Contract A

Question 1: Does Contract A meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.?

Answer: Yes, as long as the terms are clear that the purchaser must assume title to and risk of loss of the separately described and itemized materials and supplies as they are delivered, rather than accepting title only to the completed work. All materials and supplies that will be incorporated into the work must be itemized and priced before work begins.[1]

Question 2: Does the conclusion for Question #1 change if the installation supplies that are incidental to the installation process are not separately itemized and priced in the Master Supply Agreement or Customer Pricelist?

Answer: If the installation supplies that are incidental to the installation process are not separately described, itemized, and priced in the Master Supply Agreement, Contract A would not meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.

Question 3: Is Section 2.8 Title to the Goods of the Master Supply Agreement, described above, sufficient to meet the title and risk of loss requirement of Rule 12A-1.051(3)(d)?

Answer: Yes, as long as the terms are clear that the purchaser must assume title to and risk of loss of the separately described and itemized materials and supplies as they are delivered, rather than accepting title only to the completed work.

Contract B

Question 1: Does Contract B meet the requirements set forth for a retail sale plus installation contract in Rule 12A- 1.051(3)(d), F.A.C.?

Answer: No. The terms are not clear that the purchaser must assume title to and risk of loss of the separately described and itemized materials and supplies as they are delivered, rather than accepting title only to the completed work.

Question 2: Does the conclusion for Question #1 change if the installation supplies that are incidental to the installation process and are not separately itemized and priced in the Master Supply Agreement or Customer Pricelist?

[1] It is noted that the contractual provisions and the facts presented appear contradictory as to whether incidental items that are incorporated into the work are separately described, itemized, and priced on the Customer Price List and Purchase Order. If incidental supplies that are incorporated into the work are **not** separately itemized on the Customer Pricelist and Purchase Order, the answer to this question is No.

Answer: If the installation supplies that are incidental to the installation process are not separately described, itemized, and priced in the Master Supply Agreement, Contract B would not meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.

Question 3: Is Section 6 Works of Others of the Contract B Master Supply Agreement, described above, sufficient to meet the title and risk of loss requirement of Rule 12A-1.051(3)(d), F.A.C.?

Answer: No. The terms do not make it clear that the purchaser must assume title to and risk of loss of the materials and supplies as they are delivered, rather than accepting title only to the completed work.

Contract C

Question 1: Does Contract C meet the requirements set forth for a retail sale plus installation contract in Rule 12A- 1.051(3)(d), F.A.C.?

Answer: No.

December 4, 2024

[redacted]

Via Email: [redacted]

Subject: Technical Assistance Advisement 24A-018
Sales and Use Tax
STATUTE CITE(S): Sections 212.02, 212.05, and 212.06, Florida Statutes (F.S.)
RULE CITE: Rule 12A-1.051, Florida Administrative Code (F.A.C.)
[redacted]
FEI#: [redacted]
BP#: [redacted]
[redacted]
FEI#: [redacted]
BP#: [redacted]
[redacted]
FEI#: [redacted]

BP#: [redacted][2]
[redacted]
FEI#: [redacted]
BP#: [redacted]
[redacted]
FEI#: [redacted]
BP#: [redacted]
Collectively Referred to as "Taxpayer"

[redacted]:

This is in response to your letter dated, [redacted], requesting this Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to Section(s.) 213.22, F.S., and Rule Chapter 12-11 F.A.C, Florida Administrative Code, regarding the matter discussed below. Your request has been carefully examined, and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

Requested Advisements

Contract A

1. Does Contract A meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.?

2. Does the conclusion for Question #1 change if the installation supplies that are incidental to the installation process and are not separately itemized and priced in the MSA or Customer Pricelist?

3. Is Section 2.8 Title to the Goods of the MSA, described above, sufficient to meet the title and risk of loss requirement of Rule 12A-1.051(3)(d), F.A.C.?

Contract B

1. Does Contract B meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.?

2. Does the conclusion for Question #1 change if the installation supplies that are incidental to the installation process and are not separately itemized and priced in the MSA or Customer Pricelist?

3. Is Section 6 Works of Others of the Contract B MSA, described above, sufficient to meet the title and risk of loss requirement of Rule 12A-1.051(3)(d)?

[2] [redacted]

Contract C

1. Does Contract C meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.?

Facts

Taxpayer is in the business of [redacted]. Taxpayer enters into contracts with [redacted]. Below, are the facts for each type of contract that Taxpayer enters into for the [redacted].

Contract A

Taxpayer enters into a Master Supply Agreement ("MSA") with the Customer for the [redacted]. The MSA outlines the terms and conditions of the agreement between Taxpayer and Customer. The MSA provides that Taxpayer will provide goods as identified in a Purchase Order issued by the Customer.

