MINUTE ITEM
This Calendar Item No. C97 was approved as Minute Item No. 97 by the California State Lands Commission by a vote of 3 to Ø at its 4-24-01 meeting.

CALENDAR ITEM
C97

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04/24/01
W 25650
D. Brown
L. Kiley
M. Meier

CONSIDERATION OF EMERGENCY REGULATIONS GOVERNING SELECTION OF CONTRACTORS IN COMPLIANCE WITH GOVERNMENT CODE SECTION 4526

PROPOSAL:

The Commission's Staff proposes the adoption of regulations to implement the provisions of Section 4526 *et seq.* of the Government Code (Gov. C.), to establish procedures for securing architectural, landscape architecture, engineering, environmental, land surveying, and construction project management services.

BACKGROUND:

Gov. C. Section 4526 requires State agency heads to solicit and use qualification and performance data furnished by prospective contractors for specified services as a basis for selection of such contractors, as opposed to the competitive bidding process utilized in the past. The Government Code requires that each agency head adopt regulations implementing the new process before utilizing it. The Commission cannot secure contractor services unless and until it has in place regulations such as those here proposed.

On June 27, 2000, the Commission approved regulations that are very similar to the attached. However, at the recommendation of the Office of Administrative Law, modifications to the text of the requirements and the process employed in their adoption were deemed necessary. These modifications require Staff to present this second proposal.

Although these regulations would be adopted as emergency measures, Staff recommends that it also be authorized to take whatever action is necessary and appropriate to make these regulations permanent. Under the Administrative Procedures Act (Gov. C. Sections 11340 through 11359), emergency regulations remain in effect only 120 days. In order to ensure the provisions are permanent, the

Commission must comply with the adoption procedures required for nonemergency regulations. At this time, the requirements for public notice and the public comment period have been completed. Still to be accomplished are preparation and submission of the Rulemaking File and review of the File by the Office of Administrative Law. This should take approximately sixty to ninety days to complete. In the mean time, these proposed Emergency Regulation, if adopted by the Commission and approved by the Office of Administrative Law, would remain in effect.

PERMIT STREAMLINING ACT DEADLINE:

N/A

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (14 Cal. Code Regs. 10561), the Commission Staff has determined that this activity is exempt from the requirements of the CEQA because the activity is not a "project" as defined by the CEQA and the State CEQA Guidelines.

   Authority: Public Resources Code Section21084 and 14 Cal. Code Regs. 15300.

2. The proposed regulatory amendments do not affect small businesses as defined in Gov. C. Section 11342, sub. (h), because small businesses will be accorded equal opportunity to submit statements of qualifications and performance data which will form the basis for selection of contractors for specified services.

EXHIBIT:

A. Proposed Regulations

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ACTIVITY IS EXEMPT FROM THE REQUIREMENTS OF CEQA PURSUANT TO TITLE14, CALIFORNIA CODE OF REGULATIONS, SECTION 15061 BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY PUBLIC RESOURCES CODE SECTION21065 AND TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15378.

2. FIND THAT AN EMERGENCY EXISTS AND THAT THE REGULATIONS ARE NECESSARY FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC HEALTH, SAFETY AND GENERAL WELFARE OF THE ENVIRONMENT BY PREVENTING DELAY OF PROJECTS UNDERTAKEN FOR ENERGY PRODUCTION AND THE PROTECTION OF THE ENVIRONMENT AND BY PREVENTING OTHER PROJECTS THAT MAY OTHERWISE TAKE PLACE WITHOUT ADEQUATE ENVIRONMENTAL REVIEW.

