

STORAGE NAME: h0639.fpr.doc

DATE: February 20, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
FISCAL POLICY AND RESOURCES
ANALYSIS**

BILL #: HB 639

RELATING TO: Tax on Sales Use and Other Transactions

SPONSOR(S): Representative(s) Brown

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) FISCAL POLICY AND RESOURCES
 - (2) STATE ADMINISTRATION
 - (3) FISCAL RESPONSIBILITY COUNCIL
 - (4)
 - (5)
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I. SUMMARY:

Current law provides for a 6 percent tax on the sale and use of tangible personal property. Sales of tangible personal property 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 seller by the governmental entity are exempt from sales tax. This exemption does not apply if a governmental employee is involved in the transaction; the governmental entity must be solely responsible for the purchase of the property. Accordingly, the exemption does not include sales of tangible personal property made to a contractor employed either directly or as an agent of any governmental entity or political subdivision, even when the tangible personal property goes into or becomes a part of public works owned by such government or political subdivision.

HB 1151 provides a sales tax exemption for tangible personal property sold to a contractor employed directly by or as an agent of a governmental entity, when the purchased property will become part of a public facility owned by such governmental entity.

The bill requires the governmental entity, the contractor, and the seller to meet certain conditions to qualify for the exemption.

The Revenue Estimating Conference has estimated the fiscal impact of this bill at -\$91.6 million, which includes an impact of -\$76.3 million to state revenues and -\$15.3 million to local revenues.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Chapter 212, F.S.

Chapter 212, F.S., specifies the taxes imposed on sale, use, and other transactions. Section 212.06, F.S., sets the tax rate at 6 percent of the retail sales price at the moment of sale, 6 percent of the cost price at the moment of purchase, or 6 percent of the cost price at the moment of consumption or the storage for use of consumption, or distribution of tangible personal property or services taxable under Chapter 212, F.S.¹

Section 212.08(6), F.S. provides for exemptions for 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 seller by the governmental entity. The exemption does not apply if a governmental employee is involved in the transaction; the governmental entity must be solely responsible for the purchase of the sales. Accordingly, the exemption does not include sales of tangible personal property made to a contractor employed either directly or as an agent of any governmental entity or political subdivision, even when the tangible personal property goes into or becomes a part of public works owned by such government or political subdivision. When determining whether or not a particular transaction is exempt, the determination must be based on the substance of the transaction and not the form in which it occurred. The Department of Revenue (DOR) must adopt rules that give special consideration to factors that govern the status of the tangible personal property.²

Florida Administrative Code

The DOR's rules regarding purchasing of tangible personal property for use in public works projects can be found in the Florida Administrative Code (the Code). The Code provides the definition of what is deemed a "public work." Public work contracts also include, but are not limited to, building, electrical, plumbing, heating, painting, decorating, ventilating, paperhanging, sheet metal, roofing, bridge, road, waterworks, landscape, pier, or billboard contracts.³

The Code clarifies when the sale of tangible personal property is tax exempt. Section 212.08(6), F.S., states that the tax exemption does not apply to a contractor, employed by a governmental

¹ See Section 212.06(1)(a), F.S.

² See Section 212.08(6), F.S.

³ See Section 12A-1.094, F.A.C.

entity, purchasing supplies for a public works project. The Code elaborates on this restriction. "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."⁴ Therefore, even if a contractor is going to use the particular supplies for a public works project, the contractor is still subject to taxation. However, if the contractor is purchasing the tangible personal property for resale to a government body, this purchase is tax exempt. This exemption for resale purposes is appropriate only "where the levy would otherwise fall on the government itself, or on an agency or instrumentality so closely connected with the government that the two cannot realistically be viewed as separate entities . . . [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."⁵

The Code clarifies the process that sellers, contractors, and governmental entities must undergo to qualify for making tax-exempt purchases. Any governmental entity desiring to qualify for tax exemption must file with the DOR a Sales and Use Tax Application for a *Consumer's Certificate of Exemption*⁶, and provide documentation sufficient to substantiate the entity's claim for exemption. Upon final approval, the DOR may issue the qualified governmental entity a Consumer's Certificate of Exemption. The DOR has the authority to review each certificate of exemption to ensure that the entity possessing the sales tax exemption certificate is engaging in activities that warrant its possession. During the review process an entity may be required to submit documentation and evidence of its organizational structure, federal tax status, program content, or any other materials deemed necessary by the DOR.