Regarding sales and use tax, Section 2.2 Purchasing of the MSA states:

> Sales and use taxes will be paid in accordance with Purchase Order; provided, however, where Purchase Order is silent as to sales and use tax, or where Purchase Order prices do not include sales and use tax, (i) [Customer] shall pay applicable sales and use taxes, and (ii) the sales and use taxes will be determined by the state and locality of the Work.

Additionally, regarding title and risk of loss of the goods purchased, Section 2.8 Title to the Goods of the MSA states:

> Title to and risk of loss of the Goods shall pass to [Customer] upon [Taxpayer's] completion of its performance with respect to the physical delivery to the Work Site of such Goods and upon [Customer's] acceptance of such Goods.

Taxpayer bids on jobs for the [redacted]. During the bidding process, Taxpayer provides a detailed pricelist ("Customer Pricelist") which serves as the agreed upon pricing agreement if the Customer accepts the bid. The Customer Pricelist separately states the unit cost of each [redacted].

Next, Customer submits a Purchase Order to Taxpayer for the materials and labor for each job. Each Purchase Order includes itemize pricing for the materials and installation cost. The Customer considers this contract as a retail sale plus installation contract so sales tax on the material cost is included on the Purchase Order. The materials for the job are separately identified on the Purchase

Order and include a price, quantity, and description that tie back to the Customer Pricelist. The labor charges are also shown as a separate line item on the Purchase Order and tie back to the Customer Pricelist.

Installation supplies, such as [redacted], however, are not separately itemized on the Customer Pricelist or Purchase Order. The incidental supplies are immaterial in cost compared to the cost of labor for the [redacted]. Taxpayer pays applicable sales and use tax on the purchase of incidental supplies.

Taxpayer fulfills the [redacted]. Once the job is completed, Taxpayer submits an invoice to the Customer that is based on the Purchase Order and separately itemizes each item of material, installation, and sales tax on the material charge.

Contract B

Taxpayer enters into a MSA with its Customer for the [redacted]. The MSA outlines the terms and conditions of the agreement between Taxpayer and Customer.

The pertinent clauses from Contract B MSA regarding sales and use tax are as follows:

> Section 2.1 Performance of Work
>
> [Taxpayer] shall be solely responsible to pay for all labor, salaries, materials, tools, equipment, supplies, state, federal, local and all other applicable sales, use, income or other taxes of any type or nature.
>
> Section 2.2. Performance as to Goods
>
> [Customer] shall be responsible for any state sales taxes. [Taxpayer] shall pay all other state, federal, and local taxes and delivery charges in connection with all purchase orders.

Further, regarding title and risk of loss, under Section 6 Works of Others of the Contract B MSA states:

> [Taxpayer] shall be responsible for protecting its Work including the Goods and the work of its Subsubcontractors, and any other subcontractors of [Customer] that are impacted by the Work, until final acceptance by [Customer], at which point title to the Work shall vest in [Customer].

The bidding process and purchase order process for Contract B are similar to Contract A. Installation supplies, such as [redacted], which are incidental to the [redacted] are not separately itemized on the Customer Price List or Purchase Order. These incidental supplies are immaterial to the cost of labor for installation. The installation process and incidental supplies

used in Contract B are generally the same as the process in Contract A. Taxpayer pays applicable sales and use tax on the purchase of incidental supplies.

Once the job is completed, Taxpayer submits an invoice to Customer that is based on the Purchase Order and separately itemizes each item of material and installation. Payment for the goods and installation are made by the Customer after acceptance of the completed work.

Contract C

Taxpayer provides [redacted] and materials to the Customer. For Contract C, the MSA outlines the terms of the agreement for a lump-sum project . Work is awarded through MSA Addendums which include an agreed upon contract price for work to be completed by Taxpayer. Also, a Pricing Addendum to the MSA includes an itemized invoice forecasting the [redacted] and materials to be used by Taxpayer for a project. The Pricing Addendum separately states [redacted], quantity, and includes a description of the [redacted] to be incorporated in the project. The materials and installation identified on the Pricing Addendum do not include individual prices, however, the cost of the materials and installation tie back to the MSA Addendum. The MSA Addendum includes an itemized price for each building, listing as a lump amount the materials and labor costs. The total project cost is also listed at the bottom of the MSA Addendum. Unlike Contract A and B, itemized purchase orders are not sent before the work begins. Rather, a Progress Bill is sent monthly by Taxpayer listing the lump sum payment due for labor and materials to the Customer. The price for labor and materials are not separately stated on the Progress Bill. Once the job is completed, the Progress Bill submitted to the Customer becomes due. Payment for the goods and installation are made by Customer after acceptance of the completed work.