3. FIND THAT:

   A. THE REGULATIONS WILL HAVE NO SIGNIFICANT IMPACT UPON CREATION OR ELIMINATION OF JOBS, CREATION OF NEW BUSINESSES, THE ELIMINATION OF EXISTING BUSINESSES, OR EXPANSION OF BUSINESSES WITHIN THE STATE OF CALIFORNIA;

   B. THE REGULATIONS WILL HAVE NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING THE ABILITY OF CALIFORNIA BUSINESSES TO COMPETE WITH BUSINESSES IN OTHER STATES;

   C. THE COMMISSION IS NOT AWARE OF ANY COST IMPACTS THAT A REPRESENTATIVE PRIVATE PERSON OR BUSINESS WOULD NECESSARILY INCUR IN REASONABLE COMPLIANCE WITH THE PROPOSED ACTION, SINCE THE REGULATIONS ARE INTENDED TO SIMPLIFY EXISTING CONTRACTING PROCEDURES;

   D. THE ADOPTION OF THE REGULATIONS WILL NOT AFFECT SMALL BUSINESSES BECAUSE COMPLIANCE REQUIREMENTS ARE UPON THE COMMISSION, RATHER THAN UPON ANY SMALL BUSINESS;

   E. THE REGULATIONS WILL NOT IMPOSE ANY COSTS OR MANDATES UPON ANY LOCAL AGENCY OR SCHOOL DISTRICT, NOR IMPOSE ANY MANDATES THAT WOULD REQUIRE REIMBURSEMENT THERETO;

   F. THE REGULATIONS MAY RESULT IN MINIMAL COST SAVINGS TO THE COMMISSION DUE TO STREAMLINED CONTRACTING PROCEDURES;

G. THE REGULATIONS WILL HAVE NO SIGNIFICANT EFFECT ON HOUSING COSTS, NOR ON COSTS OR SAVING IN FEDERAL FUNDING TO THE STATE;

H. THE REGULATIONS DO NOT DUPLICATE OR CONFLICT WITH FEDERAL REGULATIONS; AND

I. NO ALTERNATIVE WOULD BE MORE EFFECTIVE IN CARRYING OUT THE PURPOSE FOR WHICH THE REGULATIONS ARE PROPOSED OR WOULD BE AS EFFECTIVE AND LESS BURDENSOME TO AFFECTED PRIVATE PERSONS THAN THE PROPOSED REGULATIONS.

4. ADOPT THE PROPOSED REGULATIONS AS EMERGENCY REGULATIONS, WHICH WOULD ADD ARTICLE 13, INCLUDING SECTIONS 2980.0 THROUGH 2980.9, TO TITLE 2, DIVISION 3, CHAPTER 1, OF THE CALIFORNIA CODE OF REGULATIONS, SUBSTANTIALLY IN THE FORM OF THOSE SET FORTH IN EXHIBIT "A", TO BECOME EFFECTIVE UPON FILING WITH THE SECRETARY OF STATE.

5. AUTHORIZE THE COMMISSION STAFF TO MAKE MODIFICATIONS IN THE REGULATIONS IN RESPONSE TO RECOMMENDATIONS BY THE OFFICE OF ADMINISTRATIVE LAW.

6. DIRECT THE COMMISSION STAFF TO TAKE WHATEVER ACTION IS NECESSARY AND APPROPRIATE TO COMPLY WITH PROVISIONS OF THE GOVERNMENT CODE REGARDING ADOPTION OF REGULATIONS AND AMENDMENTS AND TO ENSURE THAT THE REGULATIONS BECOME PERMANENT AND EFFECTIVE.

7. DIRECT COMMISSION STAFF TO TAKE WHATEVER ACTION IS NECESSARY AND APPROPRIATE TO IMPLEMENT THE REGULATIONS AT SUCH TIME AS THEY BECOME EFFECTIVE.

EXHIBIT A

ARTICLE 13. CONTRACTS SECURING ARCHITECTURAL, LANDSCAPE ARCHITECTURE, ENGINEERING, ENVIRONMENTAL, LAND SURVEYING, AND CONSTRUCTION PROJECT MANAGEMENT SERVICES

2980. Purpose and Scope.

The purpose of this article is to establish, as authorized and required by Government Code Sections 4525 *et seq.*, procedures for securing architectural, landscape architecture, engineering, environmental, land surveying, and construction project management services.

