

# The Florida Department of Revenue Changes Rules for Direct Purchase Orders



By Jason Moyer

**T**he FL Department of Revenue ("DOR") has changed the Rules for doing Direct Purchase Orders that qualify for tax exemption from Sales and Use Tax.

Many of the active construction projects in Florida are Government Jobs, where a municipality or other governmental entity is building a jail, or school, ect. In many cases, that Governmental entity intends to directly purchase the materials in order to avoid paying sales and use tax on the materials. In order for this transaction to be done properly, AND TO AVOID THE MUNICIPALITY, GENERAL CONTRACTOR OR SUBCONTRACTOR FROM BECOMING LIABLE FOR THIS TAX, the transaction must satisfy all the requirements of F.A.C. Rule 12A-1.094. It is this Rule which governs the taxability of transactions in which contractors manufacture or purchase supplies and materials for use in public works. "Public works" are construction 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.

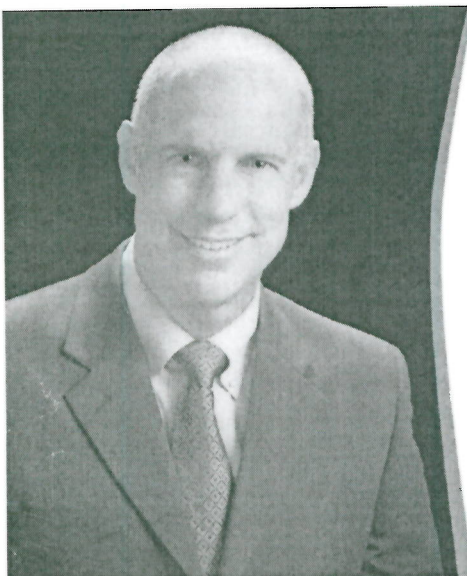
In the past, we have had to make sure that the following criteria were satisfied: (i) that the governmental entity issue its purchase order directly to the vendor supplying the materials the contractor will use and provide the vendor with a copy of the governmental entity's Florida Consumer's Certificate of Exemption, (ii) that the vendor's invoice be issued to the governmental entity, rather than to the contractor, (iii) that the governmental entity make payment directly to the vendor from public funds, (iv) that the governmental entity take title to the tangible personal property from the vendor at the time of purchase or delivery by the vendor, and (v) that the governmental entity assume the risk of damage or loss at the time of purchase. 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.

However, the FL DOR has added another hoop to be jumped through. Effective January 2, 2011, it is also required that the governmental entity issue a Certificate of Entitlement to purchase materials tax-exempt for a public works project to each vendor and each contractor certifying: (1) that the materials and supplies purchased will become part of a public facility; and (2) that the governmental entity will be liable for any tax, penalty, or interest due should the Department later determine that the items purchased do not qualify for exemption under Section 212.08(6), F.S. The law excludes a federal governmental entity from these requirements.

**So watch out everyone!**

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## NOTICE OF RULE DEVELOPMENT

DEPARTMENT OF REVENUE

SALES AND USE TAX

RULE NO:    RULE TITLE:

12A-1.094    Public Works Contracts

PURPOSE AND EFFECT: Rule 12A-1.094, F.A.C. (Public Works Contracts), and Section 212.08(6), F.S., govern the taxability of transactions in which contractors and subcontractors purchase supplies and materials for use in public works contracts. Public works contracts are projects for public use or enjoyment, financed and owned by the government, in which private persons install tangible personal property that becomes a part of a public facility. The exemption in Section 212.08(6), F.S., is a general exemption for sales made directly to the government. Rule 12A-1.094, F.A.C., establishes the criteria that govern whether a governmental entity, rather than the public works contractor, is the purchaser of the materials.

Effective January 2, 2011, Section 8, Chapter 2010-138, L.O.F., requires governmental entities to issue a Certificate of Entitlement to purchase materials tax-exempt for a public works project to each vendor and each contractor certifying: (1) that the materials and supplies purchased will become part of a public facility; and (2) that the governmental entity will be liable for any tax, penalty, or interest due should the Department later determine that the items purchased do not qualify for exemption under Section 212.08(6), F.S. The law excludes a federal governmental entity from these requirements.

The purpose of the proposed amendments to Rule 12A-1.094, F.A.C., is to: (1) maintain, without change, the current criteria governing whether a governmental entity is the purchaser of materials and supplies that qualify for exemption under Section 212.08(6), F.S.; (2) provide the

requirements and format of the Certificate of Entitlement required by Section 8, Chapter 2010-138, L.O.F., effective January 2, 2011; and (3) provide that the governmental entity is prohibited from transferring the liability for tax, penalty, and interest to another party by contract or agreement.

SUBJECT AREA TO BE ADDRESSED: The subject of the rule development workshop is the requirements of Section 8, Chapter 2010-138, L.O.F., effective January 2, 2011, regarding public works contracts.

