

PROPOSED CHANGE BY AGC TO THE DEPARTMENT

12A-1.094 Public Works Contracts.

(1) This rule shall govern the taxability of transactions in which contractors manufacture or purchase supplies and materials for use in public works contracts, as that term is referred to in Section 212.08(6), F.S. This rule shall not apply to non-public works contracts for the repair, alteration, improvement, or construction of real property, as those contracts are governed under the provisions of Rule 12A-1.051, F.A.C. In applying this rule, the following definitions are used.

(a)1. “Contractor” is one that supplies and installs tangible personal property that is incorporated into or becomes a part of a public facility pursuant to a public works contract with a governmental entity exercising its authority in regard to the public property or facility. Contractors include, but are not limited to, persons engaged in building, electrical, plumbing, heating, painting, decorating, ventilating, paperhanging, sheet metal, roofing, bridge, road, waterworks, landscape, pier, or billboard work. This definition includes subcontractors.

2. “Contractor” does not include a person that furnishes tangible personal property that is not affixed or appended in such a manner that it is incorporated into or becomes a part of the public property or public facility to which a public works contract relates. A person that provides and installs tangible personal property that is freestanding and can be relocated with no tools, equipment, or need for adaptation for use elsewhere is not a contractor within the scope of this rule.

3. “Contractor” does not include a person that provides tangible personal property that will be incorporated into or become part of a public facility if such property will be installed by another party.

4. Examples.

a. A vendor sells a desk, sofas, chairs, tables, lamps, and art prints for the reception area in a new public building. The sales agreement requires the vendor to place the furniture according to a floor plan, set up the lamps, and hang the art prints. The vendor is not a contractor within the scope of this rule, because the vendor is not installing the property being sold in such a way that it is attached or affixed to the facility.

b. A security system vendor furnishes and installs low voltage wiring behind the walls, motion detectors, smoke alarms, other sensors, control pads, alarm sirens, and other components of a security system for a new county courthouse. The components are direct wired, fit into recesses cut into the walls or other structural elements of the building, and are held in place by screws. The vendor is a contractor within the scope of this rule. The security system is installed and affixed in such a manner that it has been incorporated into the courthouse.

c. A vendor enters an agreement to provide and install the shelving system for a new public library. The shelves are built to bear the weight of books. The shelf configuration in each unit maximizes the number of books the shelves can hold. The number and size of the units ordered is based on the design for the library space. The units will run floor to ceiling and will be anchored in place by bolts or screws. The vendor is a contractor within the scope of this rule. The shelving system will be affixed in such a manner that it becomes a part of the public library.

d. A vendor agrees to provide and install the computer terminals, monitors, keyboards, servers, and related equipment for a county tax collector’s office in central Florida. The job includes connecting the equipment to the structural cabling system that has been installed by an electrical contractor. The cables running to the computer terminals are held in place by screws that fit into the back of the terminal units. The vendor is not a contractor within the scope of this rule. The computer equipment has not been affixed in such a way as to become a part of the facility. The equipment has not been attached to any structural element of the building.

e. A manufacturer agrees to provide the prestressed concrete forms for a public parking garage. A construction company is awarded the bid to install those forms and build the garage. The manufacturer is not a contractor within the scope of this rule, because the manufacturer will not install any tangible personal property that becomes a part of the garage. The construction company is a contractor within the scope of this rule.

(b) “Governmental entity” includes any agency or branch of the United States government, a state, or any county, municipality, or political subdivision of a state. The term includes authorities created by statute to operate public facilities using public funds, such as public port authorities or public-use airport authorities.

(c) “Public works” are defined as projects for public use or enjoyment, financed and owned by the government, in which private persons undertake the obligation to do a specific piece of work that involves installing tangible personal property in such a manner that it becomes a part of a public facility. For purposes of this rule, a public facility includes any land, improvement to land, building, structure, or other fixed site and related infrastructure thereon owned or operated by a governmental entity where governmental or public activities are conducted. The term “public works” is not restricted to the repair, alteration, improvement, or construction of real property and fixed works, although such projects are included within the term.

(d) “Real property” within the meaning of this rule includes all fixtures and improvements to real property. The status of a

project as an improvement or fixture to real property will be determined by reference to the definitions contained in subsection 12A-1.051(2), F.A.C.

(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.

(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 and provide the vendor with a copy of the governmental entity's Florida Consumer's Certification 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 IT TAKES TITLE TO THE TANGIBLE PERSONAL PROPERTY THROUGH SUBSTANTIAL COMPLETION OR BENEFICIAL OCCUPANCY 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, BUT THE GOVERNMENTAL ENTITY MUST BE A NAMED INSURED AND RESPONSIBLE FOR ANY DEDUCTIBLE UNDER SUCH INSURANCE. (AGC)

(c) Sales are taxable sales to the contractor unless it can be demonstrated to the satisfaction of the Executive Director or the Executive Director's designee in the responsible program that such sales are, in substance, tax exempt direct sales to the government.

