

AMENDED IN ASSEMBLY MAY 10, 2011
AMENDED IN ASSEMBLY MARCH 15, 2011
CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 780

Introduced by Assembly Member Charles Calderon

February 17, 2011

An act to add Section 7111 to the Public Contract Code, and to amend Sections 7261 and 7262 of the Revenue and Taxation Code, relating to fixed price contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 780, as amended, Charles Calderon. Public contracts: fixed price contracts: sales and use taxes rate changes: transactions and use taxes.

Existing law imposes requirements on public entities with respect to the terms of public contracts. ~~Existing law~~ *The Sales and Use Tax Law* imposes a state sales and use tax on retailers and on the storage, use, or other consumption of tangible personal property in this state at the combined rate of 7¼% of the gross receipts from the retail sale of tangible personal property in this state and of the sales price of tangible personal property purchased from any retailer for storage, use, or other consumption in this state that is stored, used, or otherwise consumed in this state.

~~This bill would require a fixed price contract, as specified, between a government entity, as defined, and a contractor to authorize payment for a change in the contract price that is attributable to an increase or decrease in the state sales and use tax rate, provide, for a fixed price contract, as specified, between a government entity and a contractor, that the contractor is entitled to an increase in payment for a change~~

in the contract price that is attributable to an increase in the taxes imposed by the Sales and Use Tax Law, and the government entity is entitled to a reduction in payment for a change in the contract price that is attributable to a decrease in the taxes imposed by the Sales and Use Tax Law, with the increase or decrease paid in accordance with the contract terms or as agreed to by the parties, as prescribed. By placing new duties on local officials with respect to their contract practices, the bill would impose a state-mandated local program.

Existing laws authorize districts, as specified, to impose transactions and use taxes in accordance with the Transactions and Use Tax Law, which conforms to the Sales and Use Tax Law. The Transactions and Use Tax Law requires any transactions and use taxes ordinance adopted in accordance with that law to include specified provisions, as may be amended, including provisions that exempt from the tax the sale of, or the storage, use, or other consumption of, tangible personal property obligated to be furnished or purchased for a fixed price pursuant to a contract entered into prior to the operative date of the ordinance, and provisions that exempt from tax a lease of, or possession of, or the exercise of any right or power over, tangible personal property during the period of time for which there is an obligation to lease the property for an amount fixed by the lease prior to the operative date of the ordinance. That law provides that property is not deemed obligated pursuant to a contract or lease if any party has an unconditional right to terminate the contract or lease.

~~This bill would instead provide that the property is not deemed obligated to a contract or lease if the tax payer has an unconditional right to terminate the contract or lease as provided.~~

This bill would provide that the sale or lease of tangible personal property to a government entity, as defined, is deemed obligated pursuant to a contract or lease for any period of time for which the contractor or lessor does not have the unconditional right to terminate that contract or lease.

Section 2230 of the Revenue and Taxation Code provides that the state will reimburse cities and counties for revenue losses caused by the enactment of sales and use tax exemptions.

This bill would provide that, notwithstanding Section 2230 of the Revenue and Taxation Code, no appropriation is made and the state shall not reimburse cities and counties for sales and use tax revenues lost by them pursuant to this bill.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 7111 is added to the Public Contract
2 Code, to read:

3 ~~7111. (a) A fixed price contract between a government entity
4 and a contractor shall authorize payment for a change in the
5 contract price that is attributable to an increase or decrease in taxes
6 imposed by Part 1 (commencing with Section 6001) of~~

7 *7111. (a) For a fixed price contract between a government
8 entity and a contractor, the contractor is entitled to an increase
9 in payment for a change in the contract price that is attributable
10 to an increase in the taxes imposed by Part 1 (commencing with
11 Section 6001) of Division 2 of the Revenue and Taxation Code,
12 and the government entity is entitled to a reduction in payment for
13 a change in the contract price that is attributable to a decrease in
14 the taxes imposed by Part 1 (commencing with Section 6001) of*
15 *Division 2 of the Revenue and Taxation Code. This increase or*
16 *decrease shall be paid made in accordance with the provisions of*
17 *the contract governing payment for changes in the work or, if no*
18 *provisions are set forth, payment shall be as agreed to by the*
19 *parties.*

