

COPP
September 2005
Construction Contracting Overview/ Panel Discussion

- I. Construction Contracting:
 - 1. General Contracting
 - 2. Construction Management
 - 3. Design Build RFQ
 - 4. Design Build RFP
 - 5. Delivery Order Contracting
 - 6. Performance Contracting
 - 7. Continuing C.M. Contracting

- II. Tax Exempt Material Direct Purchasing:

- III. Contract Negotiation:

- IV. Pre-Qualification of Construction Contractors:

- V. Day Labor Projects:

- VI. Overview of Construction Contracting Authority Statutes CCNA, S.B.E. Rule, and SREF.

COPP Panel:
Beverly Barker (SJRCC)
Bill Brown (LCCC)
Tom Flowers (MCC)
Vonda Melchior (HCC)
Scott Roches (SCC)
Larry Snell (Florida State
College at Jacksonville)

Construction Contracting Overview

		A	B	C	D	E	F	G
	Process Step/Requirement/Scope (N/R = Not Required)	General Contracting (Hard Bid)	Construction Management at Risk (CM)	Design Build RFQ (D/B)	Design Build RFP (D/B)	Delivery Order Construction	Performance Contracting	Continuous C.M. Contracting
1.	Purpose/Scope	Single Project (Low Bid)	Complex Project (Most Qualified)	Negotiate D/B GMPC Contract	Design Build	On Going Smaller Projects (Formula)	Fund/Impl. Energy Savings Measures	On Going C.M.
2A	Pre-Requisite of needing separate professionals under contract? (*DCP = Must use a Design Criteria Professional)	Yes A/E	Yes (Parallel) A/E	*	*	N/R	N/R	Yes A/E
2B.	Professional specifications attached to solicitation? CD = Construction Documents DD = Design Development DCP = Design Criteria Package	Yes (100% CD's)	Yes (D.D's)	Yes (DCP)	Yes (DCP)	N/R	N/R	N/R
3.	Initial solicitation public advertisement required?	Yes	Yes	Yes	Yes	Yes	Yes or use State Contract	Yes
4.	Ongoing packages/projects advertisement required?	N/R	Yes	N/R	N/R	N/R	Yes	Yes
5.	Prequalification of construction contractors?	Yes	Yes (or in RFQ)	No, in RFQ	No, in RFP	No, in RFP	No, invite state contract contractors	No, in RFQ
6.	Solicitation used (Phase I) (ITB = Invitation to Bid)	ITB	RFQ	RFQ	RFQ	RFP	Request for Quotation	RFP
7.	Solicitation used (Phase II)	N/R	Negotiate GMP	Negotiate GMP	RFP	N/R	Negotiate Contract	N/R
8.	Subcontractor and their licenses identified/disclosed at "initial" bid opening?	Yes	No	No	No	No	No	No
9.	Multiple private or public bid openings for each division or project.	N/R	Yes	No	No	No	Yes	Yes
10.	Basis of Award (LB = low bidder meeting specifications) (MQ > most qualified)	LB	MQ	MQ	MQ & LB	MQ & LB	MQ	MQ
11.	Contract negotiations required?	N/R	Yes	Yes	N/R	N/R	Yes	Yes

		A	B	C	D	E	F	G
	Process Step/Requirement/Scope (N/R = Not Required)	General Contracting (Hard Bid)	Construction Management at Risk (CM)	Design Build RFQ (D/B)	Design Build RFP (D/B)	Delivery Order Construction	Performance Contracting	Continuous C.M. Contracting
12.	Type contract(s) required: PGMP = Pre GMP Contract ACC = Annual Continuing Contract PO= Purchase Order CC = Construction Contract GMP = Guaranteed Max Price Contract	PO and CC	PO and PGMP GMP	PO and GMP	PO and GMP	ACC and PO	Energy Audit Agreement and Energy Saving Agreement	ACC and PO
13	Utilizes a fixed formula with defined unit prices (i.e. % of R.S. Means) initially bid.					Yes		
14.	Energy engineering study pledging future guaranteed energy savings to fund construction.						Yes	

I. Construction Contracting Overview:

A. General Contracting: (AKA hard bid, low bid, G.C.)

1. Purpose: Simple construction projects where the College is comfortable awarding the project to one of your pre-qualified construction contractors on a low bidder meeting specifications basis.
2. Solicitation Pre-Requisites: You would already have selected/hired an Architect/Engineer (A/E) (using the CCNA process) and they would have provided your College 100% C.D's (i.e. construction documents of drawings/blue prints and specifications that have been sealed and signed off that they are 100% complete.) We are not allowed to "open" a G.C. bid until the specifications are at the 100% CD stage. Colleges can optionally utilize the State DOE division of facilities building and construction to review your're A/E 100% CD's to conform compliance with statutes, regulations and rules.
3. Advertisement? Yes
4. Type Solicitation Used? Formal sealed Invitation to Bid (ITB)
5. Public Bid Opening? Yes
6. Subcontractors and their licenses required to be submitted and disclosed at bid opening? Yes
7. Negotiation Required? No, bidder is forced to sign your construction contract that should have been attached to your ITB or forfeit a 5 percent bid bond guarantee.
8. Basis of Award? Low responsive bidder meeting specifications.
9. Type contract(s) used? P.O. to encumber funds and a construction contract.
10. Bonding: 100% performance and payment bonds are required for projects greater than \$200,000 at their lump sum low bid plus any alternates awarded.
11. Unique statutes/regulations? No

Construction Contracting Overview

B. Construction Management “at Risk” (AKA CM)

1. Purpose: Complex construction projects where the College wants to evaluate not only the bid prices submitted but to also take into award consideration the CM unique past experience similar to your project (i.e. performing arts theater) are unique qualifications to hire the most qualified contractor.
2. Solicitation Pre-Requisites: You normally would have already selected and hired an A/E who would provide your College design development (i.e. D.D.) documents. D.D.'s are mutually agreed to conceptual descriptions of the project that precede actual CD's being drawn. It is recommended the CM be hired early in the project to act as the owners consultant advocate to review DD's & CD's being drawn by the A/E to value engineer the project. CM value engineering is to recommend alternate materials or construction processes to minimize the overall cost of the project, where the College can enjoy all of those savings if so defined in your CM contract.
3. Advertisement Required? Yes
4. Type Solicitation Used? Formal Request for Qualifications (RFQ)
5. Public Bid Opening? Yes
6. Subcontractors and their licenses required to be submitted at initial RFQ opening? No, these will need to be obtained later after 100% CD's and a GMP contract has been negotiated and entered into and individual CM bid packages are bid, evaluated and awarded to subcontractors.
7. Negotiation Required? Yes, the College will have to negotiate and enter into two contracts. The first will be a pre-construction/pre GMP professional service fee contract to pay them for professional services to help the owner value engineer the project and obtain informal quotes to be able to submit the College a guarantee maximum price (GMP) proposal. The second contract to negotiate is the GMP contract.
8. Basis of Award? Most qualified/top ranked responsive proposer that submitted their qualifications in response to your RFQ.
9. Type contract(s) used? Pre GMP contract, GMP contract and a PO.
10. Bonding: 100% Performance and Payment Bond required (if greater than \$200,000 project) at the GMP price.
11. Relevant Unique Statutes/Regulations? Relevant unique statute/regulations: FS 235.211 and 1013.45

Construction Contracting Overview

- C. Design Build (Qualifications based selection) (AKA D/B, RFQ)
1. Purpose: Complex projects where the College wants to sometimes compress a project lead time to hire a single vertical company or a team of companies (who will contract together as sub-consultants and sub-contractors to a lead contractor/consultant) to provide the College “both” all of the design services required for the project as well as all construction services under a single combined D/B contract and selection of the D/B firm or D/B team is on the basis of their qualifications (not on the basis of the low bidder meeting specifications.)
 2. Solicitation/Pre-Requisites: Your College must have already hired a design criteria professional (DCP) (in accord with Florida Statutes) (SREF etc.) and provide the D/B proposers a copy of a “design criteria package” to base their submittal of qualifications on.
 3. Advertisement Required? Yes
 4. Type Solicitation Used? Request for Qualifications (RFQ)
 5. Public Bid Opening? Yes
 6. Subcontractors and their licenses required to be submitted at initial RFQ opening? No, these will need to be obtained later after the D/B firm has both signed a GMP contract and has bid out individual division packages. A/E sub-consultants licenses should be disclosed at the initial public opening.
 7. Negotiation Required? Yes, a GMP contract is required to be negotiated and entered into with the D/B firm. Note: normally a D/B GMP does not include returning to the owner value engineering savings.
 8. Basis of Award? Most qualified/top ranked responsive proposer that submitted to response to your RFQ.
 9. Type contract(s) used? GMP contract and a PO
 10. Bonding: 100% Performance and Payment Bond required (if greater than \$200,000) at the final GMP price.
 11. Relevant Unique Statutes/Regulations? FS 287.055(3) (c), (10) (b), (3) (A), and (2) (h)

