

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

When an agency needs architectural, landscape architectural, engineering, environmental, land surveying, or construction project management professional services, Government Code section 4526 requires the agency to award the contract based on “demonstrated competence and qualifications” rather than the competitive bidding method where the agency awards the contract to the lowest cost bidder. Government Code section 4526 also requires agencies to adopt regulations detailing their contract selection process for the specified professional services. Therefore, to comply with legal requirements for the hiring of such professional services, the agency must promulgate regulations in accordance with Government Code section 4526. (SCM vol. 1, Ch. 11.)

In 2000, the Department adopted “emergency” regulations for the selection of professional services firms. The emergency regulations implemented Government Code section 4526, but only applied to one division within the Department, the California Geologic Energy Management Division (“CalGEM”), rather than the Department as a whole.¹ The Department, however, is the contracting entity for the Department and its various divisions, including CalGEM, and the Department generally, as well as its several other divisions – the Division of Mine Reclamation, the California Geological Survey, and the Division of Land Resource Protection – may have a need to hire professional services firms. Because the Department’s current regulations to implement Government Code section 4526 refer only to CalGEM, questions over statutory compliance arise when the Department or another of its divisions have a need to solicit specified professional services. The Department finds no reason or benefit in having the professional services selection regulations apply exclusively to CalGEM.

BENEFITS

The proposed amendments to the Department’s regulations for the hiring of professional services will clarify that the regulations apply not only to CalGEM but to the Department as a whole. The primary benefit of the amendments will be to ensure full legal compliance with Government Code sections 4525 et seq. when the Department or any of its divisions contract for professional services. The Department administers a variety of programs vital to California’s public safety, environment, and economy. Accordingly, there is a foreseeable need for the Department to require contracts for professional services within the scope of

¹ At the time the regulations were adopted, CalGEM was named the Division of Oil, Gas, and Geothermal Resources.

Government Code section 4526, including environmental services. Examples may include: (1) a Department contract with an environmental consultant to perform environmental review to ensure Department-led projects comply with the California Environmental Quality Act; (2) a Division of Mine Reclamation contract for environmental or engineering services to assist in the planning and implementation of appropriate remediation of abandoned mines; or (3) a California Geological Survey contract for environmental and engineering consultation to assist in carrying out its statutory mandate to identify suitable locations of carbon dioxide injection wells.

Under a close reading of the Department's current regulations, only CalGEM can legally avail itself of the statutorily required selection process for these professional services. If the Department or its other divisions have a need for specified professional services, they are faced with the precarious decision of either soliciting the contract using low-cost bidding or following the statutorily required process prioritizing competence and qualification without assurance that the Department's regulations apply beyond CalGEM. The proposed amendments will correct this discrete issue without any need to change the substantive elements of the regulations. This will bring consistent and clarity to the Department's contract solicitation process, thereby improving the Department's administrative efficiency and compliance with legal requirements.

PURPOSE

Amendment to Sections 1690-1698 of Title 14 of the California Code of Regulations: To amend the Department's current regulations for the selection of certain professional services to cover the entire Department. All references to the "Division" are replaced with the "Department." The "Department" is defined as the Department of Conservation.

NECESSITY

Sections 1690 through 1698 of Title 14 of the California Code of Regulations implement Government Code section 4525 et seq., which is intended to ensure that certain professional services contracts are to be awarded based on demonstrated competence and qualifications at a fair and reasonable price. (Gov. Code, § 4526.) Consistent with the statutes, the proposed amendments to Sections 1690 through 1698 would enable the Department and its other divisions to solicit and enter into professional services contracts based on competence and qualifications. The amendments will bring the entire Department into

conformity with the statutory requirements (rather than applying exclusively to CalGEM).

The proposed amendments are necessary because the statute requires all agencies that may have a need to obtain the specified professional services, such as the Department, to have regulations in place detailing how the agency will award contracts based on demonstrated competence and qualification. (Gov. Code, § 4526.) While the Department has a need to contract for such services, its existing regulations do not clearly cover the Department as a whole. The proposed amendments are necessary to ensure the Department can meet its operational needs of hiring of specified professional services in compliance with applicable legal requirements.

