

CALIFORNIA DEPARTMENT OF JUSTICE
TITLE 11. LAW
DIVISION 1. ATTORNEY GENERAL
CHAPTER 6. SELECTION PROCESS FOR PRIVATE ARCHITECTURAL AND
ENGINEERING FIRMS

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

Generally, the California Constitution forbids state agencies from contracting for private companies to perform the services that state civil service employees can perform. In response, California voters adopted Proposition 35 in November 2000. Entitled the “Fair Competition and Taxpayer Savings Act,” Proposition 35 added Article XXII to the California Constitution to provide that the State of California and all other governmental entities “shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement.” (Cal. Const., art. XXII, § 1.)

If a state agency wants to contract with private architectural and engineering firms, it is required to develop regulations describing the procedures to “assure that these services are engaged on the basis of demonstrated competence and qualifications for the types of services to be performed and at fair and reasonable prices to the public agencies.” (Gov. Code, § 4526.) Currently, the Department is unable to contract with private architectural and engineering firms because it has not adopted regulations on this subject. Instead, the Department is required to contract with the Department of General Services to perform this work.

The Department of General Services (DGS) contracts with private firms on the Department’s behalf for most architectural and engineering projects because DGS does not have the staff on-hand to perform the work. This creates additional paperwork, time, and expense for the Department.

BENEFITS ANTICIPATED FROM REGULATORY ACTION

The purpose and intent of Proposition 35 included “remov[ing] existing restrictions on contracting for architectural and engineering services and [allowing] state, regional and local governments to use qualified private architectural and engineering firms to help deliver transportation, schools, water, seismic retrofit and other infrastructure projects safely, cost effectively and on time;” “encourag[ing] the kind of public/private partnerships necessary to ensure that California taxpayers benefit from the use of private sector experts to deliver transportation, schools, water, seismic retrofit and other infrastructure projects;” “promot[ing] fair competition so that both public and private sector architects and engineers work smarter, more efficiently and ultimately deliver better value to taxpayers;” “speed[ing] the completion of a multi-billion dollar backlog of highway, bridge, transit and other projects;” “ensur[ing] that contracting for architectural and engineering services occurs through a fair, competitive selection process, free of undue political influence, to obtain the best quality and value for California taxpayers;” and “ensur[ing] that private firms contracting for architectural and engineering services with governmental entities meet established design and construction standards and

comply with standard accounting practice and permit financial and performance audits as necessary to ensure contract services are delivered within the agreed schedule and budget.” (Initiative Measure (Prop. 35, § 2, approved Nov. 7, 2000, eff. Nov. 8, 2000).)

The specific benefits anticipated by the proposed regulations include: (1) the Department will be able to complete projects in a timely manner by directly contracting with private firms when State civil service staff are not available to perform the necessary work; (2) the Department will be able to make annual announcements based on the general need for architectural and engineering services to assist in its overall mission and may enter into requirements contracts, also commonly known as “on-call” contracts; (3) “on-call” contracts will allow for expeditious and cost-effective contracting for as-needed projects; and (4) business opportunities for private firms to contract with the Department will be increased.

SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION

§ 600. Purpose and Scope.

(a) In accordance with Government Code section 4526, the Department has established regulations allowing it to contract with private architectural and engineering firms. The purpose of this section is to describe the scope of the chapter. This is necessary to inform the regulated community that the chapter establishes applicable criteria and procedures for the Department to procure architectural and engineering services.

(b) The language explaining that a contract may be awarded on the basis of bids rather than by following these procedures is a statement of the law contained in Government Code section 4529. Including this statutory exclusion in the regulations is necessary for clarity so that all procedures are in one place.

§ 601. Definitions.

This section defines six key terms that are used in the proposed regulations. The definitions are necessary to avoid any confusion that might result if these terms were not defined and to ensure uniform application throughout the regulations.

(a) Architectural and engineering (A&E) services: This definition is necessary to define the type of contracting services that fall under the “architectural and engineering services” umbrella as used in the regulations.

(b) Chief: This definition is necessary to specify who in the Department has authority to make certain determinations related to the A&E contracting process.

(c) Department: This definition is necessary to clarify that the term “Department” refers to the Department of Justice.