Construction Contracting Overview

D. Design Build (Proposal Based Selection) (AKA D/B, RFP)

1. Purpose: Similar to “C” Design Build Qualifications based selection this process allows the College to take advantage of the potential requirement to compress the typical design/bid/build lead times and be able to take advantage of both pre qualifying D/B Firms/D/B teams and awarding the resultant contract to the low bidder /top ranked firm/team submitting a competitive GMP proposal in response to a Phase II RFP.
2. Solicitation/Pre-Requisites: Your College must already have a design criteria professional (DCP) under contract. The DCP develops a design criteria package which is provided to D/B firms/D/B teams to base their Phase I (RFQ) and Phase II (RFP) proposal submittals upon.
3. Advertisement Required? Yes
4. Type Solicitation Used? Phase I (RFQ) and finalist then are submitted a Phase II RFP to submit which includes a GMP proposal.
5. Public Bid Opening? Yes, two (2). One is a RFQ opening and one is an RFP opening.
6. Subcontractors and their licenses required to be submitted at initial RFQ opening? No, these will happen later the RFP opening. D/B sub-consultants (if any) should be disclosed of the initial RFQ opening.
7. Negotiation Required? Yes/No. If you attached a GMP contract to the RFP, then no negotiations are required as the D/B firm RFP submittal accepted your GMP contract and includes the GMP.
8. Basis of Award? Most qualified/top ranked responsive responsive proposer that also submitted a RFP competitive proposal GMP.
9. Type contract(s) used? GMP contract and a PO
10. Bonding: 100% Performance and Payment Bond required (if greater than \$200,000) at the final GMP price.
11. Relevant Unique Statutes/Regulations? FS 287.055(3) (c), (10) (b), (3) (A), (2) (h)

Construction Contracting Overview

E. Delivery Order Construction (AKA DOC)

1. Purpose: This process provides the College a “Rapid” response annual continuing contract with a construction contractor to provide construction services (and limited as built design services) for numerous smaller projects. College’s like VCC, DBCC, and FCCJ have successfully used this process (used by the U.S.A.F.) to supplement/replace having on staff numerous licensed trades workers (i.e. plumbers and electricians) to perform repetitive small projects. This process requires construction firms to submit not only their qualifications, but also bid on numerous fixed factors*/unit prices* to be used to formula price future jobs/projects. (* = percentage of localized R.S. Means cost for: a) Projects < \$200,000 straight time rate %; b) projects < \$200,000 over time/night rate%; c) projects equal to or greater than \$200,000 straight time rate %; d) projects equal to or greater than \$200,000 over time rate %;
2. Solicitation/Pre-Requisites: None. Your College should identify in the RFP a “minimum” value of DOC your College will commit/year/contract and establish a maximum value/#years the contract will be for before you will solicit new RFP’s again.
3. Advertisement Required? Yes
4. Type Solicitation Used? RFP
5. Public Bid Opening? Yes
6. Subcontractors and their licenses required to be submitted at initial RFQ opening? No, they will be identified on each DOC task order/project/PO issued.
7. Negotiation Required? No, if you attach your DOC contract to the RFP you issue.
8. Basis of Award? Most qualified/top ranked proposer that also submits a competitive RFP fixed bid of formulas and unit prices.
9. Type contract(s) used? Delivery Order Construction contract and numerous P.O’s issued (one for each project) from a DOC quotation issued to the College that utilizes the contracted fixed formulas and unit prices.
10. Bonding: 100% Performance and Payment Bond required only for singleprojects equal to or greater than \$200,000 at the value of the PO issued for a project.
11. Relevant Unique Statutes/Regulations? See “B” C.M. Section.

Construction Contracting Overview

- F. Performance Contracting: (AKA Energy Savings Agreement, ESCO)
1. Purpose: To hire an energy saving contractor (ESCO) to complete an energy saving study/analysis to determine if there is adequate energy savings measures (ECM's) (i.e. installing energy saving light bulbs and ballasts, etc) to fund the College pledging future energy savings to offset the cost of ESCO purchasing and implementing the ECM's now which would then leave the College with enjoying lower energy consumption and lower cost over time after ESA is paid off.
 2. Solicitation/Pre-Requisites: None, College may want to invite state contract holder ESCO's to submit a proposal in response to your request for quotations/request for qualifications to select which ESCO to work with.
 3. Public Advertisement Required? If inviting state contract holders no RFQ ads required, but there is an APA requirement to advertise your Board reviewing and approving the ESCO ESA.
 4. Type Solicitation Used? None, if just use one state contract holder or use a request for quotation if inviting multiple state contract holders.
 5. Public Bid Opening? Yes
 6. Subcontractors and their licenses required to be submitted at initial RFQ opening? Not at the RFQ opening. Once you sign a Energy Saving Agreement (ESA) you have the option to have the ESCO bid out the purchase and installation of the accepted ECM's or the College can help and then you would have multiple bid openings and subs identified at that time.
 7. Negotiation Required? Yes, you will have at a minimum two contracts to negotiate. The first is the Energy Saving Audit analysis where you pledge pay the ESCO nothing to do the audit (if adequate savings are found) but expose your self to having to pay for the engineering study/audit if the audit does find adequate ECM's to pledge and you do not agree to sign the ESA. The second negotiation is the Energy Saving Agreement (ESA) that you agree to defined guaranteed ECM's to be installed. You will need to define in the ESA whether the ESCO will do maintenance or not in return for your College agreeing to pay back the ESCO over time a defined payment per year.
 8. Basis of Award? Use state contract or top-ranked most qualified proposer submitting a request for quotation.
 9. Type contract(s) used? Energy Saving Audit, Energy Saving Agreement (ESA).

10. Bonding: No, a corporate energy saving guarantee is required to be submitted in lieu of a 100% performance and payment bond.
11. Relevant Unique Statutes/Regulations? Yes, FS 1013.23, 471, 481, and 489.

Construction Contracting Overview

G. Continuous C.M. Contracting

1. Purpose: To retain under a single contract a construction manager (C.M.) to provide construction management of ongoing smaller size projects.
2. Solicitation/Pre-Requisites: None, the College can use either the State DMS Division of Building and Construction State Contractors who hold state C.M. contracts or issue you own RFQ.
3. Public Advertisement Required? Yes, issuing the RFQ is required to be advertised unless using a state contract.
4. Type Solicitation Used? RFQ or even a RFP with defined unit prices (i.e. request bids on profit, overhead %, and rates of \$/hr/discipline).
5. Public RFQ/RFP Opening? Yes
6. Subcontractors and their licenses required to be submitted at initial RFQ opening? No. They need to be obtained on each individual project.
7. Negotiation Required? Yes, first for a CM annual indefinite quantity contract with selected unit prices and secondly using defined unit prices for each task order/PO issued against a CM proposal for projects.
8. Basis of Award? Use state contractor or use RFQ/RFP and award to most qualified, top-ranked proposer.
9. Type contract(s) used? An annual indefinite quantity contract and PO.
10. Bonding: Yes, if a single project is greater than \$200,000.
11. Relevant Unique Statutes/Regulations? FS 235.211 and 1013.45.

II. Tax-Exempt Material Direct Purchasing:

COPP Colleges have the option to recommend and obtain their Board of Trustees to authorize each College to enter into agreements with construction contractors to directly purchase defined mutually agreed to construction raw materials and enjoy tax-exempt savings on the raw materials purchased for the project. It is recommended you establish a minimum value for your issuing a direct tax P.O. to maximize tax savings and minimize PO's issued. FLORIDA STATE COLLEGE AT JACKSONVILLE, for instance, does not issue direct tax saving PO's unless the value of the PO is greater than \$3,000, thus saving \$210.00 in sales tax.

