Filed 6/14/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CONSULTING ENGINEERS AND LAND SURVEYORS OF CALIFORNIA, INC., et al.,

Plaintiffs and Respondents,

v.

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT,

Defendant and Appellant.

C048282

(Super. Ct. No. 03CS01654)

APPEAL from an order and judgment of the Superior Court of Sacramento County, Raymond M. Cadei, Judge. Affirmed.

Law Offices of Kelley Stimpel Martinez, Kelley Stimpel Martinez; Law Offices of James E. McGlamery and James E. McGlamery for Defendant and Appellant.

Stoel Rives and James P. Corn for Plaintiffs and Respondents.

Bill Lockyer, Attorney General, Louis R. Mauro, Senior Assistant Attorney General, Christopher E. Krueger, Vickie P. Whitney and Leslie R. Lopez, Deputy Attorneys General, for the Department of Transportation as Amicus Curiae on behalf of Plaintiffs and Respondents.

This dispute is another round in a long-standing battle by state employees to prevent the State of California from contracting out to private companies the performance of state services. Armed with the Civil Service Act, article VII of California's Constitution (article VII), state employees have usually prevailed in the courts because article VII has been interpreted to forbid, in most circumstances, private companies from contracting with the state to perform services that can be accomplished by state employees.

The battlefield changed in November 2000, when California's voters approved Proposition 35, adding article XXII to our Constitution (article XXII) to allow the state to contract with private entities to obtain architectural and engineering services for public works of improvement. Proposition 35 specified that article VII shall not be construed to limit the state from contracting with private companies for such services.

The state and Professional Engineers in California Government (PECG), a union representing engineers employed by the state, then entered into a collective bargaining agreement, known as a Memorandum of Understanding (MOU). Among other things, it provides that, except in extremely unusual or urgent circumstances, the state must make every effort to use state employees to perform architectural and engineering services for public works projects, before resorting to contracts with private companies. In order to "ensure that [state] employees have preference over contract employees," the MOU contains requirements that make it more difficult for a state entity to contract out for such services.

These requirements are contained in what we will refer to as provision 24 of the MOU.

In this latest round of the ongoing battle, Consulting Engineers and Land Surveyors of California, Inc., John M. Humber, and Harris & Associates, Inc. (collectively, CELSOC) filed a petition for writ of mandate, seeking to enjoin the implementation of provision 24 of the MOU. In a well articulated ruling, the trial court granted the requested relief. PECG appeals.

As we will explain, we agree with the trial court's ruling that the terms of provision 24 of the MOU "limit the ability of the State to contract freely for architectural and engineering services," and are "on their face, directly in conflict with Article XXII." We also conclude substantial evidence supports the court's finding that the implementation of provision 24 would (1) disrupt ongoing public works projects and waste public funds by terminating existing contracts, (2) produce great and irreparable injury to the public and to the parties to existing architectural and engineering services contracts, and (3) result in the loss of benefits that would flow to the public from such future contracts.

Hence, we shall affirm the judgment enjoining the implementation of provision 24 of the MOU.

BACKGROUND

Section 1 of article VII states: "(a) The civil service includes every officer and employee of the State except as otherwise provided in this Constitution. [¶] (b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive

examination." Article VII creates the State Personnel Board (§ 2), to which enforcement and administration of the civil service laws are delegated (§ 3). It embraces "every officer and employee of the State" (§ 1), except for certain positions specifically exempted from the civil service (§ 4). Article VII is implemented by the state Civil Service Act. (Gov. Code, § 18500 et seq.; see *California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, 395.)

Courts have interpreted article VII as a restriction on the contracting out of state tasks to the private sector. (*California State Employees' Assn. v. State of California* (1988) 199 Cal.App.3d 840, 844 (hereafter *CSEA*), and cases cited in *CSEA*.) "The restriction does not arise from the express language of article VII. [Citation.] 'Rather, it emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction.' [Citation.]" (*Ibid*.)

