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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-414
of	:	June 20, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Victor D. Sonenberg Deputy Attorney General	:	

SUBJECT: SELECTION OF PRIVATE FIRMS—Government Code sections 4525 to 4529, relating to the selection of private architectural or engineering firms by agency heads, do not apply to such selection by counties or other local government agencies.

The Honorable L. J. Dewald, County Counsel, Placer County, has requested an opinion on the following question:

Do Government Code sections 4525 to 4529, relating to the selection of private architectural or engineering firms, apply to such selection by local governmental agencies such as counties?

CONCLUSION

Government Code sections 4525 to 4529, relating to the selection of private architectural or engineering firms by agency heads, do not apply to such selection by counties or other local governmental agencies.

ANALYSIS

In 1974 Chapter 10 (commencing with section 4525) was added to Division 5 of Title 1 of the Government Code[1] (Stats. 1974, ch. 1434, § 1, p. 3137). It provides a procedure for selecting private architectural or engineering firms for public projects on the basis of competence and qualification (see § 4526) as opposed to selection on the basis of competitive bidding.

The public policy to be effectuated by this statute was explicitly set forth in section 4526 where it is declared:

> "Notwithstanding any other provision of law, it shall be considered to be the public policy of the State of California and any political subdivision thereof that selecting by an agency head for professional services of private architect or engineering firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required. . . ."

Under this statute the "agency head" is to evaluate the qualifications of architectural or engineering firms in connection with a proposed project and then select firms he deems to be the most qualified. (§ 4527.)[2] The "agency head" is then directed to negotiate a contract with the "best qualified firm" at a price he determines to be "fair and reasonable." If he is unable to negotiate such a contract, he shall negotiate with the firm that was determined to be "second most qualified," and so on. (§ 4528.)[3]

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[1] Hereafter all section references are to the Government Code unless otherwise specified.

[2] Section 4527 provides in pertinent part:

"The agency head, for each proposed project, shall 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, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required."

[3] Section 4528 provides:

"(a) The agency head shall negotiate a contract with the best qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the State of California or the political subdivision involved.

"(b) Should the agency head be unable to negotiate a satisfactory contract with the

The question we consider here is whether these provisions govern the selection of private architectural or engineering firms by local governmental agencies such as those of a county.

By its terms the statute affords a clear indication that its provisions are confined to such selection by agencies of the state government.

Most pertinent in this regard is the statute's definition of "agency head" which is set forth in section 4525(a). This section provides:

> "The term 'agency head' means the secretary, administrator, or head of a department, agency, or bureau of the State of California authorized under the State Contract Act to contract for architectural and engineering services."

Thus it is those officials who are in charge of units of the *state* government to whom the statute expressly assigns the responsibility for implementing its selection procedures. The statute omits mention of officials of local government.

This express enumeration of state officials in a statute which omits any designation of their local counterparts reflects a significant indication of legislative intent that such statute is not to be applied to the agencies of local government. As stated in *Capistrano Union High School Dist. v. Capistrano Beach Acreage Co.* (1961) 188 Cal. App. 2d 612, 617: "'where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned.'" See also *In re Hubbard* (1964) 62 Cal. 2d 119, 126–127; *County of Madera v. Superior Court* (1974) 39 Cal. App. 3d 665, 670.

The limitation of the statute's operation to units of the state government is further indicated by its qualification in the definition of "agency head [s]" that they be "authorized under the *State Contract Act* to contract for architectural and engineering services."

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firm considered to be the most qualified, at a price he determines to be fair and reasonable to the State of California or the political subdivision involved, negotiations with that firm shall be formally terminated. The agency head shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head shall terminate negotiations. The agency head shall then undertake negotiations with the third most qualified firm.

"(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this chapter until an agreement is reached."

(§ 4225 (2); emphasis added.)

The State Contract Act (§§ 14250–14424) which regulates competitive bidding and contract awarding and modification procedures relates to *state* construction projects.[4] As provided in section 14254: "As used in this chapter [the State Contract Act), 'project' includes the erection, construction, alteration, repair or improvement of any *state* structure, building, road, or other state improvement of any kind which will exceed in cost a total of fifteen thousand dollars ($15,000)." (Emphasis added.)

Thus by expressly placing the responsibility for implementing the selection procedures of sections 4525–4529 upon those officials who are the principal officers of units of *state* government and who are authorized to contract for *state* construction projects, the Legislature would appear to have abundantly indicated its intent to exclude agencies of local government from the ambit of these provisions.

