

**CALENDAR ITEM
C85**

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**CONSIDER PROPOSED AMENDMENTS TO TITLE 2, DIVISION 3, CHAPTER 1,
AMEND ARTICLE 13 SECTIONS 2980 THROUGH 2980.12 OF THE CALIFORNIA
CODE OF REGULATIONS, RELATING TO THE COMMISSION'S EXISTING RULES
FOR CONTRACTING FOR ARCHITECTURAL AND ENGINEERING (A & E)
SERVICES IN ORDER TO CONFORM TO THE STANDARDS ESTABLISHED BY
OTHER STATE AGENCIES**

PROPOSAL:

California State Lands Commission (Commission) staff proposes to amend sections 2980.1, 2980.3, and 2980.5 through 2980.10, and add sections 2980.11 and 2980.12, to Title 2, Division 3, Chapter 1, Article 13 of the California Code of Regulations. These sections pertain to contracting for architectural and engineering (A & E) services.

BACKGROUND:

Article XXII, Sections 1 and 2 of the California Constitution provide state agencies with the authority to contract with private professional entities to perform A & E services for all phases of public works. First introduced in 1974, (Stat. 1974, Ch. 1434) sections 4525 through 4529 of the Government Code provide a framework for agencies to evaluate and select A & E firms for public works based on their demonstrated competence and professional qualifications. Through various legislative amendments, A & E services have been expanded to include construction project management, landscape architecture, and environmental services.

The statutory procedure established for A & E contracting differs from that of other services or consulting contracts (see Pub. Contract Code, §10335 et seq.) as A & E firms are selected after review of a solicited Statement of Qualifications (SOQ) that describe a firm's professional qualifications as opposed to a traditional competitive bid process based on monetary estimates and specific proposals.

Once an A & E firm is selected, Public Contract Code section 6106 defines the process for negotiating fees and executing a contract. Contracts valued over \$50,000 between the Commission and a firm must be reviewed by the Department of General Services. There are no comparable federal regulations or statutes that define the process of A & E contracting by state agencies.

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The Commission's existing A & E regulations do not allow for pursuing retainer or "on-call" type contracts, nor do such regulations allow for the flexibility of selecting a qualified A & E firm to negotiate a contract where less than three qualified firms have submitted a SOQ. This proposed action will provide the Commission's Executive Officer with these tools along with adding clarity to the A & E regulations by including SOQ evaluation criteria, additional subdivisions, internal references, and adding definitions for terms.

OBJECTIVES OF THE PROPOSED REGULATION:

The objectives of this proposed rulemaking are: 1) to make the A & E contracting process clearer, more transparent, and more consistent with the A & E regulations of other state agencies; 2) provide the Commission's Executive Officer and Commission staff with more of the tools available under the Government Code in contracting for A & E services; and 3) to reduce the cost and inconvenience to A & E firms contracting for services with the Commission.

To achieve the first objective, the proposed rulemaking amends the Commission's current A & E regulations to conform to the structure and substance found in other state agency A & E regulations. The proposed action closely emulates the current form of A & E regulations from the Department of General Services (Cal. Code Regs., tit. 21, § 1310 et seq.), Department of Transportation (Cal. Code Regs., tit. 21 § 1520 et seq.), and the California Energy Commission (Cal. Code Regs., tit. 20, § 2562 et seq.). This creates uniformity between the structure and content across the Commission's and other state agencies' A & E regulations. Secondly, the proposed action amends the current regulatory language by adding specific criteria upon which A & E firms will be chosen, subdividing paragraphs into more clear and more easily understandable directives, and more clearly describing the A & E process from SOQ submission to contract execution.

The proposed rulemaking achieves the second objective by providing the expanded ability to select a qualified A & E firm when less than three qualified firm have submitted SOQs and by providing the authority to engage in retainer contracts for on-going services such as the hiring of environmental firms to conduct compliance under the California Environmental Quality Act (CEQA). These tools already exist in the A & E regulations of numerous other state agencies (see agency examples above).

