a permanent accession to the freehold? If the answer to these three questions is yes, the object is a fixture.

GLOSSARY OF TERMS

“2d” Contract:	A time and materials contract as described in Rule 12A-1.051(2)(d), F.A.C..
“3(d)” Contract:	A retail sale plus installation contract as described in Rule 12A-1.051(3)(d), F.A.C.
Cost Plus Contract:	The contractor is paid an amount equal to costs plus specified overhead and profit.
Direct Costs:	The material and labor plus other subcontracting costs.
Fixed Price Contract:	A single amount is due for completion of the project.
General Contractors:	The entity responsible for the entire construction project.
Indirect Costs:	The costs the contractor incurs related to contracting activities that are not direct costs. Indirect costs are allocated to contracts on some rational basis.
Personal Property:	The furniture, fixtures, machines, and other tangible property that is not realty.
Real Property:	Land, building, and other property annexed to realty.
Subcontractor:	The entity responsible for a portion of the contract according to special expertise.
Time and Materials:	The payment at a specified hourly rate plus payment for materials and costs.
Unit Price Contract:	The work is performed based on a specified price per unit of production such as miles in highway construction.

TAX STATUTES AND ADMINISTRATIVE RULES

Topic	Statute (F.S.)	Rules (F.A.C.)
Sales Tax in General	212.02(7)	12A-1.006
	212.02(13)	12A-006
	212.02(14)	12A-1..016(2)(b)
	212.02(15)	12A-024
	212.02(16)	12A-1.051
	212.02(19)	12A-1.091
	212.02(20)	12A-1.094
	212.02(21)	
	212.05	
	212.0501	
	212.06	
	212.07	
	212.08(5)(g)	
	Discretionary Sales Surtax	212.054
212.055		

COURT CASES IMPACTING THE INDUSTRY**Kings Bay Yacht Club, Inc. v Green**

173 S. 2d509 (Fla 1DCA 1965); Cross Reference: TAA 97(A) – 014

Issue: Where a contract is one primarily involving the sale of tangible personal property, the owner and not the contractor is the ultimate consumer obligated for payment of sales tax.

Housing by Vogue Inc. v Department of Revenue

422 So. 2d3 (Fla.1982); Cross Reference: TAA 97A– 023

Issues:

- 1) Component parts fabricated by a contractor are properly classified as items of tangible personal property.
- 2) Lump sum contractors that fabricate, construct or install tangible personal property into real property are classified as ultimate consumer of their products.
- 3) As ultimate consumers of tangible personal property they produce, these contractors are subject to taxation on the manufactured cost of their products.
- 4) Public works contractors are liable for tax on materials they purchase to incorporate into public works, regardless of whether the contract is for real property improvement or for tangible personal property.

Commercial Finance Co. v Brooksville Hotel C.

123 So. 814,816 (Fla. 1929); Cross Reference: TAA 97A – 042

Issue: In establishing the fact whether a given thing is or is not a fixture upon land, the intention of the owner in placing it there, to be gathered from his declarations, and from the character, relations and purposes of the property, is an important element, sometimes of controlling importance.

Stricklands' Mayport, Inc and BJ Strickland, Jr. v Kingsley Bank

449 So 2d 928 (Fla DCA 1984); Cross Reference: TAA 97A – 042

Issue: Sets out a three-part test for determining whether an object is a fixture or personalty. 1) Is there actual annexation to the realty or something appurtenant thereto?

2) Is the item in question appropriately applied to the use or purpose of that part of realty to where it is connected? 3) Did the party making the annexation intend the items to be a permanent accession to the freehold? If the answer to these three questions is yes, the object is a fixture.

Pershing Industries v Department of Banking

591 So 2d 991,993 (Fla 1DCA 1991)

Eager v. Florida Keys Aqueduct Authority

580 So 2d 771 (Fla 3DCA 1991); Cross Reference: TAA 96A – 018

Issue: An agency's administrative interpretation of a statute by rule has been accorded great deference by the courts and will not be overturned unless the agency's interpretation of the statutes is clearly erroneous.

Klosters Rederi A/S v State, Etc.