(d) Firm: This definition is necessary to delineate the type of entity that is considered a “firm” for purpose of these regulations.

(e) Project: This definition is necessary to establish that the contract can be awarded for a specific planned undertaking or an expected undertaking required in the future.

(f) Small business: These procedures must assure maximum participation of small business firms. (Gov. Code, § 4526.) This definition is necessary to delineate the type of entity that is considered a “small business.”

§ 602. Annual Announcements for Statement of Qualifications and Performance Data.

This section explains that the Chief will publish an annual notice describing anticipated projects and soliciting statement of qualifications from firms providing A&E services. This section is necessary to inform firms how they can learn of and be considered for proposed A&E contracting opportunities. Government Code section 4527 requires the Department to encourage firms to submit annually a statement of qualifications and performance data. Including this statutory requirement in the regulations is necessary for clarity so that all procedures are in one place.

§ 603. Announcement of Projects.

(a), (b), and (c) These subdivisions explain how the Department will publish advertised A&E contracts. These subdivisions are necessary to inform firms how they can learn of proposed A&E contracting opportunities, including “on call” contracts. They also ensure that these services are engaged on the basis of demonstrated competence and qualifications. Government Code section 4527 requires the Department to make a statewide announcement of all projects requiring A&E services. Including this statutory requirement in the regulations is necessary for clarity so that all procedures are in one place.

(d) This subdivision explains that an announcement is not made invalid if a professional publication fails to publish or makes an error in publishing that announcement. In such a circumstance, the Chief may extend the announcement deadlines to allow further publication of the announcement. This subdivision is necessary because the Department should be given the discretion to continue contract negotiations with a qualified firm at fair and responsible compensation without having to postpone any projects that must be completed.

§ 604. Establishment of Criteria.

This section explains that the Department has a standard practice of identifying criteria to be used in analyzing responses to A&E contract solicitations on a project-by-project basis. Requiring the Department to provide this information is necessary to help firms prepare their responses on a particular project. The criteria examples help ensure that these services are engaged on the basis of demonstrated competence and qualifications.

§ 605. Estimate of Value of Services.

(a) This subdivision explains how the Department prepares an estimate of the value of such services to serve as a guide in determining fair and reasonable compensation for the services rendered. This estimate of value of service information is necessary in order to have a basis for

determining the reasonableness of responses to A&E contract solicitations. The confidential nature of the information is also a valuable part of the process to ensure competition.

(b) This subdivision further explains that the Department has the right to reevaluate the estimate value of services. This is necessary because the Department's original estimate may be too high or too low. Modifying the estimate ensures that the services are performed and at fair and reasonable price to the public agency.

§ 606. Selection of Firm.

(a) This subdivision explains that the Department will review statements of qualifications. Government Code section 4527 requires the Department to evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project. Including this statutory requirement in the regulations is necessary for clarity so that all procedures are in one place.

(b) and (c) These subdivisions explain that the Department will select, based on the established criteria, no fewer than three firms to discuss the required services. This section is necessary to ensure that these services are engaged on the basis of demonstrated competence and qualifications. Government Code section 4527 requires the Department to conduct discussions with no fewer than three firms. Including this statutory requirement in the regulations is necessary for clarity so that all procedures are in one place.

(d) and (e) These subdivisions further explain that if fewer than three firms submitted statements of qualifications, the Chief may discontinue the selection process, extend the selection process and provide supplemental notice to attract additional firms, or continue the selection process with the submissions received. This is necessary because the Department may need to extend the selection process if no qualified firm applied. However, as long as one qualified firm applied, the Department should be able to continue contract negotiations without having to postpone any projects that must be completed.

§ 607. Negotiation.

(a), (b), and (c) These subdivisions explain that the Department will attempt to negotiate a contract with the most highly qualified firm at fair and reasonable compensation. Government Code sections 4526.5 and 4528 require the Department to follow these procedures when negotiating a contract. Including these statutory requirements in the regulations is necessary for clarity so that all procedures are in one place.

(d) This section further explains that the Department may, at any point, reopen previously terminated negotiations with a firm. This is necessary because the parties' positions may change after negotiations are terminated. The Department should be given the opportunity to continue contract negotiations with a qualified firm at fair and responsible compensation without having to postpone any projects that must be completed.