Thus, courts generally have concluded that article VII forbids the state from contracting for private companies to perform services of the kind that persons selected through civil service could perform "adequately and competently." (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 135.)

However, the restriction on contracting out is inapplicable if the state seeks to contract for the performance of "*new functions* not previously undertaken by the state or covered by an existing department or agency." (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 549 (hereafter *Professional Engineers*).) The restriction also may be inapplicable if the

state releases a former function in favor of "privatization" on an experimental basis under circumstances involving considerations of economy and efficiency. (*Id*. at p. 550.)

In addition, Government Code section 19130, subdivision (a) permits the state to contract out for personal services in order to obtain cost savings if those savings can be achieved without ignoring other applicable civil service requirements, such as the use of publicized competitive bidding and the avoidance of the displacement of state workers, and if there is no overriding public interest in having the state perform the function. (*CSEA*, *supra*, 199 Cal.App.3d at pp. 844-846.) *CSEA* concluded that this section does not violate article VII. "The goal of maintaining the civil service must be balanced with the goal of a fiscally responsible state government." (*Id*. at p. 853.)

With this background in mind, the California Supreme Court held that amendments to another Government Code section, expanding the authority of the state Department of Transportation (Caltrans) to award contracts to the private sector for state work, violated article VII. (*Professional Engineers, supra,* 15 Cal.4th at pp. 547, 572; Gov. Code, § 14130.) This was so because the work had been historically or customarily performed by state employees, and the Legislature had failed to make any findings demonstrating that the work could not be performed adequately and competently by state employees. (*Professional Engineers, supra,* 15 Cal.4th at pp. 570-572.)

In *Professional Engineers*, Caltrans urged the Supreme Court to disapprove certain decisions restricting the state's ability to

contract out to private companies the performance of state services. The court declined to do so noting, "although [Caltrans's] reasons, if factually based, might support a constitutional amendment to clarify, or indeed abrogate, the private contracting restriction, they offer no solid ground for ignoring traditional principles of stare decisis." (*Professional Engineers, supra,* 15 Cal.4th at pp. 563, 566.)

The electorate responded in November 2000 with Proposition 35, the "Fair Competition and Taxpayer Savings Act," adding article XXII to our Constitution. Section 1 of article XXII provides in pertinent part: "The State of California and all other governmental entities, . . . shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. The choice and authority to contract shall extend to all phases of project development . . . [and] shall exist without regard to funding sources whether federal, state, regional, local or private, whether or not the project is programmed by a state, regional or local governmental entity, and whether or not the completed project is a part of any state owned or state operated system or facility." Section 2 of article XXII goes on to say: "Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State or any other governmental entities, . . . from contracting with private entities for the performance of architectural and engineering services."

The expressed purpose of article XXII is to remove existing restrictions on contracting for architectural and engineering services; to encourage public/private partnerships for the benefit

of California taxpayers; to promote fair competition so both public and private sector architects and engineers work more efficiently; to speed the completion of backlogged transit projects; to ensure that contracting for architectural and engineering services occurs through a fair and competitive selection process that is free of undue political influence; and to make sure that private firms contracting for architectural and engineering services with governmental entities meet established design and construction standards. (Initiative Measure, Prop. 35, § 2.)

Thereafter, PECG and the state negotiated an MOU for Professional Engineer Unit 9 (Unit 9). Provision 24 of the MOU concerns contracting out of professional engineering services. It asserts that state entities are contracting out work appropriately done by Unit 9 employees, resulting in unnecessary additional costs to the state; therefore, "[e]xcept in extremely unusual or urgent, time-limited circumstances, or under other circumstances where contracting out is recognized or required by law, Federal mandate, or court decisions/orders, the State must make every effort to hire, utilize and retain Unit 9 employees before resorting to the use of private contractors." In order to accomplish this objective, the MOU specifies that state entities are required to provide PECG with copies of invitations for bids for such contracts, so PECG will have the opportunity to present alternatives that would avoid the need for contracting out.