See Attachments:

- A. Department of Revenue Tax Advisement(s)
- B. FLORIDA STATE COLLEGE AT JACKSONVILLE special condition #26.00 where bidders are advised before they bid the College's tax savings procedures, etc. where FLORIDA STATE COLLEGE AT JACKSONVILLE will require tax agreements to be signed and FLORIDA STATE COLLEGE AT JACKSONVILLE enjoying all tax savings.



General Tax Administration
Child Support Enforcement
Property Tax Administration
Administrative Services
Information Services

March 5, 2001

Jeff L. Hawkins, Project Manager
Elkins Constructors, Inc.
P.O. Box 2396
Jacksonville, Florida 32203

Re: Letter of Technical Advice 01A-235
Public Works Contracts
Section 212.08(6), F.S.
Rules 12A-1.001 & 12A-1.094, F.A.C.

Dear Mr. Hawkins:

~~This Letter of Technical Advice is in response to your correspondence of February 12, 2001, regarding the above referenced matter.~~

FACTS

This letter follows your letter of December 27, 2000, which was responded to in Letter of Technical Advice 01A-081 ("LTA"), dated January 22, 2001. In that letter, your company asked advice on the requirements of the Department of Revenue concerning exemptions in connection with a construction contract with a non-profit educational institution. The LTA response assumed that the educational institution was a private school.

The previous letter provided that your company has entered into a construction contract with the educational institution. The educational institution included a Tax Agreement in the contract that requires the contractor to requisition the educational institution to issue purchase orders for the purchase of materials, and the educational institution would pay the supplier directly for the materials. The educational institution apparently had asserted that the Florida Department of Revenue required such arrangements in the purchasing of materials, and that the Tax Agreement was a form issued by the Florida Department of Revenue.

The determination in the LTA was that the terms of the Tax Agreement were insufficient for the educational institution to use its tax-exempt status in the purchase of the materials incorporated into the construction project. Additionally, it was noted that the Florida Department of Revenue does not require exempt organization to use their tax-exempt status in construction contracts, nor was the Tax Agreement a form originated by the Florida Department of Revenue.

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REQUESTED ADVISEMENT

You request advice as to whether the same conditions described in the LTA apply if the educational institution is a State of Florida Community College.

LAW

Sales to governmental units are exempt from sales tax pursuant to section 212.08(6), F.S., which provides:

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 does not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof when such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision. . . .

Rule 12A-1.001(9), F.A.C., entitled "Governmental Units," contains guidelines for claiming and documenting the exemption. Governmental entities must obtain a consumer's certificate of exemption from the Department. Vendors are required to obtain for their records proper documentation of the exempt status of the sale.

By its terms, section 212.08(6), F.S., exempts only direct purchases by governmental entities. The exemption does not apply when a contractor, employed by a governmental entity, purchases tangible personal property which 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 the instant situation, are contained in Rule 12A-1.094, F.A.C., which provides:

- (1) This rule shall govern the taxability of transactions in which contractors manufacture or purchase supplies and materials for use in public works
- (2) The purchase or manufacture of supplies or materials by the contractor for incorporation into a public works project is taxable to the contractor since he is the ultimate consumer. . . .
- (3)(a) The purchase or manufacture of tangible personal property for resale to a governmental body is exempt from tax provided this exemption shall not include sales of tangible personal property made to contractors employed either directly or as agents of

Letter of Technical Advice

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the United States Government, a state, or any county, municipality, or political subdivision of a state when such tangible personal property goes into or becomes a part of public works financed or owned by such governmental bodies or political subdivisions.

(b) With regard to contracts with government entities, the exemption in subsection (3)(a) is appropriate only where the levy would otherwise fall on the government itself, or on an agency or instrumentality so closely connected with that government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. A finding of exempt status, however, requires something more than the implication of traditional agency notions, so that to resist a state's taxing power, a private taxpayer must actually stand in the government's shoes as a principal, rather than as a contractor employed either directly or as the government's agent. A contractor will not be deemed to actually stand in the government's shoes if the contractor has a substantial independent role in making purchases. Accordingly, the fact that title passes directly to the government and payment is made with government funds, in and of itself, cannot characterize the transaction as an exempt purchase if the purchasing entity, in its role as a purchaser, is sufficiently distinct from the government.

(4) ~~The exemption in subsection (3)(a) is a general exemption for sales made to the government. . . . 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 on the substance of the transaction, rather than the form in which the transaction is cast. The Executive Director . . . will determine whether the substance of a particular transaction is governed by subsection (2)(a) or is a sale to a governmental body as provided by subsection (3) of this rule based on all of the facts and circumstances surrounding the transaction as a whole. The Executive Director . . . will give special consideration to factors which govern the status of the tangible personal property prior to its affixation to real property. Such factors include provisions which govern bidding, indemnification, inspection, acceptance, delivery, payment, storage, and assumption of the risk of damage or loss for the tangible personal property prior to its affixation to real property. Assumption of the risk of damage or loss is a paramount consideration. A party may be deemed to have assumed the risk of loss if the party either: bears the economic burden of posting a bond or obtaining insurance covering damage or loss; or enjoys the economic benefit of the proceeds of such bond or insurance. Other factors that may be considered by the Executive Director . . . include whether: the contractor is authorized to make purchases in its own name; the contractor is jointly or severally liable to the vendor for payment; purchases are not subject to prior approval by the government; vendors are not informed that the government is the only party with an independent interest in the purchase; and whether the contractors are formally denominated as purchasing agents for the government. Sales made pursuant to so called "cost-plus", "fixed-fee", "lump sum", and "guaranteed price" contracts are taxable sales to the contractor unless it can be demonstrated to the satisfaction of the Executive Director . . . that such sales are, in substance, tax exempt sales to the government.~~

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4. The governmental entity must directly pay the vendors for the tangible personal property; and
5. The governmental entity must assume all risk of loss or damage for the tangible personal property involved in the contract, as indicated by the entity's acquisition of, or inclusion as the insured party under, insurance on the building materials.

CONCLUSION

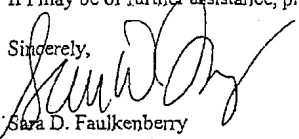
The conditions for the exempt purchase of construction materials by a governmental unit are substantially the same as those conditions that apply to the purchase of construction materials by a non-profit organization. The Tax Agreement provided with your December 27, 2000, letter is insufficient to qualify the state-owned community college to make tax-exempt purchases for incorporation into the construction project.

~~This response is based upon the facts and circumstances of your specific situation, as presented, and is not an official statement or opinion of this department but, instead, represents the opinion of the writer. If you wish an official binding statement on this issue, you may file a written request for a Technical Assistance Advisement by following the provisions of the department's Rule 12-11, F.A.C., a copy of which is enclosed. The request for a Technical Assistance Advisement should be sent to the Office of the General Counsel, Technical Assistance and Dispute Resolution, Florida Department of Revenue, P.O. Box 7443, Tallahassee, Florida, 32314-7443.~~

If you have further questions with regard to this matter and wish to discuss them, you may contact our Technical Assistance Section, 850/414-9838. If you have specific questions and would like a written response, the request should be sent to the Office of the General Counsel, Technical Assistance and Dispute Resolution, Florida Department of Revenue, P.O. Box 7443, Tallahassee, Florida, 32314-7443.

If I may be of further assistance, please do not hesitate to contact me.

Sincerely,


Sara D. Faulkenberry
Tax Law Specialist
Technical Assistance and Dispute Resolution
850/414-9838

Control # 43998
Enclosure

RULES
OF THE
DEPARTMENT OF REVENUE
CHAPTER 12-11
TECHNICAL ASSISTANCE ADVISEMENTS AND
REQUESTS FOR TECHNICAL ADVICE

- 12-11.001 General Explanation of Provisions.
- 12-11.002 Definitions.
- 12-11.003 Requests for Technical Assistance Adviselements.
- 12-11.004 Requests for Conference Discussion.
- 12-11.005 Deletion of Private or Confidential Information.
- 12-11.006 Processing Requests for, and Obtaining Copies of, Technical Assistance Adviselements.