20 ~~(b) This section shall apply only to an increase or decrease in
21 the sales and use tax rate imposed with respect to the following:~~

22 ~~(1) (A) The gross receipts from the sale of, and the storage,
23 use, or other consumption in this state of, tangible personal property
24 obligated pursuant to a contract entered into for a fixed price prior
25 to the operative date of the increase or decrease in the sales and
26 use tax rate.~~

27 ~~(B) This paragraph shall apply only to a contract in which a
28 government entity is a party to the contract.~~

1 ~~(C) For purposes of this paragraph, tangible personal property~~
2 ~~shall not be deemed obligated pursuant to a contract for any period~~
3 ~~of time for which the contractor has the right to terminate the~~
4 ~~contract upon notice, whether or not the right is exercised.~~

5 ~~(2) (A) The gross receipts from the sale of, and the storage,~~
6 ~~use, or other consumption in this state of, materials and fixtures~~
7 ~~obligated pursuant to a construction contract entered into for a~~
8 ~~fixed price prior to the operative date of the increase or decrease~~
9 ~~in the sales and use tax rate.~~

10 ~~(B) This paragraph shall apply only to a construction contract~~
11 ~~in which a government entity is a party to the construction contract.~~

12 ~~(C) For purposes of this paragraph, materials and fixtures shall~~
13 ~~not be deemed obligated pursuant to a construction contract for~~
14 ~~any period of time for which the contractor has the right to~~
15 ~~terminate the contract upon notice, whether or not the right is~~
16 ~~exercised.~~

17 ~~(3) (A) A lease of tangible personal property that is a continuing~~
18 ~~sale of the property for any period of time for which the lessor is~~
19 ~~obligated to lease the property for an amount fixed by the lease~~
20 ~~prior to the operative date of the increase or decrease in the sales~~
21 ~~and use tax rate.~~

22 ~~(B) This paragraph shall apply only to a lease of tangible~~
23 ~~personal property to a government entity.~~

24 ~~(C) For purposes of this paragraph, the sale or lease of tangible~~
25 ~~personal property shall be deemed not to be obligated pursuant to~~
26 ~~a contract or lease for any period of time for which the contractor~~
27 ~~or lessor has the unconditional right to terminate the contract or~~
28 ~~lease upon notice, whether or not that right is exercised.~~

29 ~~(4) (A) The possession of, or the exercise of any right or power~~
30 ~~over, tangible personal property pursuant to a lease that is a~~
31 ~~continuing purchase of the property for any period of time for~~
32 ~~which the lessee is obligated to lease the property for an amount~~
33 ~~fixed by a lease entered into prior to the operative date of the~~
34 ~~increase in the sales and use tax rate.~~

35 ~~(B) This paragraph shall apply only to a lease of tangible~~
36 ~~personal property to a government entity.~~

37 ~~(C) For purposes of this paragraph, the storage, use, or other~~
38 ~~consumption of, or possession of, or exercise of any right or power~~
39 ~~over, tangible personal property shall be deemed not to be obligated~~
40 ~~pursuant to a contract or lease for any period of time for which the~~

1 contractor or lessee has the unconditional right to terminate the
2 contract or lease upon notice, whether or not the right is exercised.

3 (b) (1) This section shall apply in the case of an increase in the
4 sales and use tax rate imposed only with respect to the following:

5 (A) (i) The gross receipts from the sale of, and the storage, use,
6 or other consumption in this state of, tangible personal property
7 obligated pursuant to a contract entered into with a government
8 entity for a fixed price prior to the operative date of the increase
9 in the sales and use tax rate.

