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Senate
California Legislature

LERROY F. GREENE
MEMBER OF CALIFORNIA LEGISLATURE
SIXTH SENATE DISTRICT, SACRAMENTO COUNTY

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December 12, 1989

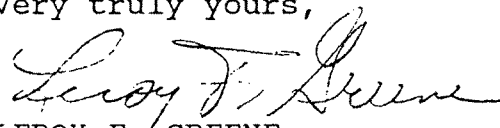
Re: **Enactment of Senate Bill 419 Mandates qualifications-based procurement by local agencies for professional services.**

SB 419, relating to public contracts, mandates local agencies to select private architectural, engineering, land surveying and construction management firms based on qualifications instead of bidding. The bill was signed on September 6, 1989.

SB 419 clarifies an earlier law (SB 2034) by clearly stating that local agencies are required to procure professional services on the basis of demonstrated competence and qualifications.

This requirement long has been official public policy in state contracts. The new law (SB 419) which extends that policy to local agencies, becomes effective January 1, 1990.

Very truly yours,


LERROY F. GREENE

LFG:gi

Attachments:

Copy of SB 419

Legislative Counsel's Opinion dated October 30, 1989

"REMEMBER — IF YOU ARE TO BE PROPERLY REPRESENTED, YOUR VIEWS MUST BE KNOWN"

Senate Bill No. 419

CHAPTER 293

An act to amend Section 4526 of the Government Code, relating to public contracts.

[Approved by Governor September 6, 1989. Filed with Secretary of State September 6, 1989.]

LEGISLATIVE COUNSEL'S DIGEST

SB 419, L. Greene. Public contracts: services.

Existing law provides that, 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 selection by a state or local agency head for professional services of private architectural, engineering, land surveying, or construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.

This bill, instead, would require both state and local agency heads to select certain professional services on that basis. The bill would also declare that it is declaratory of existing law. The imposition of this new requirement on local agencies would create a state-mandated local program.

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, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed \$1,000,000, shall be made from the State Mandates Claims Fund.

The people of the State of California do enact as follows:

SECTION 1. Section 4526 of the Government Code is amended to read:

4526. Notwithstanding any other provision of law, selection by a state or local agency head for professional services of private architectural, engineering, land surveying, or construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required. In order to implement this

method of selection, state agency heads contracting for private architectural, professional engineering, land surveying, and construction project management services shall adopt by regulation, and local agency heads contracting for private architectural, professional engineering, land surveying, and construction project management services may adopt by ordinance, procedures that 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. Furthermore, these procedures shall assure maximum participation of small business firms, as defined by the Director of General Services pursuant to Section 14837.

SEC. 2. The amendment made to Section 4526 of the Government Code by Section 1 of this act does not constitute a change in, but is declaratory of, the existing law.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

O

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Honorable Leroy F. Greene
3082 State Capitol

Public Contracts: Professional Services - #24043

Dear Senator Greene:

QUESTION

After January 1, 1990, under Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code, will local agencies be required, or merely permitted, to select the applicable professional services on the basis of demonstrated competence and professional qualification?

OPINION

After January 1, 1990, under Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code, local agencies will be required to select the applicable professional services on the basis of demonstrated competence and professional qualification.

ANALYSIS

Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code¹ contains provisions relating to contracts by state and local agency heads for private architectural, engineering, land surveying, and construction project management services. Section 4526 was amended by

¹ All statutory references are to the Government Code.

Chapter 293 of the Statutes of 1989, which will take effect on January 1, 1990 (subd. (c), Sec. 8, Art. IV, Cal. Const.). That section provides as follows:

"4526. Notwithstanding any other provision of law, selection by a state or local agency head for professional services of private architectural, engineering, land surveying, or construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required. In order to implement this method of selection, state agency heads contracting for private architectural, professional engineering, land surveying, and construction project management services shall adopt by regulation, and local agency heads contracting for private architectural, professional engineering, land surveying, and construction project management services may adopt by ordinance, procedures that 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.

"Furthermore, these procedures shall assure maximum participation of small business firms, as defined by the Director of General Services pursuant to Section 14837." (Emphasis added.)