- 12-11.007 Effect of Adviselements.
- 12-11.008 Requests by Representatives.
- 12-11.009 Revocation of Request.
- 12-11.010 Adviselements on Newly Enacted Legislation. (Repealed)
- 12-11.011 Requests for Technical Advice.
- 12-11.012 Processing Requests for Technical Advice. (Repealed)
- 12-11.013 Informal Technical Tax Statements.

12-11.001 General Explanation of Provisions.
 Under the provisions of Section 213.22, Florida Statutes, the Department of Revenue is granted the discretionary authority to issue technical assistance adviselements to taxpayers. Pursuant to this authority, it is the practice of the Department of Revenue to answer inquiries of taxpayers, whenever deemed appropriate and in the interest of sound tax management, pertaining to the tax effects and consequences of their acts and transactions.
Specific Authority 213.22(3) FS. Law Implemented 213.22 FS. History—New 5-27-82, Formerly 12-11.01.

12-11.002 Definitions.
 (1) "Technical Assistance Adviselements" (TAA) or "Adviselements" are written statements issued to taxpayers or to industry or trade associations by the Department of Revenue, setting forth the Department's position on the tax consequences

of a specific transaction or event under applicable statutes and rules.

(2) "Internal Technical Adviselements" (ITA) are written statements issued to Department personnel, in response to a Request for Technical Assistance (RTA), which state the Department's position on the tax consequences of a specific transaction or event under applicable statutes and rules.

(3) The "Department" shall mean the Department of Revenue of the State of Florida.

(4) "Taxpayer" shall mean a person subject to any tax, imposed under law by the Florida Statutes, which tax is subject to administration by the Department of Revenue.

(5) "Person" shall include any individual, joint venture, syndicate, partnership, corporation, association, estate and private or business trust, firm, legal representative, trustee, or receiver.

(6) "Under Audit" shall mean a taxpayer who has been given written notice of the Department's intent to audit a specific tax for a specific time period which includes managed audits, self-audit requests, self analysis, or written approval from the Department to participate in a certified audit. Examples of such notices are: the notification of intent to audit books and records, the notification of correspondence audit, or self analysis and self audit requests. "Under Audit" shall also include a taxpayer who has been given written notification that the Department is conducting an examination of a transaction(s) or reporting period(s) for possible underpayments or overpayments.

(7) "Authorized Employee" shall mean a person or persons who initiates, conducts, or reviews an examination of information on a transaction(s) or reporting period(s) with respect to which the TAA or RTA request is made.

(8) "Taxpayer Association" shall mean an organization that has been authorized by its members to represent the interests of the members.

(9) "Tax Information Publication" (TIP) shall mean a written, informal statement developed and issued by the

or a person who is a party to the transaction, or

(e) The issue, or a substantially similar issue, has been ruled on by the Department for the taxpayer or predecessor of the taxpayer, or a member of the taxpayer association, and the substance of the prior ruling or advisement.

After a request is filed, but before an advisement is issued, if a taxpayer or his or her authorized representative or the taxpayer association or its representative becomes aware that an examination of the issue by the Department has commenced, the taxpayer or his or her representative or the taxpayer association or its representative shall so notify the Department in writing.

(5) A request for an advisement must comply with the deletion requirements in Rule 12-11.005.

(6)(a) A request for issuance of a technical assistance advisement by the Department should be addressed to Office of the General Counsel, Technical Assistance and Dispute Resolution, Florida Department of Revenue, P.O. Box 7443, Tallahassee, Florida 32314-7443.

(7) Any request for an advisement that does not comply with all the provisions of this rule will be acknowledged, and the requirements that have not been met will be pointed out. If a request for an advisement lacks essential information, the taxpayer or his or her representative, or the taxpayer association or its representative, will be advised that if the information is not forthcoming within 30 days, the request will be closed. If the information is received after the request is closed, the request will be reopened and treated as a new request as of the date of the receipt of the essential information.

(8) When a taxpayer who is under audit or a taxpayer association that has a member who is under audit requests a Technical Assistance Advisement (TAA) on any tax being audited or a transaction or period being reviewed, other than a request regarding the sales and use tax exemptions granted to general groceries and medical items pursuant to s. 212.08(1) and (2), F.S., the taxpayer or the taxpayer association shall mail or hand-deliver to the authorized employee conducting the audit or review a copy of the TAA request at the same time the request is mailed to Technical Assistance and Dispute Resolution (TADR) for a response. Upon receipt of the TAA request, the authorized employee will notify TADR of his or her intent to provide any factual information, documents, arguments, or authorities which he or she wants considered. The authorized employee shall have 10 working days from the date of the TAA request in which to forward any information to TADR or to request additional time to submit information regarding the TAA request. The authorized employee shall not be obligated to suspend the audit or review pending issuance

of the TAA. After issuance of a Notice of Proposed Assessment or billing, no TAA will be issued to a taxpayer or taxpayer association with respect to the tax liability reflected by the proposed assessment or billing, other than a TAA request regarding the sales and use tax exemptions granted to general groceries and medical items pursuant to s. 212.08(1) and (2), F.S.

(9) No TAA will be issued to an individual taxpayer who has received notification of the Department's intent to audit a specific tax, other than a TAA request regarding the sales and use tax exemptions granted to general groceries and medical items pursuant to s. 212.08(1) and (2), F.S., if an RTA by the authorized employee, with respect to the same taxpayer and issue, is pending. If the Department does not issue an ITA in this situation, the taxpayer may submit a request for a TAA. *Specific Authority 213.06(1), 213.22(3) FS. Law Implemented 213.22 FS. History—New 5-27-82, Formerly 12-11.03, Amended 10-24-96, 6-28-00, 1-22-01.*

12-11.004 Requests for Conference Discussion.

(1) A taxpayer or the taxpayer's representative who, or a taxpayer association or its representative that, desires an oral discussion of the issue or issues involved should indicate such desire in writing when filing the request in order that the conference may be arranged at that stage of consideration when it will be most helpful.

(2) If a conference has been requested, the taxpayer or Taxpayer Association will be notified of the time and place of the conference. Unless specifically agreed to by the Department, all conferences will be held at the Department's offices in Tallahassee, Florida, or by telephone conference call if requested by the taxpayer or taxpayer association. A conference is normally scheduled only when the Department agrees that it will be helpful in deciding the case, or when an adverse decision is indicated.

Specific Authority 213.06(1), 213.22(3) FS. Law Implemented 213.22 FS. History—New 5-27-82, Formerly 12-11.04, 6-28-00.

12-11.005 Deletion of Private or Confidential Information.

(1) In order to assist the Department in making the deletions of private and confidential materials and privileged financial and commercial information from the text of advisements and supporting information provided by the requestor to the Department which are open to public inspection, there must accompany requests for advisements and the submission of supporting information either a statement of the deletions proposed by the person requesting the advisements, or a statement that no information other than names, addresses, and taxpayer identification numbers needs

Letter of Technical Advice
Page 4

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

DISCUSSION & ANALYSIS

Rule 12A-1.001(9), F.A.C., states that in order for a sale to a state or local governmental entity to be tax exempt, "payment must be made directly to the dealer by . . . the political subdivision of a state. . . ." 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 the governmental entity, however, the transaction is exempt. For there to be an exempt transaction, the governmental entity must directly purchase, hold title to and assume the risk of loss of the tangible personal property prior to its incorporation into realty, and satisfy various factors contained in Rule 12A-1.094, F.A.C.

Under Rule 12A-1.094, F.A.C., the Department will also give special consideration to several factors (~~bidding, indemnification, inspection, acceptance, delivery, payment, and storage~~) which govern the status of tangible personal property prior to its affixation to real property when determining whether the sale is to the tax exempt entity or to a contractor. However, the assumption of risk of damage or loss during the time that the building materials are physically stored at the job site prior to their installation or incorporation into the project is a paramount consideration. The governmental entity must assume all risk of loss or damage for the tangible personal property during that period. To establish that it has assumed that risk, the governmental entity should purchase, or be the insured party under, insurance on the building materials.

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

1. The governmental entity must execute the purchase orders for the tangible personal property involved in the contract, which must include the governmental entity's consumer's certificate of exemption number. The contractor may present the governmental entity's purchase orders to the vendors of the tangible personal property;
2. The governmental entity 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 up until the time it is incorporated as real property;
3. Vendors must directly invoice the governmental entity for supplies;

he or she should attach a copy of the advisement to the return.