The pertinent clauses from the Contract C MSA regarding sales and use tax are as follows:

> Article II – Price (g)
>
> . . . the [Taxpayer bill] shall not become due and payable until the following express conditions precedent have been met: (1) the completion and reasonable acceptance of the Work by [Customer] and the Architect; (2) provision by the [Taxpayer] of evidence satisfactory to [Customer] that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, materials, equipment, taxes or other items performed, furnished, or incurred for or in connection with the portion of work compiled; and (3) execution and delivery by the [Taxpayer], in a form satisfactory to [Customer] of a General Release in favor of [Customer], waivers from vendors to [Taxpayer] the Surety and the Owner, along with all applicable close out documents, warranties, owner's manuals, etc., which are called for in the contract documents.

Further, regarding title and risk of loss, Article XII (a) Liability for Damage and Personal Injury of the Contract C MSA states:

> The [Customer] is not responsible for any loss or damage to the Work to be performed and furnished under this Agreement, from any cause, until after the final acceptance of the Work by [Customer] and the Architect. [Customer] is not responsible for loss of or damage to materials, tools, equipment, appliance, or other personal property owned, rented or used by the [Taxpayer] or anyone employed by it in the performance of the Work from any cause.

Upon the acceptance of the completed work by the Customer and Architect, the risk of loss for Contract C passes from the Taxpayer to the Customer. Payment for the goods and installation are made by the Customer after acceptance of the completed work.

Law and Discussion

Section 212.06(1)(a), F.S., provides that "tax at the rate of 6 percent of the retail sales price as of the moment of sale; 6 percent of the cost price as of the moment of purchase, or 6 percent of the cost price as of the moment of commingling with the general mass of property in this state, as the case may be, shall be collectible from all dealers on the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of tangible personal property or services taxable under this chapter."

Section 212.06(14)(a), F.S., provides that "real property" means the land and improvements thereto and fixtures[3] and is synonymous with the terms "realty" and "real estate." A real property contract is an agreement, oral or written, whether on a lump sum, time and materials, cost plus, guaranteed price, or any other basis, to furnish and install tangible personal property that becomes a part of realty or real estate.

Section 212.02(10)(h), F.S., defines the term "real property" as the surface land, improvements thereto, and fixtures, and is synonymous with realty and real estate.

Rule 12A-1.051(3)(d), F.A.C., provides that for contracts to be "retail sale plus installation contracts" or sometimes referred to as "itemized contracts," the "contracts for improvements to real property must have all the materials that will be incorporated into the work itemized and priced in the contract before work begins. If a contract itemizes some materials but does not itemize other materials that will be incorporated into the work, the contract is not included in this category. Because the sale of the materials is a separable transaction from the installation, the purchaser must assume title to and risk of loss of the materials and supplies as they are delivered, rather than accepting title only to the completed work." (emphasis supplied)

Rule 12A-1.051(5), F.A.C., provides that contractors who perform "itemized contracts" must charge their customers tax on the price paid for tangible personal property, but not on the charges for installation labor.

[3] Section 212.06(14)(b), F.S., defines the term "fixture" as items that are an accessory to a building, other structure, or land and that do not lose their identity as accessories when installed but that do become permanently attached to realty.

Rule 12A-1.051(3)(d), F.A.C. allows for the sales tax on specific articles of tangible personal property to be charged to real property owners when the contract is for "specifically described and itemized materials and supplies at an agreed price, plus an agreement to repair, alter construct or improve real property at an agreed price or on the basis of time spent." The usage of any additional materials by the contractor that are not specifically itemized, described and priced in the contract makes the contract either a lump sum, cost plus or fixed fee, or upset or guaranteed price contract as provided in paragraphs (2)(a), (2)(b), or (2)(c) of the rule, thus requiring the contractor to accrue and remit the use tax. Furthermore, because the sale of the materials is a separable transaction from the installation, the purchaser must assume title to and risk of loss of the materials and supplies as they are delivered, rather than accepting title only to the completed work

