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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Bob Riley
Governor, State of Alabama
State Capitol
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Contracts – Exemptions - Sales Tax - Use
Tax - Act No. 2004-638 – Governor’s
Office

Act 2004-638 repealed the contractor’s exemption found in section 40-9-33 of the Code of Alabama effective July 1, 2004. Section 40-9-33 will not be revived when the provisions of Act 2004-638 terminate on October 1, 2006. Contracts exempt from sales or use tax entered into pursuant to section 40-9-33 before its repeal on July 1, 2004, will continue to be exempt from sales or use tax until the contracts are completed. Change orders to previously exempt contracts entered into after July 1, 2004, will be subject to sales or use tax.

Dear Governor Riley:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. Will section 40-9-33 of the Code of Alabama, which is repealed in Section 1 of Act 2004-638, nevertheless still constitute the law of Alabama after July 1, 2004, with respect to contracts of the type described in that section that were awarded in the process of performance, within the meaning of the act, before that date and are not after that date “revised, renegotiated or altered,” again within the meaning of the act?

2. The act provides, in Section 6 thereof, that its provisions "shall terminate on October 1, 2006." After October 1, 2006, will section 40-9-33 no longer stand repealed, as indicated in Section 1 of the Act, or will another act of the Legislature be necessary for section 40-9-33 to again become effective?

3. Before the enactment of section 40-9-33 in 2000, persons contracting with governmental entities exempt from the levy of the Alabama sales and use tax were required to follow procedures outlined in certain sales and use tax rules promulgated by the Department of Revenue, such as Sales and Use Tax Rules 810-6-3-.72.02 and 810-6-1-.56, in order that such entities might benefit from the exempt purchase of items of tangible personal property in connection with the performance of contracts entered into by such entities for the construction and acquisition of property, equipment, and structures. May the Department of Revenue, in view of the provisions of the act, continue to apply such regulations in the case of sales by persons contracting with governmental units in order that the purchases made pursuant thereto may, assuming compliance therewith, continue to be exempt from the Alabama sales and use tax?

4. Various provisions of Alabama law exempt, from the Alabama sales and use tax, purchases of tangible personal property made by persons contracting with various governmental units and public corporations in the State of Alabama for the construction of certain types of facilities; e.g., sections 22-21-333 and 11-62-18(d) of the Code of Alabama. Do the provisions of the act in any way affect the continued applicability, efficacy, and validity of such preexisting provisions of law?

5. Section 5 of the act provides that it applies to any contract awarded, revised, renegotiated, or altered on or after the effective date of the act, which is stated in Section 7 thereof to be July 1, 2004. With regard to these provisions of the act:

(a) Is a contract “awarded” by a governmental entity described in section 40-9-33 at any time other than the time at which official action is taken by the governing body of the governmental entity entering into the contract?

(b) Does a change made after July 1, 2004, in a contract awarded (within the meaning of the act) before July 1, 2004, which takes the form of a typical contract “change order” providing for changes in design or specification of the work to be performed under the contract, constitute a sufficient change therein so as to bring the contract within the ambit of Section 5 of the act, or may purchases thereafter made pursuant to the performance of the contract continue to be exempt from Alabama sales and use tax in accordance with section 40-9-33?

(c) If a contract awarded (within the meaning of the act) before July 1, 2004, is revised, renegotiated, or altered after July 1, 2004, but before October 1, 2006, so as to bring it within the ambit of Section 5 of the act, do any of the purchases made by the contractor pursuant to the contract and previously exempted from the Alabama sales and use tax pursuant to section 40-9-33 because they were made before the date of the revision, become, as a result of that revision, retroactively subject to the Alabama sales and use tax pursuant to the act?