(4) As part of the determination of a taxpayer's liability, it is the responsibility of the Department to ascertain whether an advisement previously issued to the taxpayer or the taxpayer association has been properly applied. It should be determined whether the representations, upon which the advisement was based, reflected an accurate statement of the material facts and whether the transaction actually was carried out substantially as proposed.

(5) Members of a taxpayer association who choose not to follow the guidance provided in a TAA will not be subject to the precedential value of the TAA, and are liable for the tax consequences of not adhering to the Department's position expressed in the TAA.

Specific Authority 213.06(1), 213.22(3) FS. Law Implemented 213.22 FS. History—New 5-27-82, Formerly 12-11.07, Amended 6-28-00.

12-11.008 Requests by Representatives.

(1) A request, by or for a taxpayer or a taxpayer association, must be signed by the taxpayer, an officer or director of the taxpayer association, or an authorized representative of the taxpayer or the taxpayer association. If the request is signed by an authorized representative, he or she must either be:

(a) An attorney, who is a member in good standing of the Florida Bar or of the bar of the highest court of any state, possession, commonwealth, or the District of Columbia, and who files with the Department a written declaration that he or she is currently qualified as an attorney and he or she is authorized to represent the principal, or

(b) A certified public accountant, who is duly qualified to practice in any state, possession, territory, commonwealth, or the District of Columbia, and who files with the Department a written declaration that he or she is currently qualified as a certified public accountant and he or she is authorized to represent the principal, or

(c) A person, other than an attorney or certified public accountant, who files with the Department a written declaration signed by the taxpayer that he or she is authorized to represent the principal.

(2) The above requirements do not apply to an individual representing his or her full-time employer, or to a bona fide officer, administrator, trustee, etc., representing a corporation, trust, estate, association, or organized group.
Specific Authority 213.06(1), 213.22(3) FS. Law Implemented 213.22 FS. History—New 5-27-82, Formerly 12-11.08, Amended 6-28-00.

12-11.009 Revocation of Request.

(1) The taxpayer's request for an advisement may be

withdrawn at any time prior to the Department's issuance of the advisement. Additionally, a taxpayer may request that one or more individual issues contained in an advisement request be withdrawn from Department considerations. The information submitted, with regard to a request or issue which is revoked, may be considered by the Department in a subsequent audit or examination of the taxpayer's return. Even though a request is withdrawn, all correspondence and exhibits will be retained by the Department and may not be returned to the taxpayer.

(2) A taxpayer, or his or her representative, may revoke a request, or revoke Department consideration pertaining to an individual issue, only upon submission of a written statement to the Department requesting the Department suspend consideration of the entire advisement request or particular issue contained therein.

Specific Authority 213.22(3) FS. Law Implemented 213.22(1),(3) FS. History—New 5-27-82, Formerly 12-11.09.

12-11.011 Requests for Technical Advice.

(1) All Requests for Technical Advice (RTA) must be made in writing.

(2) Each RTA must contain the following:

(a) A complete statement of all relevant facts relating to the specific transaction, including:

1. the taxpayer's name;
2. the audit number or a statement that the taxpayer is under a compliance review;
3. the taxpayer's identification number; and,
4. a carefully detailed description of the transaction.

(b) If the RTA does not relate to a specific taxpayer, a complete statement of all relevant facts relating to the transaction, including a detailed description of the transaction, must be submitted with the request.

(c) True copies of all contracts, wills, deeds, agreements, instruments, and other documents involved in the transaction must be submitted with the request. The RTA should include a statement of the relevance of each document included to the issue or issues, specifying the pertinent provisions.

(d) When the request pertains to only one step of a larger integrated transaction, the facts, circumstances, etc., should be submitted with respect to the entire transaction.

(e) If the authorized employee making the request asserts a particular determination of the issues, an explanation of the grounds for the determination and a statement of relevant authorities in support of the position asserted should be furnished.

(3) An RTA should be sent through the requesting employee's Process Manager, to Technical Assistance and



L. H. Fuchs
Executive Director

STATE OF FLORIDA
DEPARTMENT OF REVENUE

TALLAHASSEE, FLORIDA 32399-0100

April 25, 1996

General Tax Administration
Child Support Enforcement
Property Tax Administration
Administrative Services
Information Services

Mr. Edward A. Upthegrove
Superintendent
Hendry County School District
Post Office Box 1980
Hendry County Courthouse
LaBelle, Florida 33935

Re: Technical Assistance Advisement 96(A)-027
Sales and Use Tax
Sales Tax Exempt Purchases of Building Materials
Section: 212.08(6), F.S.
Rules: 12A-1.001, 12A-1.094, F.A.C.

Dear Mr. Upthegrove:

This is in response to your letter of February 27, 1996, wherein you requested a technical assistance advisement concerning ~~direct purchases of construction materials, supplies, and equipment for and by the Hendry County School District. You confirm in your letter that it is the Hendry County School Board's intention to delegate certain purchasing authority to a construction management firm to directly purchase certain construction materials, supplies, and equipment from third party suppliers for use in the construction of Clewiston Middle School and LaBelle Middle School.~~

Your request is on behalf of the Hendry County School Board (hereafter "Owner"), for use in the owner's construction of Clewiston and LaBelle Middle Schools (hereafter "Project"). The Agreement referred to below is between Owner and Brown and Root Building Co., A Division of Brown and Root, Inc. (hereafter "Contractor") for construction management.

According to your letter, it is your understanding that section 212.08(6), Florida Statutes (F.S.), provides that an exempt entity is not required to pay State sales tax when payment is made directly to a dealer or vendor by the exempt entity for purchases of tangible personal property.

DISCUSSION OF FACTS

You provided with and subsequent to your letter of February 27, 1996, dated and executed copies of an Agreement and Addendum, entered into between the Owner and Contractor, as well as other documents. The Agreement contains the planning, design, permitting, construction and code inspection for the Owner's

Mr. Edward A. Upthegrove
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development work at the Project. The Owner's construction budget is \$18,000,000, per Article 1.4 of the Agreement.

Article 9.1 of the Agreement provides that the Owner agrees to pay the Contractor for the cost of the Project. Cost of the Project is defined in the same Article to mean, "costs necessarily incurred in the Project during the Construction Phase for Construction services and paid by the Contractor which are not included in the construction phase fee."

Article 9.2(2) of the Agreement includes as direct cost items all materials, supplies and equipment incorporated in the Project, including costs of transportation and storage.

Under Article 2.4 of the Agreement, Contractor's Services - Construction Phase, paragraph 5, the Contractor is required to provide the Owner a 100% Performance Bond and a 100% Labor and Material Payment Bond each in the amount of not less than the total construction cost.

Article 12.1 of the Agreement provides for monthly payment statements. This Article requires the Contractor to submit to the Owner, a statement, along with cost reports, showing in detail all monies paid out, costs accumulated and costs incurred. Ten percent retainage by the Owner shall be held on all payments to the Contractor until Project is 50% completed. Article 12.3 requires the Contractor to pay subcontractors within 10 days after receipt of payment from the Owner less 10% retainage.

Article 13.2, paragraph 10, of the Agreement requires the Contractor to take out and maintain during the life of the Agreement, a "Builder's Risk Policy" completed value form as a cost of the Project, issued to provide coverage on an "all risk" basis including theft.

Also provided were excerpts from an Agreement between the Owner and Construction Manager. Under section 514A - School District Purchased Materials: Construction Manager at Risk, subsection 1, paragraph 2 of this Agreement, any purchased materials purchased by the Owner included in the subcontractor's bid are the responsibility of both the Owner and Subcontractor. Paragraph 4 of the same section requires the Subcontractor to prepare a standard Purchase Order Requisition Form in an acceptable form, to specifically identify the materials which the Owner has at its option elected to purchase.

In addition, the Owner provided an Addendum containing the following provisions:

Pursuant to section 212.08(6), F.S., sales tax does not apply

to sales of tangible personal property, including construction materials to be incorporated in the Facility, where payment for such purchases will be made directly to the vendors by the Owner.