Also relevant to the issue in the interpretation of Rule 12A- 1.051(3)(d), F.A.C., is the matter of Sears, Roebuck & Company v. Florida Department of Revenue, Case No. 92-1080 (Fla. 2nd Circuit Court, 1994). The court in Sears, supra, interpreted paragraph (3)(d) of Rule 12A-1.051, F.A.C., relative to contracts wherein Sears agreed to furnish and install appliances which became fixtures of real property, such as hot water heaters and built-in ovens, ranges, and dishwashers. A receipt was issued to the customer up front, which listed the appliance by name, and included a cost for the appliance and a separate cost for the installation. Sears would then engage an independent contractor to perform the installation. The independent installer would always supply some additional items of tangible personal property during the installation. Such items were never listed on the sales receipt, since Sears had no knowledge of what specific materials would be used by the installer to complete the installation. The items were billed later at a flat sum by the installer. Sears contended that it was not performing class (2)(d) contracts since its receipt did not specifically itemize and describe the unknown materials furnished by the independent installer. Given these facts, the court agreed with Sears and ruled it had not performed (2)(d) contracts. Accordingly, Sears was correct in not charging tax to the customer on the appliances and the installation of same. The court also ruled that Sears was correct in having paid tax on the cost price of the appliance on its purchase from the manufacturer. The tests coming out of the Sears decision to be applied in determining whether a given contract constitutes a class (3)(d) contract are: (i) the contract must itemize each and every separate material and the price per each furnished to perform the work covered by the contract; and (ii) the contract must show such itemization in advance of the work being performed.

The issuance of itemized or detailed customer pricelists or invoices does not alone constitute a (3)(d) contract. As established by the Sears decision, **all** materials used in performing the contract must be specifically itemized by type and price by a written agreement entered into prior to work being performed, and because the sale of the materials is a separable transaction from the installation, the purchaser must assume title to and risk of loss of the materials and supplies as they are delivered, rather than accepting title only to the completed work. Such contract method is usually impossible because the contractor cannot tell what materials will be needed until he commences the work.

Conclusion

Contract A

Question 1: Does Contract A meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.?

Answer: Yes, as long as the terms are clear that the purchaser must assume title to and risk of loss of the separately described and itemized materials and supplies as they are delivered, rather than accepting title only to the completed work. All materials and supplies that will be incorporated into the work must be itemized and priced before work begins.[4]

Question 2: Does the conclusion for Question #1 change if the installation supplies that are incidental to the installation process are not separately itemized and priced in the Master Supply Agreement or Customer Pricelist?

Answer: If the installation supplies that are incidental to the installation process are not separately described, itemized, and priced in the Master Supply Agreement, Contract B would not meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.

Question 3: Is Section 2.8 Title to the Goods of the Master Supply Agreement, described above, sufficient to meet the title and risk of loss requirement of Rule 12A-1.051(3)(d)?

Answer: Yes, as long as the terms are clear that the purchaser must assume title to and risk of loss of the separately described and itemized materials and supplies as they are delivered, rather than accepting title only to the completed work.

Contract B

Question 1: Does Contract B meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.?

Answer: No. The terms are not clear that the purchaser must assume title to and risk of loss of the separately described and itemized materials and supplies as they are delivered, rather than accepting title only to the completed work.

Question 2: Does the conclusion for Question #1 change if the installation supplies that are incidental to the installation process and are not separately itemized and priced in the Master Supply Agreement or Customer Pricelist?

[4] It is noted that the contractual provisions and the facts presented appear contradictory as to whether incidental items that are incorporated into the work are separately described, itemized, and priced on the Customer Price List and Purchase Order. If incidental supplies that are incorporated into the work are **not** separately itemized on the Customer Pricelist and Purchase Order, the answer to this question is No.

Answer: If the installation supplies that are incidental to the installation process are not separately described, itemized, and priced in the Master Supply Agreement, Contract B would not meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.

Question 3: Is Section 6 Works of Others of the Contract B Master Supply Agreement, described above, sufficient to meet the title and risk of loss requirement of Rule 12A-1.051(3)(d), F.A.C.?

Answer: No. The terms do not make it clear that the purchaser must assume title to and risk of loss of the materials and supplies as they are delivered, rather than accepting title only to the completed work.

Contract C

Question1: Does Contract C meet the requirements set forth for a retail sale plus installation contract in Rule 12A-1.051(3)(d), F.A.C.?

Answer: No.

This response constitutes a TAA under s. 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 s. 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for TAA, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the Taxpayer. Your response should be received by the Department within ten (10) days of the date of this letter.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850)717-6363.

Sincerely,

Leigh L. Ceci

Leigh L. Ceci, MAcc
Tax Law Specialist
Office of Technical Assistance

CC: [redacted]

Record ID: 7001201241

TADR Satisfaction Survey

The Florida Department of Revenue invites you to complete the online TADR Satisfaction Survey to help us identify ways to improve our service to taxpayers. The survey is an opportunity to provide feedback on your recent experience with the Department's office of Technical Assistance and Dispute Resolution (TADR). To access the survey, place the following address in your browser's access bar:

https://tadr.questionpro.com

When you open the survey, you'll be asked to enter the following information. This information will enable you to complete and submit the survey.

Notification number: 7001201241

Respondent code: 44

Tax type: Sales and Use Tax

Correspondence type: Technical Assistance

If you need technical assistance accessing the survey, please email Douglas Charity at douglas.charity@floridarevenue.com.

Thank you.