Finally, the proposed rulemaking may likely reduce the cost and inconvenience to A & E firms obtaining a Commission retainer contract by only requiring an A & E firm on retainer to submit one SOQ for work requiring multiple project tasks.

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The Commission has evaluated whether the proposed regulations are inconsistent or incompatible with existing state regulations and has concluded that these are the only regulations dealing with contracting A & E firms. Therefore, the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

STATUTORY AND OTHER REGULATIONS:

- A. Government Code sections 4525 through 4528.

OTHER PERTINENT INFORMATION:

1. The proposed regulation was published in the California Regulatory Notice Register on March 21, 2014.
2. The public comment period for the proposed amendments to the regulations ran for 45 days beginning on March 21, 2014, and closing on May 5, 2014. Commission staff did not received any comments from the public. No public hearing was held during the public comment period because no request was received by Commission staff to conduct such a hearing.
3. Staff is now recommending that the Commission adopt the proposed amendments and the modifications to the proposed regulation changes. After adoption, Commission staff will submit a Final Statement of Reasons, the final regulatory language, and the rulemaking file to the Office of Administrative Law for compliance with the provision of the Government Code and for publication by the Secretary of State.
4. The staff recommends that the Commission find that the subject amendments to regulations do not have a potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment, and are, therefore, not projects in accordance with CEQA.

Authority: Public Resources Code section 21065 and California Code of Regulations, Title 14, sections 15060, subdivision (c)(3) and 15378.

EXHIBITS:

- A. MODIFIED TEXT OF THE PROPOSED REGULATIONS
- B. FINAL STATEMENT OF REASONS

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IT IS RECOMMENDED THAT THE COMMISSION:

1. Find that the subject amendments to regulations are not subject to the requirements of CEQA pursuant to California Code of Regulations, Title 14, section 15060, subdivision (c)(3), because the subject activities are not projects as defined by the Public Resources Code section 21065 and California Code of Regulations, Title 14, section 15378.
2. Find that the proposed amendments will not affect small businesses as defined in Government Code section 11342.610.
3. Find that the proposed amendments will not have a significant impact on the creation or elimination of jobs or new or existing businesses within California, nor will they have an adverse economic impact on business, including the ability of California businesses to compete with businesses in other states.
4. Find that no alternatives would be more effective in carrying out the purposes for which the amendments are proposed or would be as effective as and less burdensome to affected private persons than the proposed regulations.
5. Adopt the proposed amendments to Sections 2980 through 2980.12 Article 13 of Title 2, Division 3, Chapter 1 of the California Code of Regulations, substantially in the form of that set forth in Exhibit "A" to become effective June 19, 2014.
6. Authorize the Commission staff to make minor, non-substantive, modifications to the proposed amendments in response to recommendations by the Office of Administrative Law.
7. Direct the Commission staff to take whatever action is necessary and appropriate to comply with provisions of the Government Code regarding the lawful adoption and publication of the regulations and amendments and to ensure that the regulation becomes effective.
8. Direct Commission staff to take whatever action is necessary and appropriate to implement the amendments to the regulations at such time as they become effective.

EXHIBIT A

Title 2. Administration.

Division 3. State Property Operations.

Chapter 1. State Lands Commission.

Article 13 Contracts securing Architectural, Landscape Architecture, Engineering, Environmental, Land Surveying, and Construction Project Management Services.

