

M e m o r a n d u m**190.2901**

To: Mr. Robert Nunes
Deputy Director
Sales and Use Tax Division

Date: July 15, 1991

From: Tax Counsel (LAA) – Headquarters

Subject: Meeting with Contracting Industry Representatives, July 10, 1991

During the meeting which you, I and Glenn Bystrom had with representatives of the construction industry regarding the exception from the new tax increases contained in AB 2181 and SB 179 (new Section 6376.1), the industry representatives raised several questions. They also requested language which they could present to the Legislature with which they could lobby the Legislature to amend Section 6376.1 in order to take care of the peculiar problems posed by contracting procedures in their industry. Attached hereto is the language used in 1972. (Stats. 1971, Ch. 1406 § 36.) We requested and they agreed, that in their proposed amendment that they not include the reference to “supplies”, which occurred in the 1972 statute, due to the problems with defining what were “supplies”. This change makes the suggested language identical to that used in the fixed-price contract exemption enacted in 1967. (Stats. 1967, Ch. 964, § 1).

At the end of our meeting, two questions were raised. I have consulted with Gary Jugum on these matters, and what follows is the Legal Division’s response:

1. A subcontractor has submitted an irrevocable bid to a general contractor who has in turn submitted an irrevocable bid for a public agency construction contract. The bid contains a provision that it is revoked if the general is not awarded the contract, but otherwise qualifies for a “fixed-price” contract. In our view, the subcontractor has obligated himself to perform for a fixed obligation. This obligation may be defeated only by a condition subsequent which is not in the subcontractor’s control. The bid still qualifies as being for a fixed price.
2. Same situation as above, except that the agency is not yet ready to award the contract and requests an extension. The contractors have two options only – cancel their bids or agree to extend them on the original terms and conditions. In this situation, because the contractors have the ability to walk away from the bid and refuse to go through with it in the event of a tax increase, we consider that the bid does not qualify as an agreement for a fixed price.

JLW:es