



Interim
Executive Director
Marshall Stranburg

SUMMARY

TAX: Sales and Use Tax

TAA NUMBER: 13A-007

ISSUE: Taxability of Cleaning and Security Services Performed Under Public Works Contract

STATUTE CITES: Sections: 212.02(14)(a), 212.05(1)(i), and 212.07(1), Florida Statutes (F.S.)

RULE CITE(S): Rules: 12A-1.0161(1) and (4), 12A-1.038(3)(a), 12A-1.039, and 12A-1.094(2) and (3), Florida Administrative Code (F.A.C.)

QUESTION: Whether Taxpayer is liable for sales tax for transactions where it purchases taxable security services and taxable cleaning services in fulfillment of a multi-year lump sum contract with the XXX.

ANSWER – Taxpayer proposes the following changes to its existing documentation and procedures:

- Taxpayer will amend its contracts to specifically state that the work to be performed under the subcontract is being done solely for the benefit of the XXX.
- The monthly invoices, which are presented on a Sub-Consultant Payment Certification Form or any prospective form, will separately state to the XXX the value of all services provided by subcontractors when it bills the XXX.
- Each service provider will separately state on its invoices to Taxpayer the value of all services provided, and will specifically designate the XXX as the client or customer who is purchasing the service from Taxpayer.
- Taxpayer shall comply with the requirements of Rule 12A-1.039, F.A.C., with regard to documenting the purchases for resale.

If Taxpayer (1) modifies, as proposed, the way transactions are itemized on invoices to meet the four resale conditions provided in Rule 12A-1.0161(4), F.A.C., and (2) includes specific language, as proposed, in its contracts with the service providers, stating that Taxpayer is purchasing these services for fulfillment of its contract with the XXX, future security services and nonresidential cleaning services will not be subject to tax as purchases for resale. Failure to meet these proposed changes will subject purchases of taxable security services and cleaning services to sales tax at the time of purchase.

March 22, 2013

RE: Technical Assistance Advisement – TAA 13A-007
Sales and Use Tax
Taxability of Cleaning and Security Services Performed Under Public Works Contract
Sections: 212.02(14)(a), 212.05(1)(i), and 212.07(1), Florida Statutes (F.S.)
Rules: 12A-1.0161(1) and (4), 12A-1.038(3)(a), 12A-1.039, and 12A-1.094(2) and (3), Florida
Administrative Code (F.A.C.)
XXX (herein “Taxpayer”)
FEI: XXX

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

Requested Advisement

This advisement asks whether Taxpayer is liable for sales tax for transactions where it purchases taxable security services and taxable cleaning services in fulfillment of a multi-year lump sum contract with the Florida Department of Transportation.

Facts

Taxpayer provides the following information:

[Taxpayer] provides long-term, comprehensive, asset management contracts to maintain highways, roads, bridges, traffic control equipment, weigh stations, rest areas, toll booths and other transportation related facilities. [Taxpayer] contracts with the XXX to provide those services. A representative copy of such a contract between [Taxpayer] and the XXX is attached as Exhibit A.

[Taxpayer] subcontracts with third party providers that sell security services to [Taxpayer] solely in furtherance of [Taxpayer’s] contracts with the XXX. A representative copy of such a subcontract between [Taxpayer] and such a third party is attached as Exhibit B. [Taxpayer] also subcontracts with third party providers that sell non-residential cleaning services to [Taxpayer] solely in furtherance of [Taxpayer’s] contracts with the XXX. A representative copy of such a subcontract between [Taxpayer] and such a third party provider is attached as Exhibit C. The cleaning services subcontract, unlike the security services contract, is bundled with other services (improvements to and maintenance of real property). In the course of a sales and use tax audit conducted by the Department, it was determined by the auditor that approximately 25% of the contract costs associated with the subcontract that included cleaning services were attributable to cleaning services.

The contract between [Taxpayer] and the XXX describes at pages 14-15 the required rest area cleaning service within the contract's Scope of Services. The representative subcontract between [Taxpayer] and the third party providing cleaning services incorporates into its Scope of Services these same rest area cleaning services. This wholesale incorporation of the prime contract's Scope of Services into the representative subcontract demonstrates that the services were undertaken to provide a direct and identifiable benefit to the State of Florida, the single customer of [Taxpayer] for whom the services were purchased. Additionally, C-2 of the representative contract includes a termination clause that explains that the representative subcontract is based on and subject to the prime contract between [Taxpayer] and the XXX.