10 (ii) For purposes of this subparagraph, tangible personal
11 property shall not be deemed obligated pursuant to a contract for
12 a fixed price for any period of time for which the contractor has
13 the right to terminate the contract, unconditionally or upon notice,
14 whether or not the right is exercised.

15 (B) (i) The gross receipts from the sale of, and the storage, use,
16 or other consumption in this state of, materials and fixtures
17 obligated pursuant to a construction contract entered into with a
18 government entity for a fixed price prior to the operative date of
19 the increase in the sales and use tax rate.

20 (ii) For purposes of this subparagraph, materials and fixtures
21 shall not be deemed obligated pursuant to a construction contract
22 for a fixed price for any period of time for which the contractor
23 has the right to terminate the contract, unconditionally or upon
24 notice, whether or not the right is exercised.

25 (C) (i) A lease of tangible personal property to a government
26 entity that is a continuing sale and purchase of that property for
27 any period of time for which the lessor is obligated to lease the
28 property for an amount fixed by the lease prior to the operative
29 date of the increase in the sales and use tax rate.

30 (ii) For purposes of this subparagraph, the lessor shall be
31 deemed not to be obligated to lease the property for an amount
32 fixed by the lease for any period of time for which the lessor has
33 the right to terminate the lease, unconditionally or upon notice,
34 whether or not that right is exercised.

35 (2) This section shall apply in the case of a decrease in the sales
36 and use tax rate imposed only with respect to the following:

37 (A) The gross receipts from the sale of, and the storage, use, or
38 other consumption in this state of, tangible personal property
39 pursuant to a contract entered into with a government entity for

1 a fixed price prior to the operative date of the decrease in the sales
2 and use tax rate.

3 (B) The gross receipts from the sale of, and the storage, use, or
4 other consumption in this state of, materials and fixtures pursuant
5 to a construction contract entered into with a government entity
6 for a fixed price prior to the operative date of the decrease in the
7 sales and use tax rate.

8 (C) A lease of tangible personal property to a government entity
9 that is a continuing sale and purchase of that property for any
10 period of time for which the lessor is to lease the property for an
11 amount fixed by the lease prior to the operative date of the decrease
12 in the sales and use tax rate.

13 (c) For purposes of this section, the following terms apply:

14 (1) “Fixed price” means either of the following:

15 (A) The price or prices specified in the contract or lease, and
16 the contract or lease does not authorize an increase or decrease in
17 price due to an increase or decrease in the sales and use tax rate.

18 (B) The prices or price specified in the construction contract is
19 a lump sum price or a stated unit price or a guaranteed maximum
20 price, and the construction contract does not authorize an increase
21 or decrease in price due to an increase or decrease in the sales and
22 use tax rate.

23 (1) “Fixed price” means the amount of all costs or prices is
24 fixed by the contract or lease, the contract or lease does not reserve
25 to the contractor or lessor the right to increase that amount, and
26 the contract or lease does not address the obligations of the parties
27 in the event of any change in taxes or tax rates, including sales
28 and use tax rates.

29 (2) “Government entity” means the State of California, or any
30 city, county, or city and county, community college district, school
31 district, county superintendent of schools, or special district in this
32 state.

33 (d) (1) This section shall apply only to an increase or decrease
34 in the sales and use tax rate that occurs on or after the effective
35 date of the act adding this section.

36 (2) If the sales and use tax rate imposed pursuant to Sections
37 6051.7 and 6201.7 of the Revenue and Taxation Code, or any
38 portion thereof, is extended for a period or periods on and after
39 July 1, 2011, the sales and use tax rate extension shall be regarded

1 ~~as an increase in the sales and use tax rate for purposes of this~~
2 ~~section.~~

3 *(d) This section shall apply only to contracts entered into on*
4 *and after the effective date of the act adding this section, and shall*
5 *apply only to an increase or decrease in the sales and use tax rate*
6 *that occurs on or after the effective date of the act adding this*
7 *section.*