(5) Contractors that manufacture materials for incorporation into public works shall be liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C.

(6) Contractors that supply raw materials such as rock, shell, fill dirt, and similar materials for incorporation into public works shall be liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C.

(7) Contractors that manufacture and incorporate asphalt into public works projects are liable for tax on their costs, as provided in subsection (12) of Rule 12A-1.051, F.A.C., subject to a partial exemption, as provided in Section 212.06(1)(c), F.S.

(8) Contractors that install people mover systems in public works projects are exempt from sales and use tax on their purchases of such systems or components of such systems and on any other costs incurred in the manufacture of such systems that would be taxable under the provisions of subsection (10) of Rule 12A-1.051, F.A.C.

(a) A "people mover system" includes wheeled passenger vehicles and related control and power distribution systems that form a transportation system owned by a public entity and used by the general public. The vehicles may be operator-controlled, driverless, self-propelled, or externally powered. They may run on roads, rails, guidebeams, or other permanent structures that are an integral part of the system. "Related control and power distribution systems" includes electrical or electronic control or signaling equipment

that distributes power or signals from the control center or centers or from the power source throughout the system. Embedded wiring, conduits, or cabling and the roads, rails, guidebeams, or other permanent structures on which the vehicles run are not included within the term "people mover system." A contractor that installs such embedded wiring, conduits, or cabling or that builds such a road, rail, guidebeam, or permanent structure is taxable on the purchase or use of tangible personal property incorporated into the project.

(b) A people mover system contractor should claim the exemption by providing a vendor with a certificate of entitlement to the exemption. The vendor must maintain copies of certificates until tax imposed by Chapter 212, F.S., may no longer be determined and assessed under Section 95.091, F.S. Possession by a vendor of such a certificate from the purchaser relieves the vendor from the responsibility of collecting tax on the sale, and the Department shall look solely to the purchaser for recovery of tax if it determines that the purchaser was not entitled to the exemption. A suggested form of certificate follows:

SUGGESTED PURCHASER'S EXEMPTION CERTIFICATE
PEOPLE MOVER SYSTEMS AND PARTS

_____ (Purchaser's Name) certifies that the tangible personal property purchased on or after _____ (date) will be used as part of a people mover system that will become a part of a publicly owned facility pursuant to a contract with the United States, a state, a county, a municipality, a political subdivision of a state, or the public operator of a public-use airport as defined in Section 332.004, F.S. Such contract requires Purchaser to purchase the tangible personal property for use in manufacturing, installing, manufacturing and installing, repairing, or maintaining, all or part of a people mover system operated by the governmental entity as a public facility.

_____ (Purchaser's Name) further certifies: a) that all of the tangible personal property purchased pursuant to this certificate is or will be part of a wheeled passenger vehicle or of related control or power distribution systems that are part of a transportation system for use by the general public; and b) none of the tangible personal property purchased pursuant to this certificate will be used as embedded wiring, conduits, or cabling to transmit signals among the vehicles, control equipment, power distribution equipment, and signaling equipment that make up the people mover system.

The undersigned understands that if such tangible personal property does not qualify for this exemption, the undersigned will be subject to sales and use tax, interest, and penalties. The undersigned further understands that when any person fraudulently, for the purpose of evading tax, issues to a vendor or to any agent of the state a certificate or statement in writing in which he or she claims exemption from the sales tax, such person, in addition to being liable for payment of the tax plus a mandatory penalty of 200% of the tax, shall be liable for fine and punishment provided by law for conviction of a felony of the third degree, as provided in Section 775.082, 775.083, or 775.084, F.S.

Purchaser's Name (Print or Type)

Signature and Title

Date

Florida Sales Tax Number

Federal Employer Identification
Number or Social Security Number

Telephone Number

Retain in vendor's records. Do not send to the Department of Revenue.

(c) Contractors that maintain an inventory of parts that may be incorporated into people mover system components that are sold as tangible personal property, may be used in performing real property contracts, and may be incorporated into exempt people mover systems pursuant to a public works contract may purchase such inventory parts by issuing a copy of the contractor's Annual Resale Certificate in lieu of providing a certification of specific eligibility under the people mover system exemption. If appropriate, tax should be remitted upon subsequent taxable sale or use of such parts.

Rulemaking Authority 221.08(6), 212.17(6), 212.18(2), 212.183, 213.06(1) FS. Law Implemented 212.02(4), (14), (15), (16), (19), (20), (21), 212.06(1), (2), (14) 212.07(1), 212.08(6), (7)(bbb), 212.085, 212.18(2), 212.183 FS. History--New 6-3-80, Amended 11-15-82, Formerly 12A-1.94, Amended 1-2-89, 8-10-92, 6-28-04.