The representative contract between [Taxpayer] and the third party provider of security services describes at page 14 the requirement that [Taxpayer] provide security guard services at rest areas in accordance with the requirements in the XXX Standard Maintenance Scope of Services for security guard services. The representative subcontract for security services includes at S1 through S12 a Scope of Services that tracks almost verbatim the Standard Maintenance Scope of Services for security guard services prescribed by the XXX in its representative contract with [Taxpayer], including the fines for violations that are imposed for failure to perform the services as prescribed. This demonstrates that the services acquired by [Taxpayer] were purchased to provide a direct and identifiable benefit to the XXX and to no other [Taxpayer] customer.

The representative subcontract is for provision of security services at interstate rest areas. As such, the third party contractor was on notice that the XXX was [Taxpayer's] customer. Additionally, [Taxpayer] will amend its contracts prospectively to more clearly explain that the work to be performed under the subcontract is being done solely for the benefit of the XXX.

The representative contract between [Taxpayer] and the XXX expressly requires [Taxpayer] to include with its monthly invoice a Sub-Consultant Payment Certification Form. Therefore, [Taxpayer] was required to separately state to the XXX the value of services provided by subcontractors when it billed the XXX. Additionally, [Taxpayer] has separately restated on its invoices to the XXX the charges paid for security services. And, prospectively, [Taxpayer] will separately restate on its invoices to the XXX 25% of the charges for the representative subcontract for cleaning services, or, in the case of a contract for cleaning services only, the amounts paid for those cleaning services.

[Taxpayer] is registered with the XXX for sales and use tax purposes. And it routinely provides its subcontractors for security and cleaning services with a copy of its XXX resale certificate.

Taxpayer's Position

Taxpayer asserts the purchase of taxable security services and taxable cleaning services, from the service provider subcontractors, are purchases made for resale and are not subject to sales tax at the time of purchase. Taxpayer believes its purchases are not taxable "sales at retail" but are undertaken for the sole purpose of reselling those services to the XXX within the meaning of the Department's resale rule and therefore beyond the scope of the tax. Taxpayer states the following in the inquiry:

. . . [Taxpayer's] purchase of services from the representative subcontractors of cleaning and security services are not taxable "sales at retail" but are undertaken for the sole purpose of reselling those services to the XXX within the meaning of the Department's resale rule and therefore beyond the scope of the tax. Based upon the scope of services in the representative contract between [Taxpayer] and the XXX, and the scope of services in the representative

subcontracts, the cleaning and security services acquired by [Taxpayer] provided a direct and identifiable benefit to the State of Florida and to no other client of [Taxpayer]. The representative subcontracts for cleaning and security services both identified the State of Florida as the [Taxpayer's] customer for whom the cleaning and security services were being purchased. And [Taxpayer] is amending its contract with the security services provider to more clearly state that the XXX is the only customer of the [Taxpayer] that will benefit under the representative subcontract for security services.

[Taxpayer] regularly provides with its invoices to the XXX Sub-Consultant Payment Certification Forms that identifies the value of the services provided by third party providers of cleaning and security services. Additionally, [Taxpayer] reiterated the charge for the security services on its invoices to the XXX and, prospectively will do the same for cleaning services. And Company complied with the requirements of Rule 12A-1.039[, F.A.C.,] by registering for Florida Sales and Use Tax purposes and providing its subcontractors with copies of its XXX resale permit.

[Taxpayer] is not claiming an exemption under [s.] 212.08(6)[, F.S.] Instead, [Taxpayer] contends that its purchases of cleaning and security services are exempt because it is buying them for resale, and this rule applies regardless of the tax status of the person to whom it is reselling. In other words, [Taxpayer] would claim that its purchases were sales for resale whether it was reselling to the XXX, to an exempt nonprofit, or to a non-exempt private purchaser.

Applicable Law and Discussion

Section 212.05, F.S., states in part:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . or who rents or furnishes any of the things or services taxable under this chapter . . . within the state.

Section 212.02(14)(a), F.S., provides that a “retail sale” or a “sale at retail” means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, or services taxable under this chapter . . .”. (e.s.)

Section 212.05(1)(i), F.S., provides in part:

For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * *

(i)1. At the rate of 6 percent on charges for all:

a. Detective, burglar protection, and other protection services (NAICS National Numbers 561611, 561612, 561613, and 561621). . .

b. Nonresidential cleaning, excluding cleaning of the interiors of transportation equipment, and nonresidential building pest control services (NAICS National Numbers 561710 and 561720).