§2980-2980.12

2980.1 Definitions

As used in these regulations, the following terms have the following meaning:

- (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) "Small business" firm is one that meets the definition of small business firm set forth in California Code of Regulations, Title 2, Section 1896, subdivision (n).
- (c) "Commission" is the State Lands Commission.
- (d) "Executive Officer" is the Executive Officer of the State Lands Commission or any person designated by the Executive Officer to act on behalf of the Executive Officer.
- (e) "Architectural and engineering services" or "services" includes those professional services of an architectural, landscape architectural, engineering, environmental services, construction project management, or land surveying services as well as incidental services that members of these professions and those in their employ may logically and justifiably perform.
- (f) "Construction project management" means those services provided by a licensed architect, registered engineer, or licensed general contractor which meet the requirements of Government Code Section 4529.5 for management and supervision of work performed on state construction projects.
- (g) "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.

- (h) "Project" means the nature or scope of work being solicited as defined by a statewide announcement and/or Request for Qualifications. Project includes a project as defined in Section 10105 of the Public Contract Code, or as defined in Public Resources Code Section 21065.
- (i) "Publish" means publication of notices describing projects, for which architectural and engineering services will be required, in the State Contracts Register and, additionally, in either: (1) the publications of the respective professional societies; or (2) through electronic communications media which support bulletin boards or Internet web sites that have demonstrated statewide accessibility and are regularly maintained at established addresses by professional organizations which are representative of the services to be procured.
- (j) "Retainer contract" shall mean a contract whereby the architectural and engineering services are provided on an as-needed basis over a set period of time by the selected architectural and engineering services firm.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Section 4525, Government Code.

2980.2 Conflict of Interest/Unlawful Activity Prohibited

Any practice which might result in unlawful activity, including, but not limited to, rebates, kickbacks, or other unlawful consideration, is strictly prohibited, and each Commission employee is specifically prohibited from participating in the negotiation or selection process when that employee has an interest in, or has a personal or business relationship with a person affiliated with, any person or business entity seeking a contract with the Commission or solicited by the Commission for such a contract which would subject that employee to the prohibition of Section 87100 of the Government Code.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Sections 4526 and 87100, Government Code.

2980.3 Establishment of Criteria

- (a) Each time the Executive Officer intends to contract with a firm for a service identified in Section 2980.1, subdivision (e), the Executive Officer shall use the following criteria for selecting a firm:
- (1) the firm's professional experience in performing similar services;
 - (2) the quality and timeliness of the firm's recently completed or ongoing work;
 - (3) the firm's reliability, continuity, and location;
 - (4) the firm's staffing capability;
 - (5) the education and experience of key personnel the firm intends to assign to the contract;
 - (6) the firm's knowledge of applicable regulations and technology associated with the services required; and
 - (7) other factors the Executive Officer deems relevant to the specific task to be performed.
- (b) The Executive Officer shall weigh the factors identified in subdivision (a) according to the nature of the proposed project, the complexity and special requirements of the specific project, and the needs of the Commission.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Section 4527, Government Code.

2980.4 Construction Project Management Expertise

Any individual or firm proposing to provide construction project management services pursuant to these regulations 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.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Section 4529.5, Government Code.

2980.5 Annual Announcements for Statement of Qualifications and Performance Data

- (a) On an annual basis, or more or less frequently as needed by the Commission, the Executive Officer may publish a request for statement of qualifications and performance data.
- (b) An announcement issued pursuant to this section shall contain the following information:
 - (1) a request for a statement of qualifications and performance data;
 - (2) a description of the type of services that the statement should address;
 - (3) an explanation of how the information will be used to hire firms, including geographical limitations and expiration dates;
 - (4) submittal requirements and deadlines; and
 - (5) the name and phone number of a person to contact for further submittal information.
- (c) In selecting qualified firms for projects for services as described in Section 2980.8, the Executive Officer shall evaluate relevant statements of qualification and performance data submitted in response to any announcements published under this Section.
- (d) The Executive Officer shall retain, for no less than two years from the date of receipt, any statement of qualifications or performance data received under this Section.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.

Reference: Sections 4526, 4527, 4529.12, Government Code.

2980.6 Notice and Publication for Projects

- (a) The Executive Officer may solicit and enter into specific project contracts to accomplish each specific project and/or solicit and enter into retainer contracts to accomplish projects as-needed.