8 SEC. 2. Section 7261 of the Revenue and Taxation Code is
9 amended to read:

10 7261. The transactions tax portion of any transactions and use
11 taxes ordinance adopted under this part shall be imposed for the
12 privilege of selling tangible personal property at retail, and shall
13 include provisions in substance as follows:

14 (a) A provision imposing a tax for the privilege of selling
15 tangible personal property at retail upon every retailer in the district
16 at a rate of one-quarter of 1 percent, or a multiple thereof, of the
17 gross receipts of the retailer from the sale of all tangible personal
18 property sold by that person at retail in the district.

19 (b) Provisions identical to those contained in Part 1
20 (commencing with Section 6001), insofar as they relate to sales
21 taxes and are not inconsistent with this part, except that the name
22 of the district as the taxing agency shall be substituted for that of
23 the state and that an additional transactor's permit shall not be
24 required if a seller's permit has been or is issued to the transactor
25 under Section 6067.

26 (c) A provision that all amendments subsequent to the effective
27 date of this part to Part 1 (commencing with Section 6001) relating
28 to sales tax and not inconsistent with this part shall automatically
29 become a part of the transactions and use taxes ordinance.
30 However, no amendment shall operate so as to affect the rate of
31 tax imposed by the district's board.

32 (d) A provision that the amount subject to tax shall not include
33 the amount of sales tax or use tax imposed by the State of
34 California or by any city, city and county, or county pursuant to
35 the Bradley-Burns Uniform Local Sales and Use Tax Law, or the
36 amount of any state-administered transactions or use tax.

37 (e) A provision that there are exempted from the tax the gross
38 receipts from the sale of tangible personal property, other than fuel
39 or petroleum products, to operators of aircraft to be used or
40 consumed principally outside the county in which the sale is made

1 and directly and exclusively in the use of the aircraft as common
 2 carriers of persons or property under the authority of the laws of
 3 this state, the United States, or any foreign government.

4 (f) A provision that sales of property to be used outside the
 5 district which are shipped to a point outside the district, pursuant
 6 to the contract of sale, by delivery to that point by the retailer or
 7 his or her agent, or by delivery by the retailer to a carrier for
 8 shipment to a consignee at such point, are exempt from the tax.

9 For purposes of this section, “delivery” of vehicles subject to
 10 registration pursuant to Chapter 1 (commencing with Section 4000)
 11 of Division 3 of the Vehicle Code, aircraft licensed in compliance
 12 with Section 21411 of the Public Utilities Code, and undocumented
 13 vessels registered under Division 3.5 (commencing with Section
 14 9840) of the Vehicle Code shall be satisfied by registration to an
 15 out-of-district address and by a declaration under penalty of
 16 perjury, signed by the buyer, stating that the address is, in fact, his
 17 or her principal place of residence.

18 “Delivery” of commercial vehicles shall be satisfied by
 19 registration to a place of business out of district and a declaration
 20 under penalty of perjury, signed by the buyer, that the vehicle will
 21 be operated from that address.

22 ~~(g) A provision that the sale of tangible personal property is~~
 23 ~~exempt from tax if the seller is obligated to furnish the property~~
 24 ~~for a fixed price pursuant to a contract entered into prior to the~~
 25 ~~operative date of the ordinance. A lease of tangible personal~~
 26 ~~property which is a continuing sale of that property is exempt from~~
 27 ~~tax for any period of time for which the lessor is obligated to lease~~
 28 ~~the property for an amount fixed by the lease prior to the operative~~
 29 ~~date of the ordinance. For the purposes of this subdivision, the sale~~
 30 ~~or lease of tangible personal property shall be deemed not to be~~
 31 ~~obligated pursuant to a contract or lease for any period of time for~~
 32 ~~which the seller or lessor has the unconditional right to terminate~~
 33 ~~the contract or lease upon notice, whether or not that right is~~
 34 ~~exereised.~~

