

## **SUMMARY**

**QUESTION:** Do the procedures for the purchase of materials set out in the contract for the construction of public works meet the legal requirements for the Petitioner to purchase the materials tax exempt?

**ANSWER - Based on Facts Below:** The procedures do not meet the legal requirement for the Petitioner to purchase the materials tax exempt. Specifically, the provisions in the contracts do not indicate that invoices will be sent directly to Petitioner. This is a requirement under the rule.

September 2, 2009

XXX  
XXX  
XXX

Re: Technical Assistance Advisement 09A-043  
Sales and Use Tax – XXX XXX XXX  
Subsection: 212.08(6), Florida Statutes (F.S.)  
Rules: 12A-1.038, 12A-1.094, Florida Administrative Code (F.A.C.)  
Petitioner: XXX [hereinafter “Owner”]

Dear XXX:

This letter is a response to your petition dated July 15, 2009, 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 exhibits provided are sufficient to allow Owner to take advantage of its tax-exempt status on the purchase of materials for use in a series of public works contracts.

## **PRESENTED FACTS**

The petition states that you are anticipating entering into contracts for six different construction projects. Contract provisions governing the direct purchase of materials have been drawn up to cover these projects, and you ask if the direct purchase procedures outlined in said provisions are sufficient to allow Owner to use its consumer's certificate of exemption to procure materials for incorporation into the public

works contracts.

Included in your request was a document entitled “Attachment 4: Direct Materials Acquisition and Sales Tax Exempt Purchase Procedures for Public Projects”, which will be a part of the final contract for these projects. That section reads, in relevant part:

14.1.3 The Owner will issue its own Purchase Orders directly to the vendor. The Owner's Purchase Order shall contain or be accompanied by the Owner's exemption certificate and must include the Owner's name, address, and exemption number with issue and expiration date shown. The materials shall be purchased from the vendors and suppliers selected by the Subcontractor, for prices negotiated by the Subcontractor. The Construction Manager will provide all the necessary information for preparation of the purchase orders by the Owner and will coordinate the purchase of the materials in a timely manner so as not to negatively impact on the performance of the construction activity of the project.

14.1.4 The Subcontract amount shall be reduced by the net, undiscounted amount of these purchase orders, plus all sales taxes. Issuance of the purchase orders by the Owner shall not relieve the Subcontractor or the Construction Manager of any of their responsibilities regarding material purchases, or installation, with the exception of the payments for the material so purchased. The Construction Manager and the Subcontractor shall remain, with respect to materials, supplies and equipment, fully responsible for coordination, correct quantities ordered, submittals, protection, storage, scheduling, shipping, security, expediting, receiving, installation, cleaning, and the management of all applicable warranties.

14.1.5 Notwithstanding the transfer of Owner Purchased Materials by the Owner to the Subcontractor's possession, the Owner shall retain title to any and all Owner Purchased Materials.

14.1.6 The Owner shall purchase and maintain insurance pursuant to the requirements set forth in the Owner and Construction Manager Agreement which shall be sufficient to protect against any loss of or damage to Owner purchased equipment, materials or supplies. Such insurance shall cover the value of any Owner Purchased Materials not yet incorporated into the Project from the time the Owner first takes title.

\* \* \*

14.2.8 After receipt of the Purchase Order Requisition Form, Owner shall prepare its Purchase Orders for equipment, materials or supplies which the Owner chooses to purchase directly. Pursuant to the Purchase Order, the vendor will provide the required quantities of material at the price established in the vendor's quote to the Subcontractor, less any sales tax associated with such price. Promptly upon receipt of each Purchase Order, Subcontractor shall verify the terms and conditions of the Purchase Order prior to its issuance to supplier and in a manner to assure proper and timely delivery of items. The Owner's Purchasing Director or his designated representative shall be the approving authority for the Owner on Purchase Orders in conjunction with Owner-Purchased materials. The Purchase Order shall require that the supplier provide the required

shipping and handling insurance. The Purchase Order shall also require the delivery of the Owner-Purchased Materials on the delivery date provided by the Subcontractor in the Purchase Order Requisition Form and shall indicate F.O.B. jobsite. The Owner's Purchase Orders shall contain or be accompanied by the Owner's exemption certificate and must include the Owner's name, address, and exemption number with issue and expiration date shown.

\* \* \*

14.2.12 As Owner-Purchased Materials are delivered to the jobsite, the Subcontractor and the Construction Manager, as Owner's Representative, shall visually inspect all shipments from the suppliers, and approve the vendor's invoice for material delivered. The Subcontractor shall assure that each delivery of Owner-Purchased Material is accompanied by documentation adequate to identify the Purchase Order against which the purchase is made. This documentation may consist of a delivery ticket and an invoice from the supplier conforming to the Purchase Order, together with such additional information as the Owner or Construction Manager may require. The Construction Manager, as Owner's Representative, shall verify in writing to the Owner the accuracy of the delivery ticket. The Subcontractor will then forward the invoice to the Owner through the Construction Manager for payment. The invoice shall be thereupon furnished to the Owner for processing and payment in the manner as all other Owner invoices are processed. The Owner shall have the right to assign Owner personnel to verify and audit the accuracy of all Direct Purchase documents.

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14.2.16 Notwithstanding the transfer of Owner-Purchased materials by the Owner to the Subcontractor's possession, the Owner shall retain title to any and all Owner-Purchased materials.

14.2.17 The transfer of possession of Owner-Purchased Materials from the Owner to the Subcontractor shall constitute a bailment for mutual benefit of the Owner and the Subcontractor. The Owner shall be considered the bailor and the Subcontractor the bailee of the Owner-Purchased materials. Owner-Purchased Materials shall be considered returned to the Owner for purposes of its bailment at such time as they are incorporated into the Project or consumed in the process of completing the Project. The Bailee shall have the duty to safeguard, store and protect all Owner-Purchased Materials.