After reviewing the terms of the revised Procedures supplied by the Owner, the Department has determined that in those cases where the Owner delegates its authority to the subcontractors in coordination with the Construction Manager to make purchases of equipment or materials in the Owner's own name and using the Owner's purchase orders and using the Owner's credit where the Owner is invoiced directly for the purchases, the legal incidence of the sales tax would be directly upon the Owner.

It is determined that building material purchases by the Owner for the construction of the Facility may be made exempt from sales tax in that:

1. A Purchase Order Requisition Form in a form acceptable to the Owner and Construction Manager shall be prepared by subcontractors and submitted to the Owner prior to ordering ~~Owner purchased materials~~. The requisition form will provide the name, address, telephone number and ~~contact person for the~~ materials supplier; a list of required items, the quantity needed, the price and sales tax associated with the materials, and delivery dates established by the subcontractor.
2. The Owner will prepare and issue standard Owner purchase order forms to the vendors.
3. In conjunction with the execution of the Owner's Purchase Orders by the suppliers, the Subcontractor shall execute and deliver to the Owner, through the Construction Manager, deductive change orders reflecting the full value of all materials directly purchased by Owner, plus all sales tax savings associated with the materials.
4. Subcontractors will be responsible for all matters relating to the receipt of materials purchased by the Owner including verifying correct quantities, inspection and acceptance of the goods at the time of delivery. The Subcontractor will forward the invoice to the Owner through the Construction Manager for payment.
5. Title to the Owner purchased materials will rest with the Owner at the time the materials are delivered to the Owner owned construction site (F.O.B. job site)

6. Owner is billed directly by the selling vendor for purchases of building materials.

7. Payment for the building materials is made directly to the selling vendor by the Owner.

8. The Owner will bear the costs of all Payment and Performance Bonds and Owner's Insurance including Builder's Risk Insurance as a reimbursable expense to the Construction Manager. The Owner is an additional named insured on the Contractor's Builder's Risk insurance and, in the event of damage or destruction to the Owner purchased materials, the Owner will receive all proceeds derived from all claims against insurers or others to pay for repair or reconstruction as a result of damage or destruction.

Due to these facts, direct purchases of construction materials by the Owner that will be incorporated into Facilities are exempt from sales tax.

This tax exemption does not apply to equipment rentals to contractors or subcontractors that provide construction services for the construction project, even though the economic burden of the tax, by contract or otherwise, may ultimately be borne by the Owner.

DISCUSSION OF LAW

STATUTORY AUTHORITY:

The following passage quoted from the Florida Statutes (F.S.) is particularly germane to the matter under consideration:

Section 212.08, F.S.

(6) EXEMPTIONS; POLITICAL SUBDIVISIONS.

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. This exemption does not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof when such tangible personal property goes into or becomes a part of public

Mr. Edward A. Upthegrove
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works owned by such government or political subdivision thereof (Emphasis supplied)

REGULATORY AUTHORITY:

The following provisions of the Florida Administrative Code (F.A.C.), found in Rule 12A-1.001(9), are pertinent to the transactions described in your letter:

(9) GOVERNMENTAL UNITS.

(a) All sales made directly to the United States Government, a state, or any county, municipality, or political subdivision of a state are exempt, except machines, equipment, parts, and accessories therefor used in the generation, transmission, or distribution of electricity. Except for purchases by employees of the United States Government, this exemption is not available for any taxable transaction when payment is made by a governmental employee by use of personal funds, including cash, checks, or credit cards, when the employee is subsequently reimbursed by the governmental entity. Payment must be made directly to the dealer by the governmental entity of a state, or any county, municipality, or political subdivision of a state Such governmental entities desiring to qualify for the exemption must obtain from the Department of Revenue a consumer's certificate of exemption (see Rules 12A-1.038 and 12A-1.039, F.A.C.). The exemption provided in this subsection shall be strictly defined, limited, and applied to each entity as provided herein. (Emphasis supplied.)

Rule 12A-1.094, F.A.C., provides that should a contractor purchase or manufacture supplies or materials for incorporation into a public works project, such purchase or manufacture of supplies or materials is taxable to the contractor since he is the ultimate consumer. So called "cost plus", "fixed fee", "lump sum", and "guaranteed price" contracts require the contractor to pay tax on all contract purchases, as he is the ultimate consumer. The contractor's customer is not required to pay sales tax on these contracts. When a contractor purchases materials and supplies to fulfill a lump sum, cost plus, fixed fee or guaranteed price contract for improvements to real property, the contractor should include these sales tax amounts in his bid for the contract.

The purchase or manufacture of tangible personal property for resale to a governmental body is exempt from tax provided this exemption shall not include sales of tangible personal property made to contractors. The exemption will apply provided

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the exempt government entity supplies the vendor with the appropriate exemption certificate.

In addition, Rule 12A-1.094(1), F.A.C., defines real property to include all fixtures and improvements to real property. The status of a project as an improvement or affixture to real property is determined by the objective and presumed intent of the parties, based on the nature and use of the project and the degree of affixation to realty.

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 on the substance of the transaction, rather than the form in which the transaction is cast. A contractor will not be deemed to actually stand in the government's shoes if the contractor has a substantial independent role in making purchases. Accordingly, the fact that title passes directly to the government and payment is made with government funds, in and of itself, cannot characterize the transaction as an exempt purchase if the purchasing entity, in its role as a purchaser, is sufficiently distinct from the government.

Factors which govern sales tax liability on purchases of tangible personal property employed in public works contracts include provisions which govern bidding, indemnification, inspection, acceptance, delivery, payment, storage, and assumption of the risk of damage or loss for the tangible personal property prior to its affixation to real property. Assumption of the risk of damage or loss is a paramount consideration. The governmental body may supply an exemption certificate to vendors that make direct sales to the governmental entity based on the factors supplied above with reference to assumption of risk, delivery, storage, and other factors cited above.

CONCLUSION OF LAW

Pursuant to section 212.08(6), F.S., sales tax does not apply to sales of tangible personal property, including construction materials to be incorporated into the Project, where payment for such purchases will be made directly to the vendors by the Owner.

Based on your letter, contract documentation and addendum, the Owner qualifies to purchase materials, supplies, equipment, and other materials directly from third party suppliers tax exempt provided a certificate of exemption is provided to the vendor. This tax exemption is not available to purchases made by contractors or subcontractors providing construction services for

Mr. Edward A. Upthegrove
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the Project. The Department has determined that in those cases where the Owner delegates its authority to the subcontractors in coordination with the Contractor to make purchases of equipment or materials in the Owner's own name, using the Owner's purchase orders and using the Owner's credit where Owner is invoiced directly for the purchases, the legal incidence of the sales tax would be directly upon the Owner.

The Owner must comply with the following provisions in order to maintain this sales tax exemption for such material purchases:

1. A Purchase Order Requisition Form in a form acceptable to the Owner and Contractor shall be prepared by subcontractors and submitted to the Owner prior to ordering Owner purchased materials. The requisition form will provide the name, address, telephone number and contact person for the materials supplier; a list of required items, the quantity needed, the price and sales tax associated with the materials, and delivery dates established by the subcontractor.
2. The Owner will prepare and issue standard Owner purchase order forms to the vendors.
3. In conjunction with the execution of the Owner's Purchase Orders by the suppliers, the Subcontractor shall execute and deliver to the Owner, through the Contractor, deductive change orders reflecting the full value of all materials directly purchased by the Owner, plus all sales tax savings associated with the materials.
4. Subcontractors will be responsible for all matters relating to the receipt of materials purchased by the Owner including verifying correct quantities, inspection and acceptance of the goods at the time of delivery. The Subcontractor will forward the invoice to the Owner through the Contractor for payment.
5. Title to the Owner purchased materials will vest in the Owner at the time the materials are delivered to the Owner owned construction site (F.O.B. job site).
6. Owner is billed directly by the selling vendor for purchases of building materials.
7. Payment for the building materials is made directly to the selling vendor by the Owner.

Mr. Edward A. Upthegrove
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8. The Owner will bear the costs of all Payment and Performance Bonds and Owner's Insurance including Builder's Risk Insurance as a reimbursable expense to the Contractor. The Owner is an additional named insured on the Contractor's Builder's Risk Insurance and, in the event of damage or destruction to Owner purchased materials, the Owner will receive all proceeds derived from all claims against insurers or others to pay for repair or reconstruction as a result of damage or destruction.