Provision 24 also mandates the establishment of a state joint labor/management committee, with half of its members being PECG representatives and the other half being representatives of the

Department of Personnel Administration, the Department of Finance, and "affected departments." The committee is required to review all currently existing contracts and, upon request, each state entity is required to "submit copies of any or all personal services contracts that call for services found in Unit 9 class specifications," and to provide documents concerning the personnel costs involved. The committee has the duty to "examine the contracts based on the purpose of this section, the terms of the contracts, all applicable laws, Federal mandates and court decisions/orders." In this regard, the committee must "consider which contracts should and can be terminated immediately, which contracts will take additional time to terminate, which contracts may continue (for how long and under what conditions) and how (if necessary and cost effective) to transition contract employees or positions into civil service. All determinations shall be through express mutual agreement of the Committee." If savings were generated by the termination of personal services contracts, the state is required to implement the committee's findings regarding utilization of the savings.

Provision 24 contains a subsection, entitled "Displacement Avoidance," the stated objective of which is to ensure that Unit 9 employees have preference over contract employees if the duties at issue are consistent with the Unit 9 employee's classification, the Unit 9 employee is qualified to perform the job, and there is no disruption in services. The subsection also says in pertinent part: "To avoid or mitigate Unit 9 employee displacement for lack of work, the appointing power shall review all existing personal services contracts to determine if work consistent with the

affected employee's classification is being performed by a contractor. . . . If the joint Labor/Management Committee that reviews personal services contracts determines that the terms and purpose of the contract permit the State to assign the work to a Unit 9 employee who would otherwise be displaced, this shall be implemented consistent with the other terms of this section. The State and PECG shall meet and confer for purposes of entering into an agreement about the means by which qualified employees are notified and provided with such assignments. This shall include developing a process that ensures that savings realized by terminating the contract and reassigning the work to a Unit 9 employee to avoid displacement, are utilized to offset that employee's moving and relocation costs . . . ."

According to provision 24, "[t]he State is mindful of the constitutional and statutory obligations (e.g., Government Code § 19130) as it pertains to restriction on contracting out. Thus, nothing in this section is intended to interfere with pursuit of remedies for violation of these obligations as provided by law (e.g. Public Contract Code § 10337[)]."

CELSOC filed a petition for writ of mandate, challenging the validity of provision 24 and seeking injunctive and declaratory relief. CELSOC asserted that provision 24 is an impermissible restriction on contracting out and an unlawful attempt to resurrect the civil service mandate of article VII, in violation of article XXII (hereafter Proposition 35).

PECG disagreed, claiming that provision 24 merely creates a committee to analyze nonconfidential data to determine whether

the state is incurring unnecessary costs on existing contracts, and that the preference for using state employees does not violate Proposition 35.

The trial court agreed with CELSOC and granted the petition for writ of mandate, enjoining the state and PECG from implementing provision 24. In the court's view, its ruling would not prevent PECG from obtaining cost information about outside engineering contracts, which information is readily available through the Public Records Act.

DISCUSSION

I

PECG contends that the trial court erred because the terms of provision 24 do not materially conflict with Proposition 35. We disagree.

In interpreting a voter initiative, we apply the principles that govern the construction of a statute. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) We begin by examining its language, giving the words their usual and ordinary meaning, viewed in the context of the initiative as a whole and the overall statutory scheme and purpose. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) Where possible, the language of the initiative should be read so as to conform to the spirit of the enactment. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917.) If the terms of the initiative are unambiguous, we presume the voters meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) "When the language is

ambiguous, ‘we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ [Citation.]” (*People v. Rizo, supra,* 22 Cal.4th at p. 685.)