A resale certificate is required from every purchaser or contractor who purchases tangible personal property or service for resale to the governmental entity. If the purchaser does not acquire a resale certificate, the seller is required to collect and remit the tax to the DOR.⁷ The seller must receive, from the purchaser, a certificate signed by the seller stating that the property was purchased for resale purposes. The certificate must follow one of two forms: it may include the date, the name and address of the purchaser, the effective date of the resale certificate, and the number of the seller's *certificate of registration*;⁸ or, the certificate may be signed by an authorized representative of the governmental entity bearing the number of the entity's certificate of exemption, the effective date of the certificate of exemption, and the expiration date of the certificate. If the seller does not receive a certificate in one of these two forms, the sale is not tax exempt. Sellers are required to document exempt sales.⁹

C. EFFECT OF PROPOSED CHANGES:

HB 639 provides a sales tax exemption for tangible personal property sold to a contractor employed directly by or as an agent of a governmental entity, when the purchased property will become part of a public facility owned by such governmental entity. A governmental entity includes: the United State Government, a state, a county, a municipality, or a political subdivision of a state.

The sale of tangible personal property to the contractor is exempt only if the following conditions are met:

⁴ 12A-1.094(2), F.A.C.

⁵ 12A-1.094(3)(a)(b), F.A.C.

⁶ See Section 12A-1.038(4)(a), F.A.C.

⁷ See Section 12A-1.038(1), F.A.C.

⁸ Section 212.18(3)(a), F.S., states "every person desiring to engage in or conduct business in this state as a dealer . . . and every person who sells or receives anything of value by way of admissions, must file with the department an application for a certificate of registration for each place of business."

⁹ See Section 12A-1.001(9)(d), F.A.C.

- The governmental entity holds a current consumer's Certificate of Exemption from the DOR;
- The property purchased by the contractor, who is employed or an agent of a governmental entity, will be used in the construction of the public facility owned by such governmental entity;
- The governmental entity bears the economic burden of the cost of the property, either through direct reimbursement to the contractor under the contract, or inclusion of the cost in the contractor's bid price for the project; and
- The governmental entity or the contractor purchasing the property presents to the seller the following items: a copy of a current Florida consumer's Certificate of Exemption held by the governmental entity; a signed and dated statement, provided by a representative of the governmental entity, specifying the public works project for which the property will be used, and the names of the contractors who are permitted to claim tax-exempt status when purchasing property; and a signed and dated statement, provided by the contractor, verifying that the purchased property will go in its entirety to the specific public works project.

The required statements and certificates must contain a typed declaration stating: "Under penalties of perjury as provided in s. 92.525, Florida Statutes, I declare that I have read the forgoing statement and that the facts stated in it are true."

The seller only needs a single copy of the required statements and certificates for his or her records. The seller's records must also contain either a purchase order from the contractor specifically identifying the purchased property, or electronic or other records verifying that the property is charged to an account handling funds directly related to the particular public works project. It is the seller's responsibility to verify both that the contractor purchasing the property is listed on the statement given by the governmental entity, and that the governmental entity and the contractor reference the same public works project in their respective statements.

If the seller is subject to an audit by the DOR, the seller may submit his or her records documenting the tax-exempt sale. The seller is not allowed to submit his or her records under any proceedings dictated in Chapter 72, F.S., or Chapter 120, F.S.

A contractor must maintain records verifying that the purchased property is indeed used in the public work's project named on his or her statement to the seller. Any of the purchased property that is not used in the public works project must be taxed, unless the contractor transfers the unused property to the governmental entity, or returns the unused property to the seller. The contractor's records must document such transactions.

Any person who evades the tax, or fraudulently issues a written statement claiming exemption from the tax, is liable for the payment of the tax and subject to penalties provided in s. 212.085, F.S.

The act provides an effective date of January 1, 2003.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference has estimated the impact of this bill on state government at -\$76.3 million.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The Revenue Estimating Conference has estimated the impact of this bill on local governments at -\$15.3 million.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill falls under subsection (b) of section 18 of Article VII, Florida Constitution. Subsection (b) requires a two-thirds vote of the membership of each house of the Legislature in order to enact a general law reducing the authority that municipalities and counties had on February 1, 1989, to raise revenues in the aggregate. This bill affects the local option surtax as well as the state sales tax. As such, it reduces the revenue-raising authority of local government. Therefore, the measure requires a two-thirds vote of the membership of each house of the Legislature.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

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V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON FISCAL POLICY AND RESOURCES:

Prepared by:

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