If the above provisions are met, the purchases of materials, supplies, equipment, and other materials from third party suppliers by the Owner are exempt from tax, provided the Owner supplies the vendor with its certificate of exemption at the time of purchase.

This tax exemption does not apply to equipment rentals to Contractor or subcontractors that provide construction services for the Project, even though the economic burden of the tax, by contract or otherwise, may ultimately be borne by Owner.

This response constitutes a Technical Assistance Advise ment 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 and your request are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of Section 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect the confidentiality of such information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or the response.

Sincerely,

Aleda J. Marshall

Aleda J. Marshall
Tax Law Specialist

Control #24912

1 to supervision by the department; providing
2 effective dates.

3
4 Be It Enacted by the Legislature of the State of Florida:

5
6 Section 1. Paragraph (c) of subsection (10) of section
7 287.055, Florida Statutes, 1996 Supplement, is amended to
8 read:

9 287.055 Acquisition of professional architectural,
10 engineering, landscape architectural, or surveying and mapping
11 services; definitions; procedures; contingent fees prohibited;
12 penalties.--

13 (10) APPLICABILITY TO DESIGN-BUILD CONTRACTS.--

14 (c) Except as otherwise provided in s. 240.209(3) or
15 s. 337.11(7), the Department of Management Services shall
16 ~~adopt rules for the award of design-build contracts to be~~
17 ~~followed by state agencies. Each other agency must adopt~~
18 ~~rules or ordinances for the award of design-build contracts.~~
19 ~~For Municipalities, political subdivisions, school districts,~~
20 ~~and school boards shall award design-build contracts by the~~
21 ~~use of a competitive proposal selection process as described~~
22 ~~in this subsection, or by the use of a qualifications-based~~
23 ~~selection process pursuant to subsections (3), (4), and (5)~~
24 ~~for entering into a contract whereby the selected firm will~~
25 ~~subsequently establish a guaranteed maximum price and~~
26 ~~guaranteed completion date. If the procuring agency elects~~
27 ~~the option of qualifications-based selection, during the~~
28 ~~selection of the design-build firm the procuring agency shall~~
29 ~~employ or retain a licensed design professional appropriate to~~
30 ~~the project to serve as the agency's representative.~~
31 Procedures for the use of a competitive proposal selection

4
CODING: Words ~~stricken~~ are deletions; words underlined are additions.

VII DEPARTMENT OF REVENUE written opinion:

- A number of the community colleges have avoided payment of State of Florida sales tax on building materials purchased by construction contractors/ subcontractors by entering into sales tax agreement(s) with these contractors, and issuing college purchase orders directly to building material suppliers.
 - Attached is a copy of an April 25, 1996 written opinion "Technical Assistance Advisement" 96(a)-027" of the Department of Revenue on sales tax exempt purchases of building materials.
 - This advisement documents approval to avoid paying this tax but also documents eight (8) provisions (see page #7 & 8) the owner must comply with to maintain this sales tax exemption for said material purchases.
 - College purchasing procedures at each college potentially need to be amended to be in compliance with the technical advisement #96(a)-027.
-

Special Condition 26.00

MATERIAL SUPPLIES AND EQUIPMENT - OWNER'S SALES TAX EXEMPTIONS

Florida State College at Jacksonville is a political subdivision of the State of Florida and is a Tax Exempt Institution. As such, it is exempt from the payment of Sales and Use Tax on purchases of tangible property, materials, etc., necessary for the performance of Work under construction contracts, provided the College determines it is to its best interest to do so and provided the purchase of such properties, materials, etc, are handled in the manner hereinafter described.

If the Owner exercises his right to purchase directly various construction materials, supplies and equipment that may be a part of this contract, then the Contractor will coordinate Direct Purchasing for the Owner. The Owner will, via his purchase orders, purchase the materials, and each Subcontractor shall assist the Owner and Contractor in the preparation of purchase orders.

The contract/subcontract amount shall be reduced by the net, undiscounted amount of the purchase orders, plus all sales taxes. Issuance of the purchase orders by the Owner shall not relieve the Contractor/Subcontractor of any of his responsibilities regarding material purchases, or installation, with the exception of the payments for the materials so purchased. Contractor shall remain fully responsible for coordination, correct quantities ordered, submittal, protection, storage, scheduling, shipping, security, expediting, receiving, installation, cleaning and all applicable warranties.

The material supplier may be required to provide a supply bond in the amount of 100% of the purchase order price. The bond shall be from a qualified surety company authorized to do business in the State of Florida and acceptable to the Owner and the Contractor. If the supply bond is required, the cost of the bond will be added to the amount of the purchase order. The premium cost for this supply bond should not be included in the bid price. Verifying that a designated material supplier can furnish a supply bond (if required) will be the responsibility of the Contractor.

GENERAL DESCRIPTION AND PROVISIONS

1. Summary: In connection with this subcontract, Florida State College at Jacksonville reserves the option to enter into an agreement with the contractor to purchase all, or a portion of the tangible personal property necessary for the performance of the Contract, and thereby to save the amount of the sales tax thereon by virtue of the College's status as a Tax Exempt Institution.
2. Base Bid: The Base Bid (and all Alternate Bids) submitted on the bid form WILL INCLUDE the COST of all required taxes, including sales and use tax.
3. Bids: The Contractor shall submit his bid for Base Bid and bids for each Alternate with the inclusion of all required taxes including sales and use tax, the same as if tax were to be paid in the normal manner. The sales and use tax savings will be affected during the performance of the construction contract.

4. Administrative Costs: Any and all administrative costs incurred by the Contractor's administering the purchase in the name of the Owner shall be considered to be included in the Base bid for the Work. No addition shall be added to the contract amount because of the service provided by Contractor in the purchase of property, materials, etc., in the name of the Owner.

5. Administration: The administration of the sales and use tax savings will be in accordance with the tax agreement Attachment "A" and forms bound herein and the procedure will be administered through the Contractor by the Purchasing Department, Florida State College at Jacksonville. Under the agreement, the Contractor will be responsible to submit to the Owner duly authorized requisitions from which the Owner will purchase necessary construction material for this project. The owner will issue and approve said Purchase Orders and render payment directly to vendors and materials suppliers, on behalf of the contractor.

The Contract will be reduced by the sum of all direct material purchase orders "Including" sales and use taxes. The Owner will prepare all direct purchase orders as outlined in the enclosed instructions.

The arrangements for such purchases in the name of the Owner shall be made upon request by the Contractor submitting said requisition and shall be under a procedure generally as described herein. The amount of any sales or use taxes not assessed against or collected in connection with any purchases of tangible personal property made in the name of the Owner under the above referenced arrangements shall be applied to reduce the compensation to be paid the contractor under the contract.

6. Responsibility: The Contractor, notwithstanding this special purchase arrangement, shall select, describe, submit requisitions to the Owner to obtain approvals, submit samples, coordinate, process, prepare shop drawings pursue, receive, inspect, store, protect, insure, guarantee and otherwise be responsible for all materials, the same as would have been the case if the tax savings procedure were not implemented. The Owner is responsible for payment only.

7. Form of Agreement, Invoice, etc: Samples of the proposed forms of Agreement, Invoice Summary, and Purchase Order are bound herein.

DIRECT PURCHASE MATERIALS INSTRUCTION

The Contractor will within five (5) days of receipt of Notice of Award submit to the Owner three (3) executed original tax agreements. One executed agreement will be returned to the contractor for their record.

The Contractor will within fifteen (15) days of notification of selection submit to the Owner a requisition list of Owner Direct Purchase Material for the Owner to consider. The list will include bid package number, vendor name, address, phone number and contact, material description and quantity, material amount, freight and delivery charges and sales tax amount. Requisition list must include only items of Owner Direct Purchase greater than \$3000.00 in value.

Upon approval, order all of the requisition list of direct purchase materials, on a formal written numbered purchase order will be issued by Florida State College at Jacksonville. Contractor to include in the faxed requisition a list of names of employees of the contractor/subcontractors authorized to purchase and receive deliveries from the suppliers. Contractor to forward with the

list a sample signature of said employees. Florida State College at Jacksonville will prepare the purchase order and distribute the original and appropriate number of copies (see distribution below).

Each purchase order is numbered for accountability.

Upon issuance of Owner Direct Purchase Order to a vendor, the Owner will deduct from Contractors contract the value of the Purchase Order plus taxes saved.