However, an element of ambiguity inheres in this otherwise explicit indication that the statute is to be confined to agencies of the state government. This ambiguity arises from references in the statute to "political subdivision[s]" of the state. For example, section 4526 refers to "the public policy of the State of California and *any political subdivision thereof*. . . ." (Emphasis added.) Section 4528(a) requires the agency head to negotiate a contract that "is fair and reasonable to the State of California *or the political subdivision involved*. . . ." Finally, section 4528(b) applies to the agency head in the situation where he is unable to negotiate a contract at a price that is "fair and reasonable to the State of California *or the political subdivision involved*. . . ." (Emphasis added.)

This ambiguity is resolved by an examination of the amendments that were made during the course of enacting the statute which was introduced in the Legislature as Assembly Bill No. 325 on February 12, 1973. Most significant in this regard is that the term "agency head" was first defined in section 4525 (2) as "the secretary, administrator, or head of a department, agency, or bureau of the State of California and *any political subdivision thereof* authorized under the State Contract Act to contract for architectural and engineering services." (AB 325 1973–1974 (Reg. Sess.) as amended in the Assembly 1/16/74; emphasis added.) Thus at this point the proposed statute expressly included agency heads of units within *political subdivisions*. But on June 20, 1974, the reference to "any political subdivision thereof" in the definition of "agency head" was stricken out as the bill was amended in the Senate. This amendment thus removed "agency head[s]" of "political subdivision [s)" from the enumeration of those charged with implementing the statute.

[4] See sections 25450–25468 similarly regulating county construction projects and sections 37901–37935 with respect to city construction projects.

At the same time that the definition of "agency head" in section 4525 was thus constricted to heads of *State* government units, similar limiting amendments were made to section 4526. Prior to these amendments section 4526 declared the public policy to be that "selecting for professional services of private architect or engineering firms shall be on the basis of demonstrated competence. . . ." (AB 325, *supra*, as amended in the Senate, March 27, 1974.) This declaration of public policy was amended by adding to it the, now narrowly defined term, "agency head," so that it presently provides that "selecting by an agency head for professional services of private architect or engineering firms shall be on the basis of demonstrated competence. . . ." (AB 325, *supra*, as amended in the Senate, June 20, 1974. Emphasis added.) Section 4526 was further amended at this time by deleting the reference to "public agencies" as the authority responsible for promulgating implementing regulations, and designating instead "agency heads" as the authority responsible for such regulations. (AB 325, *supra*, as amended in the Senate, June 20, 1974.)

The deliberate elimination of "political subdivisions" from the definition of "agency head," the specific confining of the declaration of public policy to selections of architects and engineers made by "agency heads," and the direct substitution of "agency head," a term limited to specified state officials, for the broader term "public agencies," constitutes a cogent demonstration of the Legislature's intent to exclude local government from the statute's comprehension and to limit the statute's applicability to units of the state government.

The significance of such reenactment amendments to a bill was recognized in *Rich v. State Board of Optometry* (1965) 235 Cal. App. 2d 591, where it was stated: "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." (*Id*. at p. 607. See also *Madrid v. Justice Court* (1975) 52 Cal. App. 3d 819, 825.)

It can thus be seen that the surviving references to "political subdivision[s]" in the present statute are disconnected from any of its operative provisions and are essentially dormant remnants of a bill that once did explicitly apply its operative provisions to "political subdivision[s]." Viewed in this light such references can be disregarded as being surplusage, at least with respect to any function of indicating which governmental agencies are to be included within the present statute s operation.

While we are aware of the general rule of statutory construction that words in a statute should not be regarded as surplusage (*People v. Gilbert* (1969) 1 Cal. 3d 475, 480), this rule must yield when the words in question are repugnant to a clearly manifested legislative intent. As stated in *Jordan v. LeBlane and Broussard Ford, Inc.* (La. App. 1976) 332 So. 2d 534, 537: "Where words and clauses which have inadvertently crept into

statutes are clearly repugnant to legislative intent, such words and clauses may be disregarded." See also *Silver v. Brown* (1966) 63 Cal. 2d 841, 845, where it was stated: "The literal meaning of the words of a statute may be disregarded . . . to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole."

In the present situation, the limiting definitions of the statute and its pertinent legislative history clearly indicate that an application of that statute to local governmental agencies would be contrary to the intent of the Legislature.

We therefore conclude that the provisions of sections 4525 to 4529 relating to the selection of architectural and engineering firms are inapplicable to such local agencies.

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