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 6376.4 to the Revenue and Taxation Code, relating to taxation.~~ *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. ~~Sales and use taxes: exemption: fixed price contract.~~ *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 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, 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.

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.

~~Existing 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 7 ¼% 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.~~

~~This bill would, for any increase or extension of counties and cities also impose a sales and use tax at a combined rate of 1% the sales and use tax rate on and after July 1, 2011, exclude from that increased rate of tax, the gross receipts from certain sales and uses of tangible personal property that are subject to a fixed price pursuant to a contract entered into prior to the operative date of the sales and use tax rate increase.~~

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

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

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

7111. (a) A fixed price contract between a government entity and a contractor shall authorize payment for a change in the contract price that is attributable to an increase or decrease in taxes imposed by Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code. This increase or decrease shall be paid in accordance with the provisions of the contract governing payment for changes in the work or, if no provisions are set forth, payment shall be as agreed to by the parties.

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

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

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

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

(2) (A) The gross receipts from the sale of, and the storage, use, or other consumption in this state of, materials and fixtures obligated pursuant to a construction contract entered into for a

fixed price prior to the operative date of the increase or decrease in the sales and use tax rate.

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

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

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

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

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

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

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

(C) For purposes of this paragraph, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which the contractor or lessee has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

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

(1) "Fixed price" means either of the following:

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

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

(2) "Government entity" means the State of California, or any city, county, or city and county, community college district, school district, county superintendent of schools, or special district in this state.

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

(2) If the sales and use tax rate imposed pursuant to Sections 6051.7 and 6201.7 of the Revenue and Taxation Code, or any portion thereof, is extended for a period or periods on and after July 1, 2011, the sales and use tax rate extension shall be regarded as an increase in the sales and use tax rate for purposes of this section.

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

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

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

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

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

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

(e) A provision that there are exempted from the tax the gross receipts from the sale of tangible personal property, other than fuel or petroleum products, to operators of aircraft to be used or consumed principally outside the county in which the sale is made and directly and exclusively in the use of the aircraft as common carriers of persons or property under the authority of the laws of this state, the United States, or any foreign government.

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

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

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

(g) A provision that the sale of tangible personal property is exempt from tax if the seller is obligated to furnish the property for a fixed price pursuant to a contract entered into prior to the operative date of the ordinance. A lease of tangible personal property which is a continuing sale of that property is exempt from tax for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to the operative date of the ordinance. For the purposes of this subdivision, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which ~~any party to~~ the ~~contract~~ *seller* or ~~lease~~ *lessor* has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

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

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

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

The following additional provisions shall be included:

(1) Except as provided in paragraph (2), a retailer engaged in business in the district shall not be required to collect use tax from the purchaser of tangible personal property, unless the retailer ships or delivers the property into the district or participates within the district in making the sale of the property, including, but not limited to, soliciting or receiving the order, either directly or indirectly, at a place of business of the retailer in the district or through any representative, agent, canvasser, solicitor, subsidiary, or person in the district under the authority of the retailer.

(2) “A retailer engaged in business in the district” shall also include any retailer of any of the following: vehicles subject to registration pursuant to Chapter 1 (commencing with Section 4000)

of Division 3 of the Vehicle Code, aircraft licensed in compliance with Section 21411 of the Public Utilities Code, or undocumented vessels registered under Division 3.5 (commencing with Section 9840) of the Vehicle Code. That retailer shall be required to collect use tax from any purchaser who registers or licenses the vehicle, vessel, or aircraft at an address in the district.

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

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

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

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

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

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

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

~~SECTION 1. Section 6376.4 is added to the Revenue and Taxation Code, to read:~~

~~6376.4. On and after July 1, 2011, from the operative date of an act that increases or extends a sales and use tax rate, to the date on which the taxes imposed by that act cease to be operative, there is exempted from the taxes imposed by this part an amount equal to an amount that is attributable to the rate of tax imposed with respect to the following:~~

~~(a) (1) The gross receipts from the sale of, and the storage, use, or other consumption in this state of, the following:~~

~~(A) Tangible personal property, if the seller is obligated to furnish or the purchaser is obligated to purchase the property for a fixed price pursuant to a contract entered into prior to the operative date of the act that increased the sales and use tax rate.~~

~~(B) Materials and fixtures obligated pursuant to an engineering construction contract or a building construction contract entered into for a fixed price prior to the operative date of the act that increased the sales and use tax rate.~~

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

~~(b) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to the operative date of the act that increased the sales and use tax rate. For purposes of this subdivision, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.~~

~~(c) The possession of, or the exercise of, any right or power over tangible personal property pursuant to a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to the operative date of the act that increased the sales and use tax rate. For purposes of this subdivision, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.~~

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