This section provides that selection by a local agency head for specified professional services shall be on the basis of demonstrated competence and professional qualification, and that local agency heads may adopt by ordinance procedures to assure that these services are engaged on this basis.

A fundamental tenet of statutory construction is that the Legislature is presumed to have meant what it said, and the plain meaning of the language governs (Great Lakes Properties, Inc. v. City of El Segundo, 19 Cal. 3d 152, 155). Use of the word "shall" in a statute generally imports a mandatory construction (Ford Motor Credit Co. v. Price, 163 Cal. App. 3d. 937). The ordinary import of "may" is a grant of discretion (In re Richard E., 21 Cal. 3d 349).

Thus, Section 4526 will require local agency heads to select certain professional services on the basis of demonstrated competence and professional qualification but permits, rather than requires, local agency heads to adopt by ordinance procedures to assure that these services are so engaged. In other words, local agency heads must obtain professional services on the basis of demonstrated competence and professional qualification, but they may utilize any procedures, including the enactment of an ordinance, to achieve this result.

Moreover, the prior version of this provision stated, in pertinent part, as follows:

"4526. 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 selection by a state or local agency head for professional services of private architect, engineering, land surveying, or construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.

* * *

A declaration of public policy is merely indicative of legislative intent and, in general, an expression of legislative intent does not have a legally binding effect and thus is merely discretionary (see Mullan v. State, 114 Cal. 578, 584). Therefore, in accordance with this earlier version of Section 4526, local agencies were permitted, but not required, to let contracts for specified professional services on the basis of demonstrated competence and professional qualifications rather than on the basis of competitive bidding.

Chapter 293 of the Statutes of 1989 amended Section 4526 by, among other things, deleting the clause referring to the public policy of the state and adding the first sentence of Section 4526 which is a statement of positive law imposing mandatory action.

It is a tenet of statutory construction that it is presumed that a legislative body intended to change a law in all those particulars concerning which it made a change in language (Krater v. City of Los Angeles, 130 Cal. App. 3d 839, 845). Therefore, we think that the Legislature, by amending the language of Section 4526, intended to make selection by local agency heads for professional services on the basis of demonstrated competence

and professional qualifications mandatory rather than discretionary.

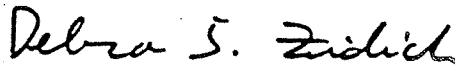
This conclusion is supported by the fact that Chapter 293 of the Statutes of 1989 was designated as a state-mandated local program because it imposed a new requirement on local agencies with regard to the selection of professional services. The designation as a state-mandated local program is also consistent with committee reports regarding the bill (S.B. 419) which specifically state that "by denying local government agencies the option of selecting certain professional services based in part on cost criteria, this bill imposes a state-mandated local program" (see Senate Floor Analyses of S.B. 419, February 8, 1989, and June 14, 1989, 1989-90 Reg. Sess.).

Accordingly, based on the above discussion, it is our opinion that after January 1, 1990, under Chapter 10 (commencing with Section 4525) of Division 5 of Title 1, local agencies will be required to select the applicable professional services on the basis of demonstrated competence and professional qualification.

Very truly yours,

Bion M. Gregory
Legislative Counsel

Debra J. Zidich

By  (77)
Debra J. Zidich
Deputy Legislative Counsel

DJZ:jdg

involved, negotiations with that firm shall be formally terminated. The state agency head shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the state agency head shall terminate negotiations. The state agency head shall then undertake negotiations with the third most qualified firm.

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

(b) When the selection is by a local agency head, the local agency head may undertake the procedures described in subdivision (a).
[Amended, Chapter 314, Statutes of 1991]

4529. Exception for non-professional services

This chapter shall not apply where the state or local agency head determines that the services needed are more of a technical nature and involve little professional judgment and that requiring bids would be in the public interest.
[Amended, Chapter 1016, Statutes of 1988]

4529.5. Evidence of expertise and experience

Any individual or firm proposing to provide construction project management services pursuant to this chapter shall provide evidence that the individual or firm and its personnel carrying out onsite responsibilities have expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project.
[Added, Chapter 698, Statutes of 1987]

* * *

Federal Law: Qualification Based Selection

Federal Property and Administrative Services Act of 1949,
"The Brooks Act"
Title 40, USCA, §§541—544

541. Definitions in the Brooks Act

As used in this title—

(1) The term "firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

(2) The term "agency head" means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

(3) The term "architectural and engineering services" means professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph.
(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
(C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive

planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.
[Amended, Public Law 100-656, 1988]

542. Procurement based on negotiated contracts

The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

543. Statements of Qualifications

In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. 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.