Section 212.07(1), F.S., states in pertinent part:

- (a) The privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer.
- (b) A resale must be in strict compliance with s. 212.18 and the rules and regulations, and any dealer who makes a sale for resale which is not in strict compliance with s. 212.18 and the rules and regulations shall himself or herself be liable for and pay the tax. . .

Rule 12A-1.039, F.A.C., provides in part:

- (1)(a) It is the specific legislative intent that each and every sale, use, storage, consumption, or rental is taxable, unless such sale, use, storage, consumption, or rental is specifically exempt. The exempt nature of the transaction must be established by the selling dealer.
 - (b) A sale for resale is exempt from the tax imposed by Chapter 212, F.S., only when the sale for resale is in strict compliance with the provisions of this rule. For purposes of this rule, a “sale for resale” includes the following sales, leases, or rentals when made to a person who is an active registered dealer. This is not intended to be an exhaustive list. . .
3. The sale of taxable services identified in subsection 12A-1.0161(1), F.A.C., to a dealer when such services are being resold to the dealer’s customers under the conditions stated in subsection 12A-1.0161(4), F.A.C.

A resale certificate is required from every purchaser who purchases tangible personal property or service for resale, subject to the provisions of subsection (1) of this rule. Otherwise, the dealer will be required to collect and remit the tax to the Department of Revenue.

Rule 12A-1.0161(1) and (4), F.A.C., provides in part:

- (1)(a) A tax is imposed on the sale at retail or use in this state of nonresidential pest control services described in Rule 12A- 1.009, F.A.C., nonresidential cleaning services described in Rule 12A-1.0091, F.A.C., and detective burglar protection, and other protection services described in Rule 12A-1.0092, F.A.C. The tax is imposed at the rate of 6 percent of the total sales price or cost price of such service. The tax shall be computed on each taxable sale or use of a service for the purpose of remitting the amount of tax due the state, and shall include each and every such retail sale or use of a service. The charge for services performed within this state but used or consumed outside this state by the purchaser is exempt from tax.

- (b) For the purposes of this rule, a service shall mean those services enumerated in paragraph (a) above.

* * *

- (4) A sale of a service is a sale for resale and is exempt from sales tax when the service is later sold under the following conditions:

- (a) The service provides a direct and identifiable benefit to a single client or customer of the purchaser; and

- (b) The purchaser of the service buys the service pursuant to a written contract (or other evidence sufficient for audit purposes) with the seller which specifically designates the client or customer on whose behalf the purchaser is buying the service; and
- (c) The purchaser of the service separately states the value of the service in the charge for the service when it is subsequently sold to the purchaser's client or customer; and
- (d) The selling dealer complies with the provisions of Rule 12A-1.039, F.A.C., with regard to documenting sales for resale.

Discussion

Taxpayer entered into contracts with the XXX to provide taxable security services and non-residential cleaning services. Taxpayer purchases these services from subcontractors who provide these services in accordance with subcontracts with Taxpayer. Taxpayer does not currently meet the four resale conditions as provided in Rule 12A-1.0161(4), F.A.C., allowing it to purchase taxable security services and non-residential cleaning services exempt from tax as a sale for resale.

Taxpayer proposes the following changes to its existing documentation and procedures:

- Taxpayer will amend its contracts to specifically state that the work to be performed under the subcontract is being done solely for the benefit of the XXX.
- The monthly invoices, which are presented on a Sub-Consultant Payment Certification Form or any prospective form, will separately state to the XXX the value of all services provided by subcontractors when it bills the XXX.
- Each service provider will separately state on its invoices to Taxpayer the value of all services provided, and will specifically designate the XXX as the client or customer who is purchasing the service from Taxpayer.
- Taxpayer shall comply with the requirements of Rule 12A-1.039, F.A.C., with regard to documenting the purchases for resale.

If Taxpayer (1) modifies, as proposed, the way transactions are itemized on invoices to meet the four resale conditions provided in Rule 12A-1.0161(4), F.A.C., and (2) includes specific language, as proposed, in its contracts with the service providers, stating that Taxpayer is purchasing these services for fulfillment of its contract with the XXX, future security services and non-residential cleaning services will not be subject to tax as purchases for resale. Failure to meet these proposed changes will subject purchases of taxable security services and cleaning service to sales tax at the time of purchase.

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 on 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 than 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 15 days of the date of this letter.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at 850-717-6729.

Sincerely,

Joseph D. Franklin III
Tax Law Specialist
Technical Assistance and Dispute Resolution

Control #: 131013