35 *(g) (1) A provision that the sale of tangible personal property*
 36 *is exempt from tax if the seller is obligated to furnish the property*
 37 *for a fixed price pursuant to a contract entered into prior to the*
 38 *operative date of the ordinance. A lease of tangible personal*
 39 *property which is a continuing sale of that property is exempt from*
 40 *tax for any period of time for which the lessor is obligated to lease*

1 *the property for an amount fixed by the lease prior to the operative*
2 *date of the ordinance.*

3 (2) (A) *For the purposes of this subdivision, the sale or lease*
4 *of tangible personal property shall be deemed not to be obligated*
5 *pursuant to a contract or lease for any period of time for which*
6 *any party to the contract or lease has the unconditional right to*
7 *terminate the contract or lease upon notice, whether or not that*
8 *right is exercised.*

9 (B) (i) *Notwithstanding subparagraph (A), the sale or lease of*
10 *tangible personal property to a government entity shall be deemed*
11 *obligated pursuant to a contract or lease for any period of time*
12 *for which the contractor or lessor does not have the unconditional*
13 *right to terminate that contract or lease.*

14 (ii) *For purposes of this subparagraph, “government entity”*
15 *means the State of California, or any city, county, or city and*
16 *county, community college district, school district, county*
17 *superintendent of schools, or special district in this state.*

18 SEC. 3. Section 7262 of the Revenue and Taxation Code is
19 amended to read:

20 7262. The use tax portion of any transactions and use tax
21 ordinance adopted under this part shall impose a complementary
22 tax upon the storage, use, or other consumption in the district of
23 tangible personal property purchased from any retailer for storage,
24 use, or other consumption in the district. The tax shall be at a rate
25 of one-quarter of 1 percent, or a multiple thereof, of the sales price
26 of the property whose storage, use, or other consumption is subject
27 to the tax, and the ordinance shall include provisions in substance
28 as follows:

29 (a) Provisions identical to those contained in Part 1
30 (commencing with Section 6001), insofar as they relate to use
31 taxes and are not inconsistent with this part, except that the name
32 of the district as the taxing agency shall be substituted for that of
33 the state. The name of the district shall be substituted for the word
34 “state” in the phrase “retailer engaged in business in this state” in
35 Section 6203 and in the definition of that phrase.

36 The following additional provisions shall be included:

37 (1) Except as provided in paragraph (2), a retailer engaged in
38 business in the district shall not be required to collect use tax from
39 the purchaser of tangible personal property, unless the retailer
40 ships or delivers the property into the district or participates within

1 the district in making the sale of the property, including, but not
2 limited to, soliciting or receiving the order, either directly or
3 indirectly, at a place of business of the retailer in the district or
4 through any representative, agent, canvasser, solicitor, subsidiary,
5 or person in the district under the authority of the retailer.

6 (2) “A retailer engaged in business in the district” shall also
7 include any retailer of any of the following: vehicles subject to
8 registration pursuant to Chapter 1 (commencing with Section 4000)
9 of Division 3 of the Vehicle Code, aircraft licensed in compliance
10 with Section 21411 of the Public Utilities Code, or undocumented
11 vessels registered under Division 3.5 (commencing with Section
12 9840) of the Vehicle Code. That retailer shall be required to collect
13 use tax from any purchaser who registers or licenses the vehicle,
14 vessel, or aircraft at an address in the district.

15 (b) A provision that all amendments to the provisions of Part 1
16 (commencing with Section 6001) relating to the use tax and not
17 inconsistent with this part shall automatically become a part of the
18 ordinance. However, no amendment shall operate so as to affect
19 the rate of tax imposed by the district’s board.

20 (c) A provision that the amount subject to tax shall not include
21 the amount of any sales tax or use tax imposed by the State of
22 California or by any city, city and county, or county pursuant to
23 the Bradley-Burns Uniform Local Sales and Use Tax Law (Part
24 1.5 (commencing with Section 7200)) or the amount of any
25 state-administered transactions or use tax.