- (b) Unless a project is to be accomplished under a valid existing retainer contract, the Executive Officer shall publish a statewide announcement of any project or projects requiring architectural and engineering services. Such announcement shall contain, at a minimum:
- (1) a description of the work to be performed;
 - (2) the criteria upon which the award will be based;
 - (3) submittal requirements and deadlines;
 - (4) the name and phone number of a person to contact for further submittal information; and
 - (5) any additional criteria upon which the Executive Officer may deem as relevant to the specific project or projects.
- (c) The Executive Officer shall maintain a mailing list of firms that have requested announcements published pursuant to subdivision (b). The Executive Officer shall provide copies of announcements to those firms. Failure of the Executive Officer to send a copy of an announcement to a firm or failure of a firm or firms to receive an announcement sent by the Executive Officer shall not preclude any contract.
- (d) The Executive Officer shall endeavor to provide to all small business firms which have indicated an interest in receiving such announcements a copy of each project announcement. Failure of the Executive Officer to send a copy of an announcement to any firm or failure of such firm or firms to receive an announcement sent by the Executive Officer shall not preclude any contract.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.

Reference: Sections 4626, 4527, and 4529.12, Government Code.

2980.7 Estimate of Value of Services

- (a) Before interviewing a firm, the Executive Officer shall prepare an estimate of the value of the proposed services based upon accepted rates for comparable services. The estimate shall serve as a guide during contract negotiations to evaluate a fair and reasonable compensation.

- (b) If at any time the Executive Officer determines the State's estimate to be unrealistic due to changing market costs, special conditions, or other relevant considerations, the Executive Officer shall reevaluate and modify the estimate as necessary.
- (c) The Executive Officer's estimate shall remain confidential until the award of the contract, abandonment of any further procedure for the services to which it relates, or end of project.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.

Reference: Section 4528, Government Code.

2980.8 Selection of Qualified Firms

- (a) After expiration of the notice period stated in the announcement issued pursuant to Section 2980.6, subdivision (b), the Executive Officer shall evaluate current statements of qualifications and performance data on file with the Commission, together with those that may be submitted by other firms regarding the proposed project requiring architectural and engineering services. The Executive Officer shall conduct discussions with no less than three firms regarding the Commission's need for services, and the ability of each firm to provide those services to the Commission for the proposed project in a timely manner.
- (b) The Executive Officer shall select therefrom, in order of preference, based upon criteria established pursuant to Section 2980.3 and indicated within the announcement, no less than three of the firms deemed to be the most highly qualified to provide the services required.
 - (1) Where three firms cannot be found which could provide the required service, the Executive Officer may select from the available applicant firms.
 - (2) Selections based on less than three firms shall be documented with the names and addresses of firms contacted by the Executive Officer and the reasons why the provisions of this section could not be met. This documentation shall be maintained in the Commission's contract file.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.

Reference: Sections 4527 and 4528, Government Code.

2980.9 Negotiation of Contract

- (a) The Executive Officer shall, in accordance with Section 6106 of the Public Contracts Code, negotiate a contract with the best-qualified firm, as determined by the provisions of Section 2980.8, for services at compensation that the Executive Officer determines is fair and reasonable to the State of California. Negotiations shall be completed with an agreed upon contracting price and contractual agreement within 14 calendar days from the award date for the winning consultant firm. Should the Executive Officer be unable to negotiate a satisfactory contract with the firm considered to be the best-qualified at a price the Executive Officer determines to be fair and reasonable to the State of California, negotiations with that firm shall be formally terminated. The Executive Officer shall then undertake negotiations in the same manner with the next best-qualified firm(s) selected in order of preference pursuant to Section 2980.8, subdivision (b) until a contract is negotiated.
- (b) Should the Executive Officer be unable to negotiate a satisfactory contract with any of the selected firms, the Executive Officer shall select additional firms, as provided in Section 2980.8, and continue negotiations in the same manner until a satisfactory agreement is reached.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Sections 4527 and 4528, Government Code.