Proposition 35 provides that the state and all governmental entities shall be allowed to contract out architectural and engineering services, and that article VII shall not be construed as restricting the state from doing so. In other words, the judicially construed civil service restrictions of article VII against contracting out do not apply to such contracts. The voters emphasized the purpose of Proposition 35 is to remove existing restrictions on contracting for architectural and engineering services so that state government can use qualified private firms to help deliver transportation and infrastructure projects safely, to promote fair competition in order to obtain the best quality and value for California taxpayers, and to speed the completion of backlogged projects. (Initiative Measure, Prop. 35, § 2.)

However, provision 24 of the MOU negotiated by PECG and the state (1) mandates the preferential use of civil service engineers over outside engineers, except under specified circumstances; (2) permits termination of existing outside engineering contracts and transfer of the work to civil service engineers after the contracts are reviewed by a committee dominated by PECG members; and (3) requires that steps must be taken, such as termination of outside contracts where possible, to minimize the displacement of state engineers resulting from contracting out engineering services. Although cost savings appear to be a consideration with respect

to the termination of existing engineering contracts, there is no requirement that the preference given to civil service engineers for new projects must be based on cost effectiveness.

The effect of all of these requirements is to restrict the ability of state authorities to freely contract out engineering services. The mandatory preference for civil service engineers, without a concomitant requirement of cost savings, does not ensure the best value for California taxpayers, and it undermines the goal of promoting fair competition. Moreover, common sense dictates that the review and termination of existing contracts is not conducive to speeding the completion of backlogged projects. In other words, provision 24 contravenes the goals of Proposition 35 and thwarts the intent of the electorate.

II

PECG's strained efforts to save provision 24 of the MOU are unconvincing.

A

First, PECG asserts that Proposition 35 was intended to remove only the contracting out restrictions that existed in November 2000 (when the initiative was approved by the voters); thus, it does not apply to the provisions of later enacted MOU's, like provision 24.

This is a nonsensical contention. Proposition 35 was a forward thinking initiative designed to free the state in the future from the statutory and constitutional provisions the courts had construed to restrict contracting out for engineering and architectural services on public works projects. The fact that provision 24 did not exist when Proposition 35 was passed is immaterial. By seeking to reimpose

restrictions of the kind eliminated and forbidden by Proposition 35, provision 24 is the very type of action that the voters intended to preclude by adopting the initiative measure.

B

Next, PECG argues provision 24 applies only to "already awarded contracts" and does not restrict the state's ability to "contract freely" for architectural and engineering services on public works projects; hence, it does not violate Proposition 35.

In PECG's view, provision 24 "merely provides a forum for open debate over whether particular A&E [architectural and engineering] contracts are cost effective. [It] is in no way intended to slow down, interfere with or restrict the State's ultimate decision with respect to whether or not [to] contract out."

This attempt to "make over" provision 24 is unconvincing. The parts of provision 24 entitled, "A. Purpose" and "B. Policy Regarding Personal Services Contracts and Cost Savings," plainly show that the MOU is intended to restrict the state's ability to contract out for engineering and architectural services on public works projects. Under the guise of fiscal responsibility, it does so by, among other things, (1) compelling state entities to "make every effort to hire, utilize and retain Unit 9 employees before resorting to the use of private contractors" for such services; (2) requiring state entities to provide PECG with copies of requests for private contractor bids for such services, so that PECG can advocate against contracting out; (3) creating a joint labor/management committee with responsibility for reviewing all private contracts for services found in Unit 9 class specifications, and determining which of those contracts

should be terminated immediately or transitioned into civil service; (4) imposing a requirement that a state entity must meet and confer with PECG when a Unit 9 state employee would be "displaced" by the contracting out of architectural and engineering services on public works projects, in order to "ensure that Unit 9 employees have preference over contract employees."

By any measure, these are significant restrictions on the ability of a state entity to contract out for architectural and engineering services on public works projects now and in the future.

C

Equally unconvincing is PECG's claim that provision 24 does not authorize the joint labor/management committee to terminate state contracts with private companies for architectural and engineering services on public works projects.

Paradoxically, in its response to an amicus curiae brief, PECG argues the committee will terminate such a contract only upon the mutual agreement of the entire committee, which necessarily will include the agreement of the affected department that entered the contract in the first instance; and, therefore, the termination will reflect an exercise of the department's contracting choice.