The Department has reviewed the regulations and has determined there is no need to make any changes to the substantive aspects of the regulations on account of expanding them to the Department as a whole. Neither the Department nor any of its other divisions have any unique circumstances or requirements that would make a substantive change necessary. These regulations meet the Department's needs as a whole and will not require any substantive changes. In sum, the proposed amendment will result in the least burdensome, most efficient way of achieving the statutory purpose of ensuring contracts for specified professional services are awarded based on demonstrated competence and at a fair and reasonable price.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Department is not relying on any technical, theoretical, or empirical study, reports, or documents to support the proposed amendments.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Department has considered whether the proposed amendments to Regulation Sections 1690-1698 will have economic impacts and has concluded that they will not. The proposed amendments do not impose any new requirements. The only effect of the proposed amendments is to change the definition of the entity authorized to utilize the professional services contract process (changing "Division" to the Department). These regulations are required by statute, to implement a contract selection process already mandated and set forth in statute, and the minor change to clarify that the regulations apply to the Department rather than one of its divisions will not have any meaningful economic or fiscal impacts.

Any effects on private architectural, landscape architectural, engineering, environmental, land surveying, and construction management firms will be

negligible. The proposed amendments will have no effect on the Department's need for the specified professional services and will not change the number of contracts solicited, which is dictated by the Department's program needs. The proposed amendments will not expand or reduce the Department's demand for the specified professional services.

Without the proposed amendments, the Department's solicitation of specified professional services will either be based on low-cost bidding or use the existing regulations for awarding contracts based on competence even though those regulations technically apply only to CalGEM. At most, the proposed amendments will affect the way the some specified professional service firms compete for a small number of Department contracts – prioritizing competence and qualifications for services performed at a reasonable price over simply the lowest cost bid. This solicitation process, however, is compelled by the statute rather than the regulations, and therefore any nominal economic impacts are attributable to the existing statute rather than the regulations. Accordingly, there is no indication the proposed amendments will result in professional service providers hiring more employees or letting any go.

For all the above reasons, the Department concludes that the proposed amendment:

- Will not be responsible for creating or eliminating jobs in California;
- Will not result in the creation of new businesses or the elimination of existing businesses within California; and
- Will not result in the expansion of businesses currently doing business within California.

Additionally, the Department finds the proposed amendment may have indirect benefits to California's public health and the environment resulting from the prioritization of demonstrated competence and qualifications in the selection of professional service providers.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

As explained above, the proposed amendments will not have any significant adverse economic impact on business. This conclusion is based largely on a common sense understanding that the prioritization of contractor qualifications over bid cost in the selection of specified professional services providers is an existing statutory requirement, and the only impact of the proposed amendments is to ensure the implementing regulations apply to the Department

rather than one of its divisions. Any economic impacts on businesses caused by prioritizing qualifications over cost in state contract selection is solely a result of the statute and not the regulations.

Moreover, the proposed amendments do not increase or decrease the Department's need for service contracts. The only effect of the regulations (again, which implement an existing statutory selection process) is to impact *which* contractor is selected, but this is not an adverse economic impact affecting businesses generally. An effect on how specified professional service providers compete for contracts – qualifications vs. the lowest bid – is not an adverse economic impact to businesses generally. Indeed, any economic impact would only be positive because the Department would be authorized to award higher-value contracts to more qualified service providers rather than be compelled to accept the bid of the contractor who offers to perform the services at the lowest price. Therefore, the proposed amendments will not have a significant adverse economic impact on the specified professional services industries as a whole.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE DEPARTMENT'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Department finds there are no reasonable alternatives to the proposed amendments that would be less burdensome and equally as effective in achieving the purpose of the statute being implemented. The statute already requires that the specified contract selection process be utilized for certain professional services contracts. The alternative of maintaining the status quo is rejected for all the reasons discussed above.

Following a review of the current regulations that apply only to CalGEM, the Department has determined that the regulations satisfy the Department's needs and therefore rejects the idea of drafting a new set of regulations as an alternative to amending the existing regulations to simply change "Division" to "Department." Drafting an entirely new set of regulations would be unnecessary, unduly burdensome, and duplicative. The proposed amendments are the most efficient way to ensure that the selection process regulations apply to the Department without duplicating rulemaking efforts.

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS

The proposed amendments do not duplicate or conflict with federal regulations addressing the same issue. The regulations address the Department's processes for the selection of certain professional services in accordance with California statutes. The regulations and proposed amendments are not in conflict with any

federal regulations and there is no duplication or conflict with federal regulation that weighs against the proposed amendments.