



**FLORIDA**

Executive  
Director

Leon Biegalski

**QUESTION:** WILL TAXPAYER'S CONTRACT QUALIFY FOR THE PUBLIC WORKS EXEMPTION PROVIDED FOR BY SECTION 212.08(6), F.S.?

**ANSWER:** YES. TAXPAYER WILL SATISFY ALL CRITERIAL REQUIRED BY RULE 12A-1.094(4), F.A.C., AND TIP13A01-01.

**July 28, 2016**

Subject: Technical Assistance Advisement ("TAA") 16A-013  
Sales and Use Tax-Public works; Real Property Improvements

Section(s) 212.08(6), Florida Statutes ("F.S.")  
Rule(s) 12A-1.094, Florida Administrative Code ("F.A.C.")

XXXX ("Landlord")("University")("Petitioner")  
XXXX ("Developer")

Dear XXXX:

This letter is a response to your petition dated XXXX, for the Department's issuance of a Technical Assistance Advisement ("TAA") to Petitioner, regarding public works and real property improvements. Your petition has been carefully examined, and the Department finds it to be in compliance with the requisite criteria set forth in Rule Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of section 213.22, F.S.

### Issue

Whether University may directly purchase materials from suppliers without sales tax for the proposed project?

### Facts

University is a XXXX educational facility. University will build a student housing project (the "Project") that will be built on property leased or owned by University. University and Developer will control the construction of the Project. The Project will consist of residential buildings, a dining facility, a health and wellness facility, and other ancillary student amenity and support space on part of the University campus.

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

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**Florida Department of Revenue**  
Tallahassee, Florida 32399-0100

The land that the improvements will be constructed upon will be XXXX to Developer for XXXX years pursuant to a written agreement XXXX. The use of the Project and control of the Project will be governed by the XXXX. At the end of the XXXX period, the property will XXXX to the University.

The use of the improvements will be limited to student housing, dining, health and wellness, and ancillary amenity and support space, all for University's purpose. Developer will have XXXX to the Project, until the termination of the XXXX. The XXXX will limit the use of the improvements to the University's purposes. Developer is required, under the XXXX, to only house "Eligible Residents" in the Project. "Eligible Residents" is defined by the XXXX and includes University students, faculty, and staff. It also includes conference participants in University programs.

University will oversee the construction of the improvements to the Project. University will retain a large amount of control over the XXXX. The construction of Project will be in accordance with University standards and the approved plans and specs, unless University approves a change. Developer is required to provide University with access and all information necessary to monitor the performance and progress of the construction, and University is entitled to attend the development team meetings relating to the progress and performance of the construction work. University retains the right to name the Project or to sell the naming rights to any or all of the improvements and receive all compensation from such sale.

University will direct the student rental contracts for housing. Developer will not be allowed to rent the residential units to the most financially attractive tenants at the highest rates that the market will bear. The residence halls may only house Eligible Residents, and housing rental rates must be approved by a unanimous consent of the Project advisory committee, on which University has two designees. Furthermore, University will perform all of the student marketing, room assignment, billing, and collection activities related to the contracting of the residential units. University will retain the right to access the improvements. University will retain free access to the Project, including the right to inspect the improvements.

University will supervise the operations of the improvements during the term of XXXX. After construction is completed and any debt is paid, University retains important operational control of the improvements. The operating expenses in the annual budget, the amount and type of rental rates, fees, deposits charged to the residents, any material deviation from the repair and replacement schedule, any significant changes to the improvements, and any proposed changes in use of the Project are all subject to the unanimous consent of an advisory committee. University continues to exercise these rights under the XXXX, even after construction is finished and any debt is paid.

University will benefit from the revenues of the Project, and it will receive a share of the profits. The Project funds will be deposited annually into several repair and replacement accounts for the Project. The funds will be required to be used on a regular basis to protect University's long term interest in the Project. Furthermore, six years prior to the end of the term, Project funds

will be deposited in a holdback reserve account for any work required to ensure the Project XXXX meet or exceed the condition required at the end of the term of the XXXX. University will also share in the profits of the Project.

University will receive the improvements in good order and at no cost to University at the term or early termination of the XXXX. At the expiration of the XXXX year term of the XXXX, the XXXX of the Project are returned to University in good and operable condition, free and clear of all liens, with all repair and rehabilitation and renovation having been performed, and with at least twenty-five percent (25%) of their useful life remaining.

The transfer of title to Developer will occur in order to accomplish the purposes of, (i) to facilitate the financing of the Project, (ii) to transfer the long term maintenance of the Project to Developer, and (iii) to accelerate delivery of the entire village concept of the Project to meet the growing demand of University students.

Developer will be responsible for the long term maintenance of the Project, which both protects University's long term interest and allows University to use its dedicated funds for the balance of the on-campus housing system. The transaction structure will allow University to accelerate the delivery of the entire Project. XXXX will, therefore, be transferred to Developer in order to accomplish the above, even though most aspects of ownership will be retained by University.

The University will comply with the conditions that must be met to satisfy the requirements of Rule 12A-1.094, F.A.C., and TIP #13A01-01 that will establish that the University rather than the contractor is the purchaser of materials.

University will execute the purchase orders for the tangible personal property involved in the contract directly to the materials vendors. University may have Developer present the University's purchase orders to the vendors of the tangible personal property.

The University will acquire title to, and assume liability for, the tangible personal property at the point in time when it is delivered to the Project job site. The vendors will be required to directly invoice the University for supplies. The University will directly pay the vendors the invoice amounts for the tangible personal property purchased directly from the vendors. The University will assume all risk of loss or damage for the tangible personal property involved in the contract. as indicated by the University's acquisition of, or inclusion as the insured party under, insurance on the building materials.