544. Contract negotiations for fair and reasonable compensation

(a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.
(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should 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 section until an agreement is reached.

* * *

Private Financing of Infrastructure

Government Code, §§5956—5956.10

5956. Purpose: private capital for infrastructure

Local governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If local governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector investment capital utilized to design, construct, maintain, rebuild, repair, and

shall not by reason of the payments be a source of income to a person who is retained or employed by the agency. [Added, Chapter 887, Statutes of 1991]

* * *

State Law: Qualification Based Selection

Government Code, Title 1, Division 5, Chapter 10,
§§4525—4529.5

4525. Definitions in the Little Brooks Act

For purposes of this chapter, the following terms have the following meanings:

(a) "Firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture, landscape architecture, engineering, environmental services, land surveying, or construction project management.

(b) "State agency head" means the secretary, administrator, or head of a department, agency, or bureau of the State of California authorized to contract for architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services.

(c) "Local agency head" means the secretary, administrator, or head of a department, agency, or bureau of any city, county, city and county, whether general law or chartered, or any district which is authorized to contract for architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services.

(d) "Architectural, landscape architectural, engineering, environmental, and land surveying services" includes those professional services of an architectural, landscape architectural, engineering, environmental, or land surveying nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.

(e) "Construction project management" means those services provided by a licensed architect, registered engineer, or licensed general contractor which meet the requirements of Section 4529.5 for management and supervision of work performed on state construction projects.

(f) "Environmental services" means those services performed in connection with project development and permit processing in order to comply with federal and state environmental laws. "Environmental services" also includes the processing and awarding of claims pursuant to Chapter 6.75 (commencing with Section 25299.10) of Division 20 of the Health and Safety Code. [Amended, Chapter 432, Statutes of 1993]

4526. Procurement based on negotiated contracts—state and local

Notwithstanding any other provision of law, selection by a state or local agency head for professional services of private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required. In order to implement this method of selection, state agency heads contracting for private architectural, landscape architectural, professional engineering, environmental, land surveying, and construction project management services shall adopt by regulation, and local agency heads contracting for private architectural, landscape architectural, professional engineering, environmental, land surveying, and construction project

management services may adopt by ordinance, procedures that 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. Furthermore, these procedures shall assure maximum participation of small business firms, as defined by the Director of General Services pursuant to Section 14837. In addition, these procedures shall specifically prohibit practices which might result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit government agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract under this section which would subject those employees to the prohibition of Section 87100. [Amended, Chapter 314, Statutes of 1991]

4526.5 Public contract code

A state agency head entering into a contract pursuant to this chapter shall, in addition to any other applicable statute or regulation, also follow Section 6106 of the Public Contract Code. [Added, Chapter 1128, Statutes of 1990]

4527. Qualification for state contracts—optional locally

In the procurement of architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services, the state agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data.

(a) When the selection is by a state agency head, statewide announcement of all projects requiring architectural, landscape architectural, engineering, environmental, land surveying, or construction project management services shall be made by the agency head through publications of the respective professional societies. 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 or her, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(b) When the selection is by a local agency head, the agency head may undertake the procedures described in subdivision (a). In addition, these procedures shall specifically prohibit practices which might result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit government agency employees from participating in the selection process when these employees have a relationship with a person or business entity seeking a contract under this section. [Amended, Chapter 314, Statutes of 1991]

4528. Mandatory state procedures—optional locally

(a) When the selection is by a state agency head the following procedures shall apply:

(1) The state agency head shall negotiate a contract with the best qualified firm for architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services at compensation which the state agency head determines is fair and reasonable to the State of California or the political subdivision involved.

(2) Should the state agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the agency head determines to be fair and reasonable to the State of California or the political subdivision