26 (d) A provision that any person subject to a use tax under an
27 ordinance adopted pursuant to this part shall be entitled to credit
28 against that tax or any transactions tax, or to reimbursement for a
29 transactions tax, paid to a district or retailer in a district imposing
30 a transactions and use tax pursuant to this part.

31 (e) A provision that, in addition to the exemptions provided in
32 Sections 6366 and 6366.1, the storage, use, or other consumption
33 of tangible personal property, other than fuel or petroleum products,
34 purchased by operators of aircraft, and used or consumed by the
35 operators directly and exclusively in the use of the aircraft as
36 common carriers of persons or property for hire or compensation
37 under a certificate of public convenience and necessity issued
38 pursuant to the laws of this state, the United States, or any foreign
39 government, is exempt from the use tax.

1 ~~(f) A provision that the storage, use, or other consumption in~~
2 ~~the district of tangible personal property is exempt from the tax if~~
3 ~~the purchaser is obligated to purchase the property for a fixed price~~
4 ~~pursuant to a contract entered into prior to the operative date of~~
5 ~~the ordinance. The possession of, or the exercise of any right or~~
6 ~~power over, tangible personal property under a lease which is a~~
7 ~~continuing purchase of the property is exempt from tax for any~~
8 ~~period of time for which the lessee is obligated to lease the property~~
9 ~~for an amount fixed by a lease entered into prior to the operative~~
10 ~~date of the ordinance. For purposes of this subdivision, the storage,~~
11 ~~use, or other consumption of, or possession of, or exercise of any~~
12 ~~right or power over, tangible personal property shall be deemed~~
13 ~~not to be obligated pursuant to a contract or lease for any period~~
14 ~~of time for which the purchaser or lessee has the unconditional~~
15 ~~right to terminate the contract or lease upon notice, whether or not~~
16 ~~the right is exercised.~~

17 *(f) (1) A provision that the storage, use, or other consumption*
18 *in the district of tangible personal property is exempt from the tax*
19 *if the purchaser is obligated to purchase the property for a fixed*
20 *price pursuant to a contract entered into prior to the operative*
21 *date of the ordinance. The possession of, or the exercise of any*
22 *right or power over, tangible personal property under a lease*
23 *which is a continuing purchase of the property is exempt from tax*
24 *for any period of time for which the lessee is obligated to lease*
25 *the property for an amount fixed by a lease entered into prior to*
26 *the operative date of the ordinance.*

27 *(2) (A) For purposes of this subdivision, the storage, use, or*
28 *other consumption of, or possession of, or exercise of any right or*
29 *power over, tangible personal property shall be deemed not to be*
30 *obligated pursuant to a contract or lease for any period of time*
31 *for which any party to the contract or lease has the unconditional*
32 *right to terminate the contract or lease upon notice, whether or*
33 *not the right is exercised.*

34 *(B) (i) Notwithstanding subparagraph (A), the sale or lease of*
35 *tangible personal property to a government entity shall be deemed*
36 *obligated pursuant to a contract or lease for any period of time*
37 *for which the contractor or lessor does not have the unconditional*
38 *right to terminate that contract or lease.*

39 *(ii) For purposes of this subparagraph, “government entity”*
40 *means the State of California, or any city, county, or city and*

1 *county, community college district, school district, county*
2 *superintendent of schools, or special district in this state.*

3 SEC. 4. Notwithstanding Section 2230 of the Revenue and
4 Taxation Code, no appropriation is made by this act and the state
5 shall not reimburse any local agency for any sales and use tax
6 revenues lost by it under this act.

7 SEC. 5. If the Commission on State Mandates determines that
8 this act contains costs mandated by the state, reimbursement to
9 local agencies and school districts for those costs shall be made
10 pursuant to Part 7 (commencing with Section 17500) of Division
11 4 of Title 2 of the Government Code.