



FLORIDA

Executive

Director

Leon M. Biegalski

August 17, 2017

TAA NUMBER: 17A-016

TAX: Sales and Use Tax

ISSUE: Public Works Contracts

STATUTE CITE(S): 212.08, Florida Statutes

RULE CITE(S): 12A-1.094, Florida Administrative Code

QUESTION: ARE PURCHASES OF FILL MATERIAL, TO BE USED IN THE CONSTRUCTION OF A STORM WATER MANAGEMENT SYSTEM AS DESCRIBED IN THE PROVIDED CONTRACT, EXEMPT FROM SALES AND USE TAX?

ANSWER: IF THE PURCHASE IS MADE BY A GOVERNMENTAL ENTITY IN STRICT COMPLIANCE WITH RULE 12A-1.094, F.A.C., AND SECTION 212.08, F.S., THE PURCHASE IS NOT SUBJECT TO SALES AND USE TAX.

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Re: Technical Assistance Advise ment 17A-016
Sales and Use Tax- Public Works Contract
Taxpayer: XXXXXX (Taxpayer)
Section(s) 212.08(6), Florida Statutes ("F.S.")
Rule(s) 12A-1.094, Florida Administrative Code ("F.A.C")

Dear XXXX:

This letter is in response to your request of March 8, 2017, for issuance of a Technical Assistance Advise ment ("TAA") pursuant to Section 213.22, F.S., and Rule Chapter 12-11, F.A.C. An examination of your request has established you complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

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

FACTS PROVIDED

Based on a review of Taxpayer's request, the facts are understood to be as follows:

Taxpayer is a Community Development District, in XXX Florida. The county ordinance creating Taxpayer provides Taxpayer the powers authorized under section 190.012(1), F.S.¹ Taxpayer encompasses 130 acres of land which will be used to build a residential community. As part of the development of the residential community, a storm water management system ("SWMS") will be constructed. Taxpayer states it intends to build the SWMS.

The engineer determined the construction of the SWMS would require fill material to be purchased. Taxpayer explains that funds sufficient to pay for the fill will be provided by the developer of the residential community, to Taxpayer. Taxpayer goes on to note the developer will not receive a return or refund of any funds provided, to the Taxpayer by the developer, for this purpose.

Taxpayer will purchase the fill pursuant to a materials purchase agreement between the fill vendor and Taxpayer. Taxpayer notes it has not yet entered into an agreement with the contractor who will install the fill material. Taxpayer states it will provide the fill vendor a copy of Taxpayer's certificate of exemption, and certificate of entitlement. Additionally, Taxpayer notes it will take title to the fill upon delivery, including assumption of the risk of loss.

With the request, Taxpayer provided copies of: the ordinance creating Taxpayer and related documents; a copy of the contract between the residential developer and the contractor who will install the fill. Additionally, Taxpayer provided copies of the letter from the engineer, the engineer's report, and the materials purchase agreement between the Taxpayer and the fill vendor. Taxpayer also provided a copy of the South Florida Water Management District permits related to the development, and the easement between Taxpayer and the developer.

The material purchase agreement lists Taxpayer as the purchaser both in the agreement and on the attached purchase order. The agreement also includes a completed certificate of entitlement and a copy of Taxpayer's consumer's certificate of exemption, which lists Taxpayer as a governmental entity

The grant of easement, outlines easements the developer is providing to Taxpayer. The grant allows Taxpayer an easement for it and its contractors who will be installing the fill material. This initial easement will exist until developer begins vertical improvements. After the vertical improvements begin, the grant includes a perpetual easement to Taxpayer relating to the SWMS. However, both easements require prior approval of the grantor before any work may be done.

¹ Taxpayer's request provides: "...Under Section 190.012(1)(a), [Taxpayer] is authorized to finance, fund, plan, establish, acquire, construct or reconstruct, enlarge or extend, equip, operate, and maintain systems, facilities, and basic infrastructures for, among other things, water management and control for the lands within the boundaries of [Taxpayer]."

The engineer's report lists several easements developer intends to grant Taxpayer. Additionally, the report notes the developer intends to deed part of the property to Taxpayer, including the SWMS.

REQUESTED ADVISEMENT

Are Taxpayer's purchase of fill for the construction of the SWMS subject to sales and use tax?

APPLICABLE STATUTES

Section 212.08(6), F.S., provides, in part, the following:

(6) EXEMPTIONS; POLITICAL SUBDIVISIONS

(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.

(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(4) and (5), F.A.C, provide, in part, the following:

(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....

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.

- (d) Sales to contractors, including subcontractors, are subject to tax.
- (e) The governmental entity may not transfer liability for such tax, penalty, and interest to another party by contract or agreement.
- (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.
- (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) of Rule 12A-1.051, F.A.C. The contractor and subcontractors, not the governmental 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.

