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,

[Signature]
LEROY F. GREENE

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"
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 17510 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.

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
October 30, 1989
Sacramento, California

Honorabe 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 Code 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 El., 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

By
Debra J. Zidich
Deputy Legislative Counsel

DJZ:jdg
Private Financings of Infrastructure  

354. Federal Law: Qualification Based Selection

Evidence of expertise and experience

Exception for non-provisional services

[Repealed. Public Law 100-650, § 242.] (e) The term "private financess" as used in this section shall be deemed to refer to any agreements or transactions entered into by a public authority for the purpose of financing or refinancing, or both, any project or portion thereof, under which the public authority is entitled to receive payment for services rendered in connection with such project or portion thereof.