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DATE: April 23, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
FISCAL POLICY AND RESOURCES
ANALYSIS**

BILL #: HB 1151

RELATING TO: Sales Tax/Tangible Personal Property

SPONSOR(S): Representative(s) Brown and others

TIED BILL(S):

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
 - (2) FISCAL POLICY AND RESOURCES
 - (3) FISCAL RESPONSIBILITY COUNCIL
 - (4)
 - (5)
-

I. SUMMARY:

Current law provides for a 6 percent tax on the sale and use of tangible personal property. There are a number of exemptions from this tax; for example, 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. 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 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.

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 before claiming tax-exempt status.

The Revenue Estimating Conference has estimated the fiscal impact of this bill at -\$91.6 million, which includes an impact of -\$76.1 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., also known as the "Florida Revenue Act of 1949," specifies the taxes imposed on sale¹, use², 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 property³ or services taxable under Chapter 212, F.S.⁴

Section 212.08, F.S., provides for particular exemptions from the taxes set forth in Chapter 212, F.S. The following are examples of some items exempt from this tax: food products for human consumption; any medical products or supplies or medicines dispensed according to an individual prescription; certain farm equipment; items bearing other excise taxes; particular items used for agricultural purposes; machinery and equipment used in production of electrical steam energy; machinery and equipment used under federal procurement contract; gas used for certain agricultural purposes; motion picture or video equipment; building materials used in the rehabilitation of real property located in an enterprise zone; machinery and equipment used in semiconductor, defense, or space technology production; materials for construction of single-family homes; building materials in redevelopment projects; and equipment used to deploy broadband technologies.⁵

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

¹ A "sale" includes any transfer of title or possession, exchange, barter, license, lease, or rental in any manner or by any means, of tangible personal property.

² The term "use" means the exercise of any right or power over tangible personal property pertaining to the owner, except it does not include the sale at retail of that property in the regular course of business. A "use tax" is the tax on the use, the consumption, the distribution, and the storage of tangible personal property.

³ "Tangible personal property" is "personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy . . . The term 'tangible property' does not include stocks, bonds, notes, insurance, or other obligations or securities."

⁴ See Section 212.06(1)(a), F.S.

⁵ See Section 212.08, F.S.

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.⁶

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 expands 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.⁷

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 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."⁸ 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."⁹

The Code clarifies the process that sellers, contractors, and governmental entities must undergo to execute tax-exempt transactions. 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*¹⁰, 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 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. If the certificate of exemption is reissued following the review, the certificate is valid for five consecutive years after the date of reissuance.¹¹

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.¹² Accordingly, the seller establishes whether or not a transaction is tax exempt. The seller must receive, from the purchaser, a certificate signed by the seller stating that the property was purchased for resale

⁶ See Section 212.08(6), F.S.

⁷ See Section 12A – 1.094, F.A.C.

⁸ 12A – 1.094(2), F.A.C.

⁹ 12A – 1.094(3)(a)(b), F.A.C.

¹⁰ See Section 12A – 1.038(7)(a), F.A.C.

¹¹ See Section 12A – 1.095(1)(a)(b)(c), F.A.C.

¹² See Section 12A – 1.038(3)(a), F.A.C.

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*; ¹³ 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. ¹⁴

C. EFFECT OF PROPOSED CHANGES:

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. 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:

- 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, ¹⁵ 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

¹³ 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."

¹⁴ See Section 12A – 1.001(9)(d), F.A.C.

¹⁵ Section 92.525, F.S., provides "when it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner: A written declaration means the following statement: 'Under penalties of perjury, I declare that I have read the forgoing [document] and that the facts stated are true.'"

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.

The seller is subject to an audit by the DOR and may submit his or her records documenting the tax-exempt sale if challenged by the DOR. The seller is not allowed to submit his or her records under any proceedings dictated in Chapter 72, F.S.,¹⁶ or Chapter 120, F.S.¹⁷

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.¹⁸

The act provides an effective date of January 1, 2002.

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 -\$76.1 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.

¹⁶ Chapter 72, F.S., outlines tax matters, the jurisdictions of circuit court in specific tax matters, the process of administrative hearings and appeals, the time for commencing actions, the parties involved; and required deposits.

¹⁷ Chapter 120, F.S., the Administrative Procedure Act.

¹⁸ Section 212.085, F.S., states that "such person, in addition to be liable for payment of the tax plus a mandatory penalty of 200 percent of the tax, shall be liable for fine and punishment as provided by law for a conviction of a felony of the third degree."

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.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The National Association of Credit Managers' Improved Construction Practices Committee (NACM-ICPC), the American Subcontractors Association, the Florida Building Materials Association, the Underground Utility Contractors of Florida, the Mechanical Contractors of South Florida, the Southeast Glass Association, and the Florida Solar Energy Industries Association, support HB 1151. According to these groups, this exemption simplifies the purchasing and construction process for subcontractors, contractors, and governmental entities. Current law requires the governmental entity to directly purchase property from sellers in order to claim tax-exempt status. The contractor then has to arrange to have the property picked up from the governmental entity, therefore postponing the start date of the project. In addition, if more supplies are needed throughout the duration of the project, the contractor is unable to simply go purchase them. The governmental entity, although not involved in the construction work, must go purchase the additional supplies and coordinate delivery with the contractor. With this legislation, the governmental entity is removed from the construction work, and the purchasing and additional purchasing of supplies is left to the discretion of the contractor. Moreover, this legislation removes

any confusion regarding liability of the purchased property. Currently, when a governmental entity purchases the property, the contractor must arrange to pick-up the property and bring it to the job site. If the property is damaged at any point in time, it is unclear which entity is liable for these damages. With this legislation, the seller can arrange a delivery with the contractor to the exact work site, and therefore avoid any liability issues of damaged property.¹⁹

The Florida League of Cities supports HB 1151. This bill will increase the efficiency of public works projects by reducing the amount of required paperwork, and expedite the actual construction process.²⁰

The Florida Association of Counties supports HB 1151. The association states that the current process is extremely burdensome for governmental entities. Often these entities end up paying the sales tax even though they are tax exempt. The bill includes two important parts: the governmental entity is allowed to dictate who purchases the tangible personal property, and the Department of Revenue has the authority to administer the process.²¹

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Lauren Cyran

Staff Director:

J. Marleen Ahearn, Ph.D., J.D.

AS REVISED BY THE COMMITTEE ON FISCAL POLICY AND RESOURCES:

Prepared by:

Kama Monroe

Staff Director:

Greg Turbeville

¹⁹ Pursuant to conversations on March 21, 2001, with Deborah Lawson, representing the NACM Improved Construction Practices Committee and the American Subcontractors Association; Kari Hebrank, representing the Florida Building Material Association, and Bruce Kershner, representing the Underground Utility Contractors of Florida, the Mechanical Contractors of South Florida, the Southeast Glass Association, and the Florida Solar Energy Industries Association.

²⁰ Pursuant to conversation with John Smith, Associate Director of Legislative Affairs for the Florida League of Cities, on March 23, 2001.

²¹ Pursuant to conversation with Bob McKee, Governmental Liaison for the Florida Association of Counties, on March 23, 2001.