



October 10, 2017

**FLORIDA**  
Executive  
Director  
Leon Biegalski

**TAX:** Sales and Use Tax

**TAA NUMBER:** 17A-020

**ISSUE:** Public Works Contract

**STATUTE CITE(S):** Section(s) 212.08(6), F.S.

**RULE CITE(S):** Rule 12A-1.094, F.A.C.

**QUESTION:** Will Taxpayer's contract satisfies the criteria for Rule 12A-1.094(4), F.A.C.?

**ANSWER:** Yes, so long as Taxpayer modifies the contract to require direct invoicing to Taxpayer.

XXXXXXXXXX  
XXXXXXXXXX  
XXXXXXXXXX  
XXXXXXXXXX

Subject: Technical Assistance Advise ment ("TAA")  
TAA 17A-020  
Sales and Use Tax-Public works

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

XXXXXX ("Taxpayer")("Owner")("Petitioner")  
Exemption Certificate Number: XXXXXXXXXXXXXXXXX

Dear XXXXXXXXXXXXXXXX:

This letter is a response to your petition dated August 10, 2017, for the Department's issuance of a Technical Assistance Advise ment ("TAA") to Petitioner, regarding public works project requirements. 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.

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

**www.floridarevenue.com**  
**Florida Department of Revenue**  
Tallahassee, Florida 32399-0100

**Issue**

Whether the proposed contract provisions will enable Taxpayer to directly purchase materials from suppliers without sales tax when the materials are used in a public works contract?

**Facts**

Taxpayer will be purchasing materials, supplies, and equipment directly from suppliers for use in a project at the XXXXXXXXXXXXXXXXXXXX. The project is a “public works” for purposes of Rule 12A-1.094(1)(b), F.A.C. The project is for an expansion and upgrade to existing structures XXXXXXXXXXXXXXXXXXXX. The completion of the project will allow the XXXXXXXXXXXX XXXXXXXXXXXX.

The owner direct purchase procedure will be used exclusively for supplies, goods, equipment, appliances, and other materials from third party suppliers, and not from contractors, or subcontractors providing construction services for the project. The proposed contract language for the owner direct purchase procedure has been provided.

The proposed contract language requires Taxpayer to issue a direct purchase order to the vendors and suppliers from whom Taxpayer will make direct purchases. Taxpayer will obtain title upon delivery of the items to the job site location designated by Taxpayer. The items will be approved for acceptance by Taxpayer or Taxpayer’s agents prior to installation. Taxpayer will assume risk of loss for the items delivered, and Taxpayer will be required to be the insured party for these items.

The proposed bid and contract language do not require direct invoicing from the supplier and vendors to the Taxpayer. Your request provides that Taxpayer will amend the proposal as needed to comply with the requirements provided for by s. 212.08(6)(c), F.S. Taxpayer will make payment directly to the vendor and not to the contractor. Taxpayer will issue the Consumer’s Certificate of Exemption and Certificate of Entitlement to each vendor and supplier.

**Applicable Law**

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, 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.

\*\*\*\*

If the contract or actions of the parties contradict the owner direct purchases procedures set forth, Taxpayer may not take advantage of its tax-exempt status on the purchase of materials for use in the public work. Also, a contractor that manufactures or fabricates its own materials, as specified in Rule 12A-1.094(5), Florida Administrative Code, does not qualify for inclusion in

direct purchase programs. In such an instance, 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.

Here, Taxpayer will be required to assume the risk of loss for the items purchased upon delivery to the jobsite. Taxpayer will acquire title to the materials upon delivery to the jobsite. Taxpayer will issue its own purchase orders directly to the suppliers prior to delivery. Taxpayer will issue the Consumer's Certificate of Exemption and Certificate of Entitlement to each supplier when submitting the purchase orders. Taxpayer will issue a check for the items purchased directly to the supplier. However, Taxpayer's proposal does not require direct invoicing to Taxpayer by the supplier. This must be included in the proposal and contract. If it is not included in the contract, or if direct invoicing from the supplier to Taxpayer does not happen, then Taxpayer's direct purchase procedures do not satisfy all required conditions, and the exemption provided for by s. 212.08(6)(c), F.S., does not apply.

#### **Concluding Statement**

Taxpayer's direct purchase procedures currently do not meet the requirements of the above-mentioned Rule, unless Taxpayer changes the proposed contract language to include for direct invoicing to Taxpayer from the suppliers, and the suppliers actually provide a direct invoice to Taxpayer. Then, once the changes are made, Taxpayer may purchase the materials tax-exempt for use in a public works contract.

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,

***Chuck Wallace***

Page 6 of 6  
Technical Assistance Advisement

Chuck Wallace  
Technical Assistance & Dispute Resolution  
(850) 717-7541

AMS ID: 7000018599