FACTS AND ANALYSIS

Act 2004-638 was signed into law on May 26, 2004, and becomes effective on July 1, 2004. Section 1 of the act specifically repeals section 40-9-33 of the Code of Alabama. Section 3 of the act amends section 40-23-2 of the Code of Alabama by adding new subsections (4)a and (4)b that provide for the dis-

position of sales tax from the sale of automotive vehicles for the fiscal years ending September 30, 2005, and September 30, 2006. Section 5 provides that the act shall apply to any contract awarded, revised, renegotiated, or altered on or after the effective date of the act. Section 6 states that the provisions of this amendatory act shall terminate on October 1, 2006, and Section 7 provides for an effective date of July 1, 2004.

In response to your first question, Section 5 of the act specifically makes the act applicable only to contracts awarded, revised, or altered after the effective date of the act. The exemption from tax provided in section 40-9-33 of the Code of Alabama will continue to apply to all contracts that were awarded before the effective date of the act with only new additions to such contracts entered into after the effective date of the act being subject to tax. Therefore, a contract awarded before July 1, 2004, that is exempt from sales or use tax under section 40-9-33 will continue to be exempt until the contract is completed.

In response to Question 2, Section 1 of the act specifically repeals section 40-9-33. Section 6 only provides that the provisions of the amendatory act shall terminate on October 1, 2006. There is no language in Section 6, however, that demonstrates a legislative intent to revive the provisions of section 40-9-33. The only amendment to the existing law contained in the act is found in Section 3, which amends section 40-23-2 of the Code of Alabama. Section 1-1-11 of the Code of Alabama provides that “[a]ll laws and all statutes or parts of statutes which are repealed or abrogated by this Code, . . . and which have not been reenacted or consolidated, shall continue to be so repealed or abrogated.” ALA. CODE § 1-1-11 (1999). Accordingly, another act of the Legislature will be necessary for the exemption found in section 40-9-33 to again become effective.

In Question 3, you ask whether sales and use tax rules in effect before the enactment of section 40-9-33 in 2000 will continue to be available to benefit taxpayers who contract with governmental units to exempt the purchase of certain items of tangible personal property in the performance of contracts. All sales and use tax rules in effect before the enactment of section 40-9-33 that are still in effect will continue to be applicable to contracts with governmental entities as they were before the enactment of section 40-9-33.

With regard to Question 4 in your request for an opinion, sections 22-21-333 and 11-62-18(d) of the Code of Alabama are specific exemptions covering special subjects and are not affected by the repeal of section 40-9-33, even though the specific subject matter may have been included in the general subject matter of the exemption found in section 40-9-33. Therefore, specific exemption statutes that have a reasonable field of operation that may, at times, cover the same situations as the contractor exemption found in section 40-9-33 are not affected by the repeal of section 40-9-33. Such specific exemption statutes will

continue to be in effect for their particular fields of operation. *See Tuscaloosa v. Ala. Retail Ass'n*, 466 So. 2d 103 (Ala.1985).

In response to Question 5, it is the opinion of this Office that a contract is "awarded" by a governmental entity when official action is taken by the governing body of the governmental entity to enter into the contract. Any "change order" entered into after the effective date of Act 2004-638 that requires the purchase of additional tangible personal property will be subject to sales or use tax under the specific language found in Section 5 of the Act. If the change or revision does not result in the purchase of additional tangible personal property, the revision or "change order" will not cause the contract to lose its exempt status. Any contract previously entered into that is revised, renegotiated, or altered after July 1, 2004, will be subject to sales or use tax only to the extent such revision is an addition to the contract previously entered into before the repeal of the contractor exemption. *See Blake v. State*, 59 So. 623 (Ala. 1912).

CONCLUSION

Act 2004-638 repealed the contractor's exemption found in section 40-9-33 of the Code of Alabama effective July 1, 2004. Section 40-9-33 will not be revived when the provisions of Act 2004-638 terminate on October 1, 2006. Contracts exempt from sales or use tax entered into pursuant to section 40-9-33 before its repeal on July 1, 2004, will continue to be exempt from sales or use tax until they are completed. Change orders to previously exempt contracts entered into after July 1, 2004, will be subject to sales or use tax.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact J. Wade Hope, Legal Division, Department of Revenue.

Sincerely,

TROY KING
Attorney General
By:



CAROL JEAN SMITH
Chief, Opinions Division