PECG's latter contention is an implicit concession that the committee will terminate contracts and that it has the authority to do so. The terms of provision 24 support such an interpretation because they state: "The Committee shall examine the contracts . . . [and] will consider which contracts should and can be terminated immediately, which contracts will take additional time to terminate, which contracts may continue" and "how (if necessary

and cost effective) to transition contract employees or positions into civil service." Even the committee interprets provision 24 as allowing it to "requir[e] that a contact be terminated."

In any event, PECG contends, the committee's ability to terminate a state contract with a private company for architectural and engineering services on public works projects does not restrict the state's ability to contract out for such services. This is so, it argues, because the committee's decision to terminate a contract is made by the "express mutual agreement" of the committee's members, which, in PECG's view, means that the decision represents the state's "choice on contracting."

However, the phrase "mutual agreement" does not necessarily mean unanimous agreement. In fact, the record shows that not even the committee has been able to agree on whether this phrase means unanimous agreement, agreement by a supermajority, or agreement by a simple majority. Therefore, we cannot say that provision 24 precludes the PECG-dominated committee from overriding an affected state entity's desire not to terminate its contract with a private company for architectural and engineering services on public works projects.[1]

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[1] PECG filed a motion asking us to "correct" the record to add the signature page of the MOU, showing that the affected departments agreed to the terms of the MOU. (Cal. Rules of Court, rule 12(c); further references to rules are to the California Rules of Court.) CELSOC opposes the motion, noting the signature page of the MOU was not presented in the trial court and, hence, is not a proper part of the appellate record. CELSOC also alleges PECG impermissibly seeks to rely on this material to raise a new argument in its reply brief. CELSOC

D

In yet another effort to salvage provision 24, PECG claims Proposition 35's dictate that "[t]he State of California and all other governmental entities . . . shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement" does not include Caltrans or other state agencies. In PECG's view, "the State" means only "the Legislature." Based on this faulty premise, PECG argues that when the Legislature passed Assembly Bill No. 977 approving the MOU, the state exercised its option by choosing to contractually bind itself to the restrictions in provision 24.

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asks us to strike the portion of PECG's brief that relies on the signature page of the MOU. CELSOC's position has merit for the following reasons.

Once the completed record is filed in the appellate court, a motion to correct the record is appropriate when there are *errors* in the reporter's transcript or the clerk's transcript. (Rule 12(c); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 4:278-4:284, 4:300, 4:303, pp. 4-59 to 4-60, 4-63 to 4-64.) However, PECG is not attempting to correct an error in the record; it is seeking to augment the record by adding the signature page of the MOU. (Rule 12(a).) Augmentation may be used only to add evidence that was mistakenly omitted when the appellate record was prepared; "[t]he record cannot be 'augmented' with material that was not before the trial court." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 4:300, 4:303, 5:134, pp. 4-63, 4-64, 5-39; *Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, fn. 3 ["Augmentation does not function to supplement the record with materials not before the trial court"]; *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826, fn. 1.) Because PECG concedes that the signature page was not part of the trial court record, we deny PECG's motion to "correct" the record, and we grant CELSOC's motion to strike the portions of PECG's reply brief that refer to the signature page.

Not so. The state includes the executive branch and its agencies. It is illogical to interpret Proposition 35's mandate allowing the state to contract out architectural and engineering work as excluding such agencies. After all, it is through those agencies that the state conducts its business. For example, Caltrans builds and maintains freeways; and it is Caltrans, not the Legislature, that would contract for architectural and engineering services to accomplish this objective. In other words, it is governmental agencies, like Caltrans, that the voters allowed to contract out for such services.