The Direct Purchasing Procedure will not be an acceptable excuse for delay to the Construction Schedule.

DISTRIBUTION: Original - Subcontractor, One Photo Copy - Contractor, Distribute rest of Purchase Order as normal.

PURCHASE REQUISITION

PURCHASE REQUISITION NUMBER: Enter the Bid Package number and Contract number you have received or will soon receive from Florida State College at Jacksonville authorizing Work to be done on this project.

DATE: Enter date purchase requisition is prepared.

VENDOR: Enter name, complete mailing address, contact name, telephone number and fax number of vendor.

PROJECT NAME:

SHIP TO: Site

INVOICE TO: Attn: Director of Accounts Payable
Florida State College at Jacksonville
501 West State Street
Jacksonville FL 32202

COMPLETE BODY OF PURCHASE REQUISITION: Item number; quantity; description of Item(s), name, product number, etc.; unit price; extended total(s); value of sales tax; freight and delivery. (See Attachment "B")

AUTHORIZED SIGNATURE; This is the same signature that is on the Tax Agreement signed in Florida State College at Jacksonville's Purchasing Department.

Contractor can fax an original copy of purchase requisition to the College by faxing to 904-632-3087, attention Purchasing Manager and calling 904-632-3084 to confirm fax is legible and received.

DISTRIBUTION: Original- Florida State College at Jacksonville, Copy 1- Contractor, Copy 2 & 3- Purchasing Department. One Photo copy- Contractor. Submit original and all copies to College for distribution. Duly authorized purchase requisition must be received **BEFORE** purchase order can be processed.

INVOICE SUMMARY

- Invoice Summary No.: Consecutively numbered beginning with 1, 2, 3, etc.
- Purchase Order No.: Indicate numbered purchase order number. Also this number must appear on all invoices for each vendor. All original invoices must go to the Florida State College at Jacksonville. Only one purchase order number per invoice.
- PROJECT NAME AND NO.: Enter project name and your purchase order number you have received from Florida State College at Jacksonville.
- COLUMN 1: Enter only 1 vendor name per invoice summary.
- COLUMN 2: Enter up to 11 invoices per invoice summary. All invoices on invoice summary must have same purchase order number.
- COLUMN 3: Enter amount of invoice without tax and before discounts. All invoices must itemize materials, sales tax and freight and delivery separately.
- COLUMN 4: Enter case discounts. Florida State College at Jacksonville is required to take discounts on the amount of the MERCHANDISE only, even if the time has lapsed for us to be eligible for the discount. Some vendors may wish to collect an unearned discount, in that case we will need another invoice summary to be prepared.
- COLUMN 5: Enter amount to be paid to vendor.
- COLUMN 6: Enter actual or 6.5% tax on amount of merchandise before discounts.

AUTHORIZATION: In addition to the invoice summary, each original invoice must contain an authorized signature indicating approval and amount to be paid with the date of authorization.

DELIVERY TICKETS: All invoices must be accompanied by SIGNED (by authorized employees and Owner's/Employee/Representative) delivery ticket and/or packing slip. Delivery ticket and or packing slip must correspond or cross reference with invoice.

COPIES NEEDED: Please submit ONE ORIGINAL SIGNED invoice summary with the authorized original invoice, delivery tickets and three copies of all documents. Invoices are to be submitted weekly.

TAX AGREEMENT

Agreement BETWEEN _____, (Herein call the "Contractor" and Florida State College at Jacksonville an educational institution herein called "Owner" for Florida State College at Jacksonville Project No. ____, titled: _____.

RECITALS

1. Contractor for Florida State College at Jacksonville entered a contract dated _____, for the performance of the Work described therein and special conditions #26.00 attached, a copy of said contract is attached hereto as Exhibit 1 (herein called the "Contract")
2. Contractor and Florida State College at Jacksonville desire to enter into a arrangement whereby certain purchases under the Contract can be made through Florida State College at Jacksonville as a means of taking advantage of Florida State College at Jacksonville's status of being exempt from sales and use tax.

AGREEMENT

1. Florida State College at Jacksonville does hereby request Contractor to requisition Florida State College at Jacksonville to directly purchase materials greater than \$3000.00 in value for and in the name of Florida State College at Jacksonville, materials, supplies and other items which Contract requires for performance of this specific contract. The purchase of any materials, supplies or other items which are not required for the performance of the Contract are expressly made outside the authority granted hereunder.
2. Florida State College at Jacksonville will be liable for the payment of all purchases made hereunder.
3. Each purchase order is numbered for accountability. Contractor will fax to the Owner purchase requisitions for preparation and execution of the purchase orders. Vendors will render statements for materials purchased to Florida State College at Jacksonville. Florida State College at Jacksonville will provide copies of original invoices to the Contractor. After reviewing the invoices and approving the invoices, Contractor will forward these invoices with proper back-up to Florida State College at Jacksonville for payment.
4. The Contract provides that Contractor will perform the Work under the Contract sum of . Said amount due Contractor under the Contract shall be reduced by the sum of all amounts paid by Florida State College at Jacksonville for materials, supplies or other items purchased hereunder and plus any savings of sales and use tax on the purchase of such items.
5. Contractor shall maintain separate accounting records for all transactions carried out under the authority granted to it as agent. Such records shall be open to Florida State

College at Jacksonville and the State of Florida's auditor general's office during normal business hours of Contractor.

6. The authority granted to Contractor hereunder may be revoked by Florida State College at Jacksonville at any time upon written notice delivered to Contractor at its office located at _____ during normal business hours.

Cost of administration incurred by contractor in conjunction with this tax agreement shall be included as part of the Base Bid and will not be included as a separate cost to Owner.

(Contractor)

Florida State College

at Jacksonville

by: _____

by: _____

Title: _____

Title: _____

III. Contract Negotiation Guidelines:

- Organize a negotiation committee.
- Schedule a pre-negotiation committee meeting and establish who will be the lead negotiator and define your College's negotiation objectives.
- Contact the top-ranked proposer's reference purchasing director and request public record access to their contract(s) with the proposer.
- Use of the DMS or State University systems construction management A/E fee curve scale/publications.
- Schedule the negotiation and request the proposer to either bring to the negotiation their officer who has the authority to negotiate and enter into an agreement or have phone access to them during the negotiations.
- Request for both A/E and construction firms to define in writing what their proposed lump-sum compensation is based upon (i.e. 200 hours of project manager, 400 hours of a licensed architect, etc.) and compare those proposed rates/% of construction cost to both the DMS/SUS fee curves, their reference clients agreements and contracts you may already have in place (annual A/E contracts, delivery order contracts, etc.)
- At the end of the negotiation meeting type up immediately a summary of what both parties agreed to that day and have both parties sign it at that time to base the final contract document upon.
- Already strive to have your College develop the contract document with your legal staff as contractors contracts were developed by their attorney and are designed to protect the contractor.
- Always read the entire contract to confirm proposed language applies to your project and cross out/ redline language that is not in your Colleges best interest or you are not allowed by statute/rule to agree to such as:
 - A. Continuation of contract beyond any fiscal year end (i.e. June 30th) is subject to continued need and receipt of continue adequate State of Florida appropriations.
 - B. COPP can not purchase insurance for or hold third parties harmless (see FS 768.28 and State Attorney General written opinions).
 - C. Truth in negotiation and contingent fee contract requirement and
 - D. State and Federal public entity crime affirmations and verifications.

Florida State College at Jacksonville provides equal access to education, employment, programs, services and activities and does not discriminate on the basis of age, race, color, national origin, sex, disability, religious belief, or marital status. The College Equity Officer has been designated to handle inquiries regarding the non-discrimination policies and may be contacted at equityofficer@fscj.edu.

Florida State College at Jacksonville is a member of the Florida College System and is not affiliated with any other public or private university or college in Florida or elsewhere.

Florida State College at Jacksonville is accredited by the Southern Association of Colleges and Schools Commission on Colleges to award the baccalaureate and associate degree. Contact the Commission on Colleges at 1866 Southern Lane, Decatur, Georgia 30033-4097, or call (404) 679-4500 for questions about the accreditation of Florida State College at Jacksonville. The Commission is to be contacted only if there is evidence that appears to support an institution's significant non-compliance with a requirement or standard.