348 So 2d 656 (Fla 3rd DCA 1977); Cross Reference: TAA 96 (A) – 045

Issue: A foreign vessel owner's action of merely removing from storage in Florida and subsequent placement on board ship of "expensible" items, constituted "use," within the statutory definition of such term defining use as the exercise of any right or power over tangible personal property incident to ownership thereof.

Southern Paving Co. v. State, Department of Revenue

(399 So.2d 11 (1981 Fla.1DCA 1592)(1990)

Issue: The intercompany transfer of asphalt between wholly owned subsidiaries is subject to tax on its full-fabricated cost regardless of the cost price shown on the books.

Structural Steel v. Owen Joist of Fla.

581 So.2d 951, 16 FLW D1582 (1991 Fla. 1DCA 2562)

Issue: The plaintiff, who failed to bill the proper sales tax, could not later recover the tax, which they owed the department, from the defendant.

Asphalt Pavers v. Department of Revenue

584 So.2d 55, 16 FLW D1862 (1991 Fla 1DCA 3048)

Issue: The exemption for oil byproducts does not apply to liquid asphalt and construction materials.

Department of Revenue v. Imperial Builders

519 So.2d 1030, 13 FLW 144 (1988 Fla. 5DCA 40)

Issue: Not all materials used in construction of greenhouses are taxable.

Warning Safety Lights, Inc. v. Department of Revenue

21 FLW D1979, 678 So.2d 1377 (1996 Fla. 4DCA 13964)

Issue: Separately stated charges to an exempt government entity for barricades and lights used in traffic control were an exempt service and not a taxable lease.

IN RE ADVISORY OPINION TO THE GOVERNOR

509 So.2d 29, 12 FLW 375 (1987 Fla. SCT 2517)

Issue: "Service Tax" which was in effect for services rendered between 6/1/87 and 12/31/87 is constitutional.

Sears Roebuck & Co. v. Florida Dept. of Revenue

2nd Circuit. Court. Leon, #921080 (1994)

Issue: It was determined that although Sears invoices for installation of garage door openers, water heaters, built-in ovens, ranges and dishwashers, central air conditioning units, etc. contained some itemization, they were not "specifically described and itemized" within the meaning of Rule 12A1.051(2)(c), F.A.C.

TAX INFORMATION PUBLICATIONS

- TIP 98A01 – 27 Exemption: Pollution Control Equipment for Landfills & Disposal Facilities
- TIP 97A01 – 02 Exemption: Solar Energy Systems and Components
- TIP 91A – 17 Exemption: Florida Entertainment Industry
- TIP 88A – 08 Asphalt for use by the Manufacturing Contractor
- TIP 85A – 01 Mobile Home Sales

TECHNICAL ASSISTANCE ADVISMENTS

- TAA 97A – 007 School District Direct Purchase
- TAA 97A – 009 Local Gov't Contract to Construct Civic Arena
- TAA 97A – 012 Local Gov't Contract to Construct Baseball Stadium
- TAA 97A – 013 Local Gov't Contract to Renovate Gov't Center
- TAA 97A – 014 Sales/Use Tax-Public Works vs. Sale of TPP
- TAA 97A – 023 Taxation of Lump Sum Contractor Factory Built Bldg
- TAA 97A – 030 Real Property vs. Tangible Personal Property
- TAA 97A – 037 Real Property vs. Tangible Personal Property
- TAA 97A – 042 Real Property Improvement or Sale of TPP
- TAA 97A – 046 Sales Tax; Construction for Non Profit Corp
- TAA 97A – 049 Sales Tax — Maintenance Heating Ventilation
- TAA 97A – 051 Sales Tax — Aircraft Service Warranty
- TAA 97A – 053 Repairs to Neon Signs — Application
- TAA 97A – 057 Local Gov't Contract Infrastructure
- TAA 96A – 002 Fire Alarm System Upgrade
- TAA 96A – 011 Sales/Use Tax - Tax Exempt Org
- TAA 96A – 012 Public Works Contract
- TAA 96A – 014 Public Works Contract
- TAA 96A – 018 Installation/Maintenance Marine Security
- TAA 96A – 022 Use Tax on Fabrication of Steel Products

TAA 96A – 027	Purchases of Building Materials
TAA 96A – 035	Public Works Contract
TAA 96A – 045	Manufacture & Installation of Signs In/Out Florida
TAA 96A – 046	Improvement to Realty — Airport