This interpretation of Proposition 35 is borne out by the ballot pamphlet argument in favor of the initiative. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 801 [ballot arguments are accepted sources from which to ascertain the voters' intent].) The ballot argument refers to California's traffic congestion and the backlog of transportation projects needed to reduce this congestion, pointing out that "Caltrans simply cannot do all the work alone" and that the "Legislative Analyst recommended [that] Caltrans contract out more work." (Ballot Pamp., Prop. 35, General Elec. (November 7, 2000), Argument in Favor of Prop. 35, at p. 20.) The ballot argument goes on to say that California got "into this mess" as the result of "several lawsuits that essentially banned the state from hiring private architects and engineers." (*Ibid*.)

This latter statement is an indirect reference to *Professional Engineers*, *supra*, 15 Cal.4th 543, which involved a lawsuit to enjoin Caltrans from contracting out services. Upholding the injunction based on the civil service mandate against contracting out work

traditionally performed by the state, the Supreme Court indicated a constitutional amendment is necessary to change this mandate. (*Id*. at p. 566.) The voters responded by amending the Constitution with Proposition 35.

Provision 24 of the MOU in effect reinstates the civil service mandate against contracting out described in *Professional Engineers*. But California voters made clear their intent to eliminate existing civil service restrictions against contracting out architectural and engineering services. They did so with a new constitutional mandate that the state "shall be allowed" to contract out such services. "No matter what discretion the Legislature has purported to give or withdraw from [government agencies], it does not have a free hand to approve MOU's or enact statutes that flout this mandate." (Cf. *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO* (2005) 36 Cal.4th 758, 774.)

E

PECG argues that we must harmonize the MOU and Proposition 35 if possible, rather than find provision 24 to be unconstitutional.

"'If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate

the Constitution, but to enact a valid statute within the scope of its constitutional powers.' [Citation]" (*Shealor v. City of Lodi* (1944) 23 Cal.2d 647, 653.)

PECG believes that provision 24 and Proposition 35 can be harmonized because the terms of provision 24 make "clear" the intent that it "not be interpreted or applied in a manner which results in a disruption of services," and that all determinations made pursuant to provision 24 shall be "through express mutual agreement" with the affected state entity. Thus, in PECG's view, the MOU is not unconstitutional because all of the determinations made, and actions taken, via provision 24 are choices made by the state.

We already have rejected PECG's claim that limitations imposed by provision 24 on the contracting out for architectural and engineering services on public works projects always will be done with the agreement of the affected state entity.

And regardless of the purported intention not to apply provision 24 in a manner that would result in the disruption of services, the fact remains that, as described *ante*, there are irreconcilable conflicts between Proposition 35 and provision 24, such that "'"the two cannot have concurrent operation. . . ."'" (*Dew v. Appleberry* (1979) 23 Cal.3d 630, 636, citations omitted.)

III

The trial court ruled that a permanent injunction was warranted based on the facial invalidity of the MOU, "which alone supports issuance of the writ." The court also found that, beyond the facial invalidity, implementation of the MOU

would cause great and irreparable injury to the public as well as to the parties to existing engineering service contracts.

PECG challenges the sufficiency of the evidence to support the permanent injunction, but confines its argument to the latter reason proffered by the trial court. It contends the court erred in permanently enjoining implementation of the MOU because nothing in its terms caused irreparable injury to CELSOC. The contention fails for three separate reasons.

First, PECG's argument is not sufficient to meet its burden of establishing reversible error. To establish entitlement to relief on appeal, PECG must demonstrate that neither ground cited by the trial court supports the ruling. This is so because if the court's decision is correct on any ground, it will be affirmed. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777.)

PECG provides no argument or legal authority establishing that where a permanent injunction, as opposed to a preliminary injunction, is sought to prevent the implementation of a contract, irreparable injury must be shown even if the challenged contract is unconstitutional on its face. It is PECG's responsibility to support its claims of error with citation and authority; we are not obligated to perform that function on PECG's behalf. (*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3; *Estate of Hoffman* (1963) 213 Cal.App.2d 635, 639.)

Second, under well-established principles of appellate review, PECG has forfeited its claim that the