As provided by Rule 12A-1.094(4)(c)4., F.A.C, the following is the format of the Certificate of Entitlement to be issued by the governmental entity:

CERTIFICATE OF ENTITLEMENT

The undersigned authorized representative of _____ (hereinafter "Governmental Entity"), Florida Consumer's Certificate of Exemption Number _____, affirms that the tangible personal property purchased pursuant to Purchase Order Number _____ from _____ (Vendor) on or after _____ (date) will be incorporated into or become a part of a public facility as part of a public works contract pursuant to contract # _____ with _____ (Name of Contractor) for the construction of _____.

Governmental Entity affirms that the purchase of the tangible personal property contained in the attached Purchase Order meets the following exemption requirements contained in Section 212.08(6), F.S., and Rule 12A-1.094, F.A.C.

You must initial each of the following requirements.

- _____ 1. The attached Purchase Order is issued directly to the vendor supplying the tangible personal property the Contractor will use in the identified public works.
- _____ 2. The vendor's invoice will be issued directly to Governmental Entity.
- _____ 3. Payment of the vendor's invoice will be made directly by Governmental Entity to the vendor from public funds.

_____ 4. Governmental Entity will take title to the tangible personal property from the vendor at the time of purchase or of delivery by the vendor.

_____ 5. Governmental Entity assumes the risk of damage or loss at the time of purchase or delivery by the vendor.

Governmental Entity affirms that if the tangible personal property identified in the attached Purchase Order does not qualify for the exemption provided in Section 212.08(6), F.S., and Rule 12A-1.094, F.A.C., Governmental Entity will be subject to the tax, interest, and penalties due on the tangible personal property purchased. If the Florida Department of Revenue determines that the tangible personal property purchased tax-exempt by issuing this Certificate does not qualify for the exemption, Governmental Entity will be liable for any tax, penalty, and interest determined to be due.

I understand that if I fraudulently issue this certificate to evade the payment of sales tax I will be liable for payment of the sales tax plus a penalty of 200% of the tax and may be subject to conviction of a third degree felony.

Under the penalties of perjury, I declare that I have read the foregoing Certificate of Entitlement and the facts stated in it are true.

Signature of Authorized Representative _____ Title _____

Purchaser's Name (Print or Type) _____ Date _____

Federal Employer Identification Number: _____

Telephone Number: _____

You must attach a copy of the Purchase Order to this Certificate of Entitlement. Do not send to the Florida Department of Revenue. This Certificate of Entitlement must be retained in the vendor's and the contractor's books and records.

DISCUSSION ANALYSIS AND CONCLUSION

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 general exemption on sales to governmental entities. Rule 12A-1.038(4)(b), F.A.C, provides, in part, 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 of Florida. Political subdivisions 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 (TPP) 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 addressed by 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 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 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 TPP 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.

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.

To summarize, the conditions that must be met to satisfy the requirements of Rule 12A-1.094, F.A.C., and establish that the political subdivision rather than the contractor is the purchaser of materials, include:

1. The political subdivision must execute the purchase orders for the tangible personal property involved in the contract directly to the materials vendors. The contractor may present the political subdivision's purchase orders to the vendors of the tangible personal property;
2. The political subdivision 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;
3. Vendors must directly invoice the political subdivision for supplies;
4. The political subdivision must directly pay the vendors for the tangible personal property; and
5. The political subdivision must assume all risk of loss or damage for the tangible personal property involved in the contract, as indicated by the political subdivision's acquisition of, or inclusion as the insured party under, insurance on the building materials.
6. The political subdivision must 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 contractor. The political subdivision is 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.

In the instant case, Taxpayer will be building a SWMS. The system is for the public benefit, as it controls water flow during storms. Taxpayer notes the project will be financed by bonds except for the purchase of the fill where the developer will give the necessary funds to Taxpayer. The rule requires that purchases must be made with public funds, but it does not specify how the funds are raised. However, the issue becomes whether the funds are part of public funds. Therefore, any refunding of the funds provided to the developer, whether in whole or part, or any agreement to refund any part of these funds to the developer, would mean the funds have not become public funds and this requirement is not met.

Additionally, Taxpayer must directly take title to the material. This includes assuming the risk of loss of the fill until it is installed into the public work. The material purchase agreement lists Taxpayer as the purchaser in the agreement and on the attached purchase order. Taxpayer states a contractor will install the purchased fill, attaching it to the property; however, this contractor has not yet been hired. Without the contract with the installing contractor, it is unclear if Taxpayer would maintain the risk of loss for the fill until the fill is incorporated into the real property as required by the rule.

However, so long as Taxpayer ensures that the criteria provided by Rule 12A-1.094, F.A.C. will be satisfied, the purchase of the fill will not be subject to sales and use tax. Taxpayer will be required to complete all measures provided herein, including, but not limited to, direct issuance of purchase orders, direct payment to vendors by Taxpayer, direct invoicing from vendors to Taxpayer, passage of title of tangible personal property directly from the vendors to Taxpayer, assumption of risk of loss of the materials used in project *from the moment the 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 Taxpayer, then Taxpayer may purchase the materials used in project without paying the vendor for sales tax.

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.

Sincerely,

Timothy Surface

Technical Assistance Advise ment

Page 9

Tax Conferee

Technical Assistance & Dispute Resolution

CC: XXXX

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