14.2.18 The Owner shall purchase and maintain insurance pursuant to the requirements set forth in the Owner and Construction Manager Agreement which shall be sufficient to protect against any loss of or damage to Owner-Purchased equipment, materials or supplies. Such insurance shall cover the full value of any Owner-Purchased Materials not yet incorporated into the Project from the time the Owner first takes title.

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14.2.20 On a monthly basis, the Subcontractor shall be required to review invoices submitted by

all suppliers of Owner-Purchased Materials delivered to the Project site during that month and either concur or object to the Owner's issuance

of payment to the suppliers, based upon the Subcontractor's records of materials delivered to the site and any defects in such materials.

14.2.21 In order to arrange for the prompt payment to the supplier, the Subcontractor shall provide to the Owner, through the Construction Manager, a list indicating the acceptance of the goods or materials in accordance with the established monthly Payment Request Schedule. The list shall include a copy of the applicable Purchase Order, invoices, delivery tickets, written acceptance of the delivered items, and such other documentation as may be reasonably required by the Owner. Upon receipt and verification of the appropriate documentation, the Owner shall prepare a check drawn to the supplier based upon the receipt of data provided. This check will be released, delivered and remitted directly to the supplier. The Subcontractor agrees to assist the Owner to immediately obtain partial or final release of lien waivers as appropriate.

### **LAW AND DISCUSSION**

Sales to governmental units are exempt from sales tax pursuant to Subsection 212.08(6), F.S., which provides, in pertinent part:

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. . . . This exemption does not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof when such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision . . . .

Rule 12A-1.038(4), F.A.C., 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, Subsection 212.08(6), F.S., 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, F.A.C., 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 Subsection 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. (emphasis added)

(c) Sales are taxable sales to the contractor unless it can be demonstrated to the satisfaction of the Executive Director or the Executive Director's designee in the responsible program that such sales are, in substance, tax exempt direct sales to the government.

(5) Contractors that manufacture materials for incorporation into public works shall be liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C. . . .

Rule 12A-1.038(4)(b), F.A.C., 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), F.A.C., state that purchases of materials for public works contracts are 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 prior to its incorporation into realty, and satisfy various factors contained in Rule 12A-1.094, F.A.C.

Rule 12A-1.094(4), F.A.C., 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 during the time that the building materials are physically stored at the job site prior to their installation or incorporation into the project is a paramount consideration. The governmental entity must assume all risk of loss or damage for the tangible personal property during that period. 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 summarize, the conditions that must be met to satisfy the requirements of Rule 12A-1.094, F.A.C., 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, which must include the governmental entity's consumer's certificate of exemption number. 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 until the time it is incorporated as real property;
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.

In this case, the procedures outlined in the proposed contract and "Attachment A" clearly indicate that:

1. Purchase orders shall be executed by the Owner;
2. Title shall pass to the Owner upon the merchandise arriving at the job site F.O.B.;
3. Payments shall be made directly by Owner to vendors; and
4. The Owner has assumed all risk of damage or loss of the supplies, as is indicated by the Owner obtaining insurance to cover the materials.

However, the documents do not indicate that the invoices will not be sent directly to the Owner.

Paragraph 14.2.12 states that:

14.2.12 As Owner-Purchased Materials are delivered to the jobsite, the Subcontractor and the Construction Manager, as Owner's Representative, shall visually inspect all shipments from the suppliers, and approve the vendor's invoice for material delivered. The Subcontractor shall assure that each delivery of Owner-Purchased Material is accompanied by documentation adequate to identify the Purchase Order against which the purchase is made. This documentation may consist of a delivery ticket and an invoice from the supplier conforming to the Purchase Order, together with such additional information as the Owner or Construction Manager may require. The Construction Manager, as Owner's Representative, shall verify in writing to the Owner the accuracy of the delivery ticket. The Subcontractor will then forward the invoice to the Owner through the Construction Manager for payment. The invoice shall be thereupon furnished to the Owner for processing and payment in the manner as all other Owner invoices are processed. The Owner shall have the right to assign Owner personnel to verify and audit the accuracy of all Direct Purchase documents. (emphasis supplied)

In addition Paragraph 14.2.21 provides that:

14.2.21 In order to arrange for the prompt payment to the supplier, the Subcontractor shall provide to the Owner, through the Construction Manager, a list indicating the acceptance of the goods or materials in accordance with the established monthly Payment Request Schedule. The list shall include a copy of the applicable Purchase Order, invoices, delivery tickets, written acceptance of the delivered items, and such other documentation as may be reasonably required by the Owner. (emphasis supplied)

These provisions indicate that the invoices will be provided by the supplier to the contractor or subcontractor at the time of delivery and subsequently forwarded to the Owner for payment. As such, the original invoices are not being sent directly to Owner.

## **CONCLUSION**

The procedures outlined in the documents provided are in compliance with most of the direct purchase procedures set forth in Rule 12A-1.094(4), F.A.C. However, the provisions do not indicate that invoices will be sent directly to the county. As such, it does not appear that the Authority will be able to take advantage of its tax-exempt status for the purchase of materials to be incorporated into the project, unless these provisions and procedures are revised to clearly indicate that the original invoices shall be submitted directly to Authority.

Please be advised that, as specified in Rule 12A-1.094(5), F.A.C., contractors, including subcontractors that manufacture or fabricate their own materials for installation in the project cannot be included in a governmental entity's direct purchase program. 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), F.A.C.

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,

Kama D. S. Monroe  
Senior Attorney  
Technical Assistance and Dispute Resolution

Control # 68227