

AMENDED IN SENATE JULY 12, 2011

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. 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 ~~7~~⁶ $\frac{1}{4}$ % 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 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. *The bill would also authorize the government entity to require the contractor to submit invoices for specified items consumed solely for use in the public work pursuant to the contract entered into by the government entity and the contractor.* 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 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) For a fixed price contract between a government
4 entity and a contractor, the contractor is entitled to an increase in
5 payment for a change in the contract price that is attributable to
6 an increase in the taxes imposed by Part 1 (commencing with
7 Section 6001) of Division 2 of the Revenue and Taxation Code,
8 and the government entity is entitled to a reduction in payment for
9 a change in the contract price that is attributable to a decrease in
10 the taxes imposed by Part 1 (commencing with Section 6001) of
11 Division 2 of the Revenue and Taxation Code. This increase or
12 decrease shall be made in accordance with the provisions of the
13 contract governing payment for changes in the work or, if no
14 provisions are set forth, payment shall be as agreed to by the
15 parties. *The government entity may require the contractor to submit*
16 *invoices for those materials or supplies specifically purchased for*
17 *actual incorporation into the public work, including, but not limited*
18 *to, materials or supplies consumed solely for use in the public*
19 *work pursuant to the contract entered into by the government*
20 *agency and contractor.*

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

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

28 (ii) For purposes of this subparagraph, tangible personal property
29 shall not be deemed obligated pursuant to a contract for a fixed
30 price for any period of time for which the contractor has the right

1 to terminate the contract, unconditionally or upon notice, whether
2 or not the right is exercised.

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

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

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

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

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

25 (A) The gross receipts from the sale of, and the storage, use, or
26 other consumption in this state of, tangible personal property
27 pursuant to a contract entered into with a government entity for a
28 fixed price prior to the operative date of the decrease in the sales
29 and use tax rate.

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

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

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

1 (1) "Fixed price" means the amount of all costs or prices is fixed
2 by the contract or lease, the contract or lease does not reserve to
3 the contractor or lessor the right to increase that amount, and the
4 contract or lease does not address the obligations of the parties in
5 the event of any change in taxes or tax rates, including sales and
6 use tax rates.

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

11 (d) This section shall apply only to contracts entered into on
12 and after the effective date of the act adding this section, and shall
13 apply only to an increase or decrease in the sales and use tax rate
14 that occurs on or after the effective date of the act adding this
15 section.

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

18 7261. The transactions tax portion of any transactions and use
19 taxes ordinance adopted under this part shall be imposed for the
20 privilege of selling tangible personal property at retail, and shall
21 include provisions in substance as follows:

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

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

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

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

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

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

18 For purposes of this section, “delivery” of vehicles subject to
19 registration pursuant to Chapter 1 (commencing with Section 4000)
20 of Division 3 of the Vehicle Code, aircraft licensed in compliance
21 with Section 21411 of the Public Utilities Code, and undocumented
22 vessels registered under Division 3.5 (commencing with Section
23 9840) of the Vehicle Code shall be satisfied by registration to an
24 out-of-district address and by a declaration under penalty of
25 perjury, signed by the buyer, stating that the address is, in fact, his
26 or her principal place of residence.

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

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

39 (2) (A) For the purposes of this subdivision, the sale or lease
40 of tangible personal property shall be deemed not to be obligated

1 pursuant to a contract or lease for any period of time for which
2 any party to the contract or lease has the unconditional right to
3 terminate the contract or lease upon notice, whether or not that
4 right is exercised.

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

10 (ii) For purposes of this subparagraph, “government entity”
11 means the State of California, or any city, county, or city and
12 county, community college district, school district, county
13 superintendent of schools, or special district in this state.

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

16 7262. The use tax portion of any transactions and use tax
17 ordinance adopted under this part shall impose a complementary
18 tax upon the storage, use, or other consumption in the district of
19 tangible personal property purchased from any retailer for storage,
20 use, or other consumption in the district. The tax shall be at a rate
21 of one-quarter of 1 percent, or a multiple thereof, of the sales price
22 of the property whose storage, use, or other consumption is subject
23 to the tax, and the ordinance shall include provisions in substance
24 as follows:

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

32 The following additional provisions shall be included:

33 (1) Except as provided in paragraph (2), a retailer engaged in
34 business in the district shall not be required to collect use tax from
35 the purchaser of tangible personal property, unless the retailer
36 ships or delivers the property into the district or participates within
37 the district in making the sale of the property, including, but not
38 limited to, soliciting or receiving the order, either directly or
39 indirectly, at a place of business of the retailer in the district or

1 through any representative, agent, canvasser, solicitor, subsidiary,
2 or person in the district under the authority of the retailer.

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

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

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

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

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

37 (f) (1) A provision that the storage, use, or other consumption
38 in the district of tangible personal property is exempt from the tax
39 if the purchaser is obligated to purchase the property for a fixed
40 price pursuant to a contract entered into prior to the operative date

1 of the ordinance. The possession of, or the exercise of any right
2 or power over, tangible personal property under a lease which is
3 a continuing purchase of the property is exempt from tax for any
4 period of time for which the lessee is obligated to lease the property
5 for an amount fixed by a lease entered into prior to the operative
6 date of the ordinance.

7 (2) (A) For purposes of this subdivision, the storage, use, or
8 other consumption of, or possession of, or exercise of any right or
9 power over, tangible personal property shall be deemed not to be
10 obligated pursuant to a contract or lease for any period of time for
11 which any party to the contract or lease has the unconditional right
12 to terminate the contract or lease upon notice, whether or not the
13 right is exercised.

14 (B) (i) Notwithstanding subparagraph (A), the sale or lease of
15 tangible personal property to a government entity shall be deemed
16 obligated pursuant to a contract or lease for any period of time for
17 which the contractor or lessor does not have the unconditional
18 right to terminate that contract or lease.

19 (ii) For purposes of this subparagraph, “government entity”
20 means the State of California, or any city, county, or city and
21 county, community college district, school district, county
22 superintendent of schools, or special district in this state.

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

27 SEC. 5. If the Commission on State Mandates determines that
28 this act contains costs mandated by the state, reimbursement to
29 local agencies and school districts for those costs shall be made
30 pursuant to Part 7 (commencing with Section 17500) of Division
31 4 of Title 2 of the Government Code.