



FLORIDA

Executive
Director
Marshall Stranburg

QUESTION: ARE PURCHASES BY A GENERAL CONTRACTOR FOR MATERIALS USED IN A PUBLIC WORKS CONTRACT SUBJECT TO SALES AND USE TAX?

ANSWER: CONTRACTORS, AS THE PURCHASERS OF THE MATERIALS, OWE SALES TAX ON PURCHASES OF MATERIALS USED IN A PUBLIC WORKS CONTRACTS.

October 9, 2015

Re: Technical Assistance Advisement – TAA 15A-013
Public Works Contract
Section: 212.08, Florida Statutes (F.S.)
Rules: 12A-1.038, 12A-1.051, 12A-1.094, Florida Administrative Code (F.A.C.)
XXXX (“Taxpayer”)
FEI: XXXX

Dear XXXX:

This letter is a response to your petition received on XXXX, 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, 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

Whether Taxpayer (contractor), as the purchaser, owed sales tax on the purchase of materials and supplies used in a public works contract.

Facts

Taxpayer is requesting a determination of proper sales and use tax treatment for a Hospital Realignment project completed by Taxpayer for the tax-exempt XXXX, on a XXXX in Florida.

Taxpayer's request provides, in part:

The XXXX contracted with Taxpayer to complete an 86,000 square foot remodel and 11,000 square foot expansion of the existing hospital. The lump-sum project scope included a new Annex Building, renovations of adjacent buildings, and various site improvements. Included in the bid award was a letter assigning Taxpayer the tax-exempt status of the XXXX.

Child Support – *Ann Coffin, Director* • General Tax Administration – *Maria Johnson, Director*
Property Tax Oversight – *Dr. Maurice Gogarty, Director* • Information Services – *Damu Kuttikrishnan, Director*

<http://dor.myflorida.com/dor/>
Florida Department of Revenue
Tallahassee, Florida 32399-0100

After researching Florida statutes, Taxpayer could not determine if it could be assigned the exemption, and as a result sales and use tax was included on all vendor invoices. Taxpayer and its subcontractors paid all applicable Florida sales and use taxes for the project.

While negotiating additional work for the base, the XXXX has reasserted its position that contracted work performed for XXXX is tax-exempt and the exemption can be assigned to Taxpayer. It is the opinion of XXXX that the sales and use tax paid was both charged and paid in error, as the project should have been exempt from Florida sales and use tax under s. 212.08(6), F.S., and Rule 12A-1.094. F.A.C.

Therefore, it is Taxpayer's contention that any tax remitted to the state should be refunded to Taxpayer's construction company, and the additional work would also be exempted from Florida sales tax.

Communication with Taxpayer's Assistant Controller and review of applicable contracts and invoices provide the following:

Taxpayer purchased the tangible personal property, which is delivered to the job site. The Taxpayer would pay for the materials, then invoice XXXX for the materials. Additionally, Taxpayer is responsible for constructing a new building, extending the existing building, and renovating the existing structure under the contract. The work is described as "turnkey," as the structures will be furnished and ready to use upon completion.

Taxpayer provided documents related to the contract, including several copies of invoices, under the contract, billed to Taxpayer.

Applicable Law

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

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

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

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

By its terms, s. 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. Additionally, Florida statutes do not provide authority for an exempt governmental entity to assign its exempt status to a contractor. 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. (Emphasis added.)

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

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

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

1. Direct Purchase Order. The governmental entity must issue its purchase order directly to the vendor supplying the materials the contractor will use....

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.

(f) In the case of contracts with any agency or branch of the United States government in which the federal governmental agency or branch is not required to produce a Certificate of Entitlement, the purchase must comply with the five criteria provided in paragraph (b), for the purchase of tangible personal property

to be exempt from sales and use tax. **If the criteria in paragraph (b) are not met, the contractor is the ultimate consumer of such tangible personal property and is liable for sales or use tax on such purchases and manufacturing costs.** (Emphasis added.)

(5) Contractors, including subcontractors that manufacture, fabricate, or furnish tangible personal property that the contractor incorporates into public works are liable for tax in the manner provided in subsection (10) or Rule 12A-1.051, F.A.C. The contractor and subcontractors, not the government entity, are deemed to be the ultimate consumers of the articles of tangible personal property they manufacture, fabricate, or furnish to perform their contracts and may not accept a Certificate of Entitlement for these articles.

Discussion

Rule 12A-1.094(2) and (3), F.A.C., state that the purchase of materials for public works contracts is taxable to the contractor as the ultimate consumer where the contractor is deemed to be the purchaser. If the purchaser of the materials is the governmental entity, however, the transaction is exempt, provided the five criteria provided in paragraph (4)(b) of Rule 12A-1.094, F.A.C., are satisfied (the federal government is not required to produce a Certificate of Entitlement – See paragraph (4)(f)).

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.

According to the information you have provided, the foregoing requirements for an exempt sale to a governmental entity were not satisfied. As shown on the purchase invoices, the exempt governmental entity did not make direct purchases of various construction materials used in public works, or pay the vendors directly. Moreover, there is no evidence that the exempt governmental entity retained legal and equitable title to all materials that were purchased, or assumed the risk of loss. Instead the invoices, as well as our conversations with Taxpayer's Assistant Controller, state Taxpayer was the purchaser of the materials.

Based upon the conclusion that Taxpayer, not the governmental entity, was the purchaser, all purchases of materials were subject to sales tax. Therefore, no refund would be due, as sales tax has not been paid in error.

Conclusion

Pursuant to Section 212.08(6), F.S., and Rule 12A-1.094, F.A.C., Taxpayer (contractor) as the purchaser, owed sales tax on materials used in the public works contract. Florida statutes do not provide authority for an exempt governmental entity to assign its exempt status to a contractor.

This response constitutes a Technical Assistance Advisement under s. 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 s. 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 s. 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.

Sincerely,

Timothy Surface
Senior Attorney
Technical Assistance and Dispute Resolution

Control #174655