RULEMAKING AUTHORITY: 212.08(6), 212.17(6), 212.18(2), 212.183, 213.06(1) FS., s. 8, Ch. 2010-138, L.O.F.

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., s. 8, Ch. 2010-138, L.O.F.

A RULE DEVELOPMENT WORKSHOP WILL BE HELD AT THE DATE, TIME, AND PLACE SHOWN BELOW.

DATE AND TIME: August 25, 2010, 9:30 a.m.

PLACE: Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida. The public can also participate in this rule development workshop through a simultaneous electronic broadcast of this event by the Department of Revenue using WebEx, and conference calling technology. The requirements to participate are access to the Internet and a telephone. The public can participate in this electronic workshop by accessing the broadcast from their home or office. Specific information about how to participate in this electronic meeting from your home or office will be included in the Agenda for this workshop posted on the Department's Proposed Rule site at [www.myflorida.com/dor/rules](http://www.myflorida.com/dor/rules).

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT: Any person requiring special accommodations to participate in any rulemaking proceeding before the Technical Assistance and Dispute Resolution Office is asked to advise the Department at least 48 hours before such proceeding by contacting Sarah Wachman at (850)410-2651. Persons with hearing or speech impairments may contact the Department by using the Florida Relay Service, which can be reached at (800)955-8770 (Voice) and (800)955-8771 (TDD).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE

DEVELOPMENT IS: Gary Gray, Revenue Program Administrator I, Technical Assistance and Dispute Resolution, Department of Revenue, P.O. Box 7443, Tallahassee, Florida 32314-7443, telephone (850)922-4729.

THE PRELIMINARY TEXT OF THE PROPOSED RULE DEVELOPMENT IS: Published on the Department's Internet site at [myflorida.com/dor/rules](http://myflorida.com/dor/rules).

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12A-1, FLORIDA ADMINISTRATIVE CODE  
SALES AND USE TAX  
AMENDING RULE 12A-1.094

12A-1.094 Public Works Contracts.

(1) through (3) No change.

(4)(a) through (b) No change.

(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 certify that the tangible personal property purchased from that vendor will go into or become a part of a public works. This requirement does not apply to any agency or branch of the United States government.

2. The governmental entity's purchase order for materials to be incorporated into the public works project and the entity's Florida Consumer's Certificate of Exemption must be attached to the Certificate of Entitlement.

3. The governmental entity will also certify 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.

4. The following is the format of the Certificate of Entitlement to be issued by the governmental entity:

CERTIFICATE OF ENTITLEMENT

I, the undersigned authorized representative of \_\_\_\_\_ (hereinafter "Governmental Entity"), Florida Consumer's Certificate of Exemption Number \_\_\_\_\_, certify that the tangible personal property purchased 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 building of \_\_\_\_\_.

I certify that the purchase of the materials 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 materials the contractor will use in the identified public works.
- \_\_\_\_\_ 2. The vendor's invoice is issued directly to Governmental Entity.
- \_\_\_\_\_ 3. Payment of the vendor's invoice is 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 delivery by the vendor.
- \_\_\_\_\_ 5. Governmental Entity assumes the risk of damage or loss at the time of purchase.

I understand 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 materials purchased. If the Department of Revenue determines that the materials purchased tax-

exempt by issuing this Certificate do 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: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

**You must attach the Purchase Order and the Florida Consumer's Certificate of Exemption issued to Governmental Entity.**

Do not send to the Department of Revenue. This Certificate of Entitlement must be retained in the vendor's and the contractor's books and records.

(d)(e) If the contractor does not have a Certificate of Entitlement, sales to the contractor are subject to tax, unless the contractor can demonstrate to the satisfaction of the Executive Director or designee that such sales are, in substance, tax-exempt direct sales to a governmental entity. 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.

(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 (4)(b), for the purchase of supplies and materials to be exempt from sales and use tax. If the criteria in paragraph (4)(b) are not met, the contractor is the ultimate consumer of such supplies or materials and is liable for sales or use tax on such purchases and manufacturing costs.

(5) Contractors, including subcontractors, that manufacture or fabricate their own materials for incorporation into public works cannot be included in a governmental entity's direct purchase program and may not accept a Certificate of Entitlement. The contractor and subcontractors, not the governmental entity, are deemed to be the ultimate consumers of the articles of tangible personal property they manufacture or fabricate to perform their contracts and are shall be liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C.

(6) through (8) No change.

Rulemaking Specific Authority 212.08(6), ~~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., s. 8, Ch. 2010-138, L.O.F. History—New 6-3-80, Amended 11-15-82, Formerly 12A-1.94, Amended 1-2-89, 8-10-92, 6-28-04,\_\_\_\_\_.