The University will issue a Certificate of Entitlement with each purchase order, along with a copy of its Consumer's Certificate of Exemption, to each vendor, as well as to the Developer. The University will be responsible for payment of tax, penalty, and interest on any purchases that are not found to be in compliance with the procedures for tax-exempt direct purchase of materials.

### **Taxpayer Position**

University believes that it is the true equitable ownership of the Project that should be considered a public works contract pursuant to Rule 12A-1.094, F.A.C., and Taxpayer Information Publication (“TIP”) #13A01-01.

University is the equitable owner of the Project. The University oversees construction, retains access to the Project, supervises operations, directs the contracting of the residential units, receives a share of the profits and benefits from the revenue of the Project, and XXXX with at least twenty-five percent (25%) of the useful life of the improvements remaining. It follows that, regardless of Developer’s possession of XXXX, University is the XXXX of the Project and XXXX. The University and Developer will comply with the requirements of Rule 12A-1.094, F.A.C., and the Taxpayer Information Publication.

Section 212.08(6), F.S., provides that sales to political subdivisions of Florida are exempt from sales tax. Rule 12A-1.038(4), F.A.C., contains guidelines for claiming and documenting the exemption. Rule 12A-1.038(4)(b), F.A.C., states that in order for a sale to a political subdivision to be tax exempt, payment for tax-exempt purchases must be made directly to the selling dealer by the political subdivision, and the political subdivision 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. The cited exemption exempts only direct purchases by governmental entities. The exemption does not apply when a contractor, employed by a political subdivision, 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 this case, are contained in Rule 12A-1.094, F.A.C.

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 a political subdivision, however, the transaction is exempt. For there to be an exempt transaction, the political subdivision must directly purchase, hold title to, and assume the risk of loss of the tangible personal property from the time of delivery to the jobsite, and satisfy various factors provided 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 political subdivision rather than a contractor is the purchaser of materials. These criteria include the issuance of a direct purchase order from the political subdivision to the vendor, direct invoice from the vendor to the political subdivision, direct payment by the political subdivision to the vendor, passage of title from the vendor to the political subdivision, and assumption of risk of loss by the political subdivision. However, the assumption of risk of damage or loss from the time that the building materials are physically delivered to the job site is a paramount consideration. The political subdivision must assume all risk of loss or damage for

the tangible personal property from the moment of acceptance of title to the materials. To establish that it has assumed that risk, the political subdivision should purchase, or be the insured party under, insurance on the building materials. University will ensure that all these criteria are followed.

In addition, to establish that the political subdivision is entitled to the exemption, it must issue a Certificate of Entitlement to the vendors, with each purchase order, and to the contractor(s). A copy of the political subdivision's Consumer's Certificate of Exemption must be attached to the Certificate of Entitlement. The Certificate of Entitlement sets forth the requirements for making tax-exempt direct purchases and notes the political subdivision's acknowledgement that it is responsible for tax, penalty, and interest on material purchases that do not meet the exemption criteria. By statute, the political subdivision is prohibited from assigning liability for the tax, penalty, and interest to another party by contract or agreement. A suggested format for the certificate is found in Rule 12A-1.094(4)(c), F.A.C. Taxpayer will ensure that all these criteria are followed.

### **Applicable Law and Discussion**

Sales to governmental units are exempt from sales tax, pursuant to Section 212.08(6), F.S., which states, 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. This exemption shall not inure to any transaction otherwise taxable under this chapter when payment is made by a government employee by any means, including, but not limited to, cash, check, or credit card when that employee is subsequently reimbursed 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.

(c) The department shall adopt rules for determining whether a particular transaction is properly characterized as an exempt sale to a governmental entity or a taxable sale to a contractor which give special consideration to factors that govern the status of the tangible personal property before being affixed to real property. In developing such rules, assumption of the risk of damage or loss is of paramount consideration in the determination. The department shall also adopt, by rule, a certificate of entitlement to exemption for use as provided in paragraph (b). The certificate shall require the governmental entity to affirm that it will comply with the requirements of this subsection and the rules adopted under paragraph (b) in order to qualify for the exemption and that it acknowledges its liability for any tax, penalty, or interest later determined by the department to be owed on such transactions.

Rule 12A-1.094, F.A.C., provides the guidelines for purchasing materials tax-exempt for a public works contract. Rule 12A-1.094(4), F.A.C., states, in relevant part:

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

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

1. Direct Purchase Order. The governmental entity must issue its purchase order directly to the vendor supplying the materials the contractor will use and provide the vendor with a copy of the governmental entity's Florida Consumer's [Certificate] of Exemption.
2. Direct Invoice. The vendor's invoice must be issued to the governmental entity, rather than to the contractor.
3. Direct Payment. The governmental entity must make payment directly to the vendor from public funds.
4. Passage of Title. The governmental entity must take title to the tangible personal property from the vendor at the time of purchase or delivery by the vendor.

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

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

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

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

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So long as University ensures that all measures that the request provides that University will be obligated to take, then the criteria provided by Rule 12A-1.094, F.A.C., will be satisfied. University will be required to complete all measures provided herein, including, but not limited to, direct issuance of purchase orders, direct payment to vendors by University, direct invoicing from vendors to University, passage of title of tangible personal property directly from the vendors to University, assumption of risk of loss (including the required insurance coverage as provided herein) of the materials used in Project from the moment that vendor delivers the material to the jobsite until it is permanently affixed as a real property improvement. If all measures that are provided in the request are completed by University, then University may purchase the materials used in Project without paying the vendor for sales tax.

### **Concluding Statement**

The proposed provisions will enable Taxpayer to directly purchase materials from vendors without University having to pay sales tax when the materials are used in the project.

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 10 days of the date of this letter.

Respectfully,

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Technical Assistance & Dispute Resolution  
850-717-7541

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