§ 608. Amendments.

This section explains that the parties may, by mutual written agreement, amend any term of the contract. This section is necessary because contract amendments may be appropriate based on facts learned after the contract is entered.

§ 609. Contracting in Phases.

(a) This subdivision explains that the Department may contract in phases without negotiating the total contract price. This subdivision is necessary because it gives the Department flexibility to obtain the best contract for a given situation. The subdivision requires the firm to accept a fair and reasonable price for subsequent phases of work so that the services are performed and at fair and reasonable price to the public agency.

(b) This subdivision explains that the procedures established with regard to estimates and negotiation (Sections 605 and 607, respectively) apply when the Department contracts in phases. This is necessary so that a contract is entered into with a qualified firm at fair and responsible compensation.

§ 610. Requirements/On-Call Contracts.

This section explains that the Department may enter into contracts for such services through a requirements contract, commonly known as an “on-call” contract. This is necessary because the Department may require A&E services for a project with a site or sites that cannot be identified at the time the request for qualifications is prepared. On-call contracts allow the Department to have private firms perform work on an as-needed or on-call basis. This flexibility is necessary so that projects are completed quickly when the need arises.

This section further provides for a rate schedule so that the services are performed and at fair and reasonable price to the public agency.

§ 611. Emergencies.

This section explains that the Chief may negotiate a contract for A&E services without following the selection provisions set forth in this chapter when an emergency exists. This is necessary because the Department may need to act immediately to prevent or mitigate the loss or impairment of life, health, property, or essential public services if there is an unexpected occurrence that poses a clear and imminent danger.

§ 612. Prohibited Practices and Conflict of Interest.

This section explains that all parties are required to comply with all laws regarding political contributions, conflicts of interest, and unlawful activities. This is required by Government Code sections 4526 and 4529.12. Including these statutory requirements in the regulations is necessary for clarity so that all procedures are in one place.

§ 613. Small Business Participation.

This section explains how the Department will encourage small businesses to apply for contracting opportunities with the Department. Government Code section 4526 requires the Department to adopt, by regulation, procedures that assure maximum participation of small business firms. These procedures are necessary because they will increase opportunities for small businesses to apply for contracting opportunities.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Department concludes:

- (1) It is unlikely that the proposal would create or eliminate jobs within the state because they do not affect the number of architectural and engineering projects within the Department. The regulations simply create an alternative to contracting with the Department of General Services so that the Department can contract instead with private architectural and engineering firms.
- (2) It is unlikely that the proposal would create new businesses or eliminate existing businesses within the state for the reason identified above.
- (3) It is likely that the proposal would result in the expansion of businesses currently doing business within the state because for the reason identified above.

The Department also concludes that:

- (1) The proposal would not benefit the health and welfare of California residents because it does not change any applicable health and welfare standards.
- (2) The proposal would benefit worker safety by allowing the Department to contract with private architectural and engineering firms, thereby enabling the Department to resolve and avoid project delays that may otherwise jeopardize worker safety.
- (3) The proposal would not benefit the state's environment because it does not change any applicable environmental standards.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR SIMILAR DOCUMENTS RELIED UPON

The Department did not rely on any technical, theoretical, or empirical studies, reports or similar documents in proposing these regulations.

EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the proposed action would not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. These regulations

increase business opportunities for existing private firms because they will allow the Department to select private firms to complete necessary projects.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department determines that these proposed regulations do not adversely affect small businesses.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASON FOR REJECTING THOSE ALTERNATIVES

The Department finds that no alternatives were presented to, or considered by, the Department that would be more effective in carrying out the purpose of these proposed regulations or would be as effective and less burdensome to affected private persons than these proposed regulations. These regulations do not impose any burden on affected private persons. Rather, they create an opportunity for private architectural and engineering firms to apply for Department contracts.

Performance Standard as Alternative:

The proposed regulations do not mandate the use of specific technologies or equipment. The proposed regulations do not impose any mandates on any firm. Seeking contracting opportunities with the Department is voluntary. However, firms that wish to contract with the Department must comply with procedures created by these regulations.