Authority: Government Code Section 4526, Public Resources Code section 6108.
Reference: Government Code Sections 4525 through 4529.5.

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 Title 2, California Code of Regulations, Section 1896(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, 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 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

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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) "Publish" shall mean publication of notices describing projects for which architectural, landscape architecture, engineering, environmental, land surveying, or construction project management services will be required in the publications of the respective professional societies and in the State Contracts Register. "Publish" shall also include publication of such notices in electronic form through the Internet.

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

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 a personal or business relationship with a person affiliated with, or has an interest in, 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: Government Code Section 4526, Public Resources Code Section 6108.
Reference: Government Code Sections 4526 and 87100.

2980.3 Establishment of General Criteria and Establishment of List of Pre-qualified Contractors.

(a) The Executive Officer shall publish at least annually a notice that solicits statements of qualification and performance data from firms that provide the services defined in Section 2980.1.

(b) The Executive Officer shall establish and publish a list of relevant general criteria which will form the basis for adding such firms to a list of pre-qualified contractors maintained by the Commission. The general criteria shall include such factors as professional excellence, demonstrated competence, specialized experience of the firm, education and experience of key personnel to be assigned, staff capability, workload, ability to meet schedules, nature and quality of completed work, reliability and continuity of the firm, location, familiarity with pertinent regulatory processes, familiarity with project locale, previous experience with a specific type of project, and other considerations deemed relevant.

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

Reference: Government Code Section 4527.

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

2980.5 Notice and Publication for Specific Projects

(a) The Executive Officer shall publish a statewide announcement of any project or projects requiring architectural, landscape architectural, engineering, environmental, land surveying, or construction management services. Such announcement shall contain, at a minimum, the type of services required, a description of the project, a projected schedule for the project, a description of responsive material that must be submitted by firms not on the Commission's list of pre-qualified firms, and a date before which that responsive material must be submitted to the Commission.

(b) The Executive Officer may, prior to engaging a firm for a specific project, develop and include in the published statewide announcement for the project a list of relevant factors, if any, that may be considered in selecting a contractor for that particular project. Such factors may be considered by the Executive Officer according to the nature of the project, the needs of the State and the complexity and special requirements of that specific project.

(c) 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 operate to preclude any contract.

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

2980.6 Estimate of Value of Services.

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Before any discussion with any firm concerning fees for services provided in connection with a particular project, the Executive Officer shall cause an estimate of the value of

such services to be prepared. This estimate shall serve as a guide in determining fair and reasonable compensation for the services rendered. Such estimate shall be, and remain, confidential until award of contract or abandonment of any further procedure for the services to which it relates. At any time the Executive Officer determines the State's estimates to be unrealistic due to rising costs, special conditions, or for other relevant considerations, the estimate shall be reevaluated and modified if necessary.

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

2980.7 Negotiation of Contract

(a) After expiration of the notice/compliance period stated in an announcement, 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, and 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. The Executive Officer shall then shall select therefrom, in order of preference, based upon criteria established pursuant to sections 2980.3 and 2980.5, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(b) The Executive Officer shall, in accordance with section 6106 of the Public Contracts Code, negotiate a contract with the best-qualified firm for services at compensation that the Executive Officer determines is fair and reasonable to the State of California. 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 with the second best-qualified firm. Failing accord with the second most qualified firm, the Executive Officer shall terminate negotiations. The Executive Officer shall then undertake negotiations with the third most qualified firm.

(c) Should the Executive Officer be unable to negotiate a satisfactory contract with any of the selected firms, the Executive Officer shall select additional firms in order of their competence and qualifications and continue negotiations in the same manner until a satisfactory agreement is reached.

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

2980.8 Contracting in Phases

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Should the Commission determine that it is necessary or desirable to have a given project 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 utilize 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.

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

2980.9 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: Government Code Section 4526, Public Resources Code Section 6108
Reference: Government Code Section 4528