2980.10 Contracting in Phases

Should the Executive Officer determine that it is necessary or desirable to have a given project requiring architectural and engineering services performed in phases, it will not be necessary to negotiate the total contract price or compensation provisions at the time the initial phase is negotiated, provided that the Executive Officer shall have determined that the firm is the best qualified to perform the whole project at a fair and reasonable cost and that the contract contains provisions that the State, at its option, may use the firm for other phases and that the firm will accept a fair and reasonable price for subsequent phases to be later negotiated and reflected in a subsequent written instrument. The procedure with regard to estimates and negotiation shall otherwise be applicable.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Section 4528, Government Code.

2980.11 Retainer Contracts

- (a) Should the Executive Officer determine that a retainer contract is appropriate and in the best interest of the State, the Executive Officer may establish such a contract with a qualified firm for the type of professional services described in this Article.
- (b) The contract term shall not exceed four years. No individual contract task may exceed \$250,000 in value.
- (c) The Executive Officer may, but is not required to, set a minimum guaranteed compensation amount for such services. These tasks may be awarded under a single retainer contract with amendments to the retainer contract incorporating each individual task as needed.
- (d) The process for selecting the firm shall be the same as the selection process for specific project contracts described in Section 2980.8.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Sections 4526 and 4527, Government Code.

2980.12 Amendments

In instances where the Commission or the Executive Officer orders a necessary change in the character or scope of work to be performed in the course of performance of the contract, the firm's compensation may, by written agreement between the Commission and the firm, be adjusted in an amount which reasonably reflects the value of the change from that character and scope of work which existed prior to the change.

Authority: Section 4526, Government Code; Section 6108, Public Resources Code.
Reference: Sections 4528, Government Code.

Exhibit B

FINAL STATEMENT OF REASONS

TITLE 2, DIVISION 3, CHAPTER 1, AMEND ARTICLE 13 SECTIONS 2980
THROUGH 2980.12

UPDATE OF INITIAL STATEMENT OF REASONS

Since the publication of the proposed regulation originally noticed to the public on February 21, 2014, there have been no updates, additions, or amendments to the Initial Statement of Reasons, Notice of Proposed Action, the original text of the proposed regulation, nor to the analysis performed or the documents relied upon for that analysis.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

THE CALIFORNIA STATE LANDS COMMISSION (COMMISSION) DID NOT RECEIVE ANY COMMENTS FROM THE PUBLIC DURING THE INITIAL NOTICE PERIOD OF MARCH 21, 2014 THROUGH MAY 5, 2014.

The text of the proposed regulation was made available to the public for comment from March 21, 2014 through May 5, 2014. The Commission did not receive any comments through any channels on the proposed regulation. Further, no request was made by any member of the public for the Commission to conduct a public hearing regarding the proposed regulations.

UPDATED INFORMATIVE DIGEST

The “Informative Digest/Policy Statement Overview” is unchanged from the Notice of Proposed Action and is therefore incorporated by reference herein.

ALTERNATIVES DETERMINATION

The Commission has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less

burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The proposed regulations seek to reduce the burden and expense for contractors seeking to engage in Architectural and Engineering work with the state. No alternatives were brought forth to the Commission by the regulated community and no evidence was introduced during the comment period that showed that the proposed regulations would pose burden upon, or be less effective than any alternative measure. According to the “Economic Impact Analysis,” part of the rulemaking file and incorporated by reference herein, “Commission staff estimates that A & E firms awarded a retainer contract may see a maximum savings of \$45,000 to \$90,000 over the life of a retainer contract as a result of this proposed action. Further, this proposed action will facilitate the hiring of A & E firms to conduct environmental evaluation of various projects, furthering the aims of the California Environmental Quality Act.” No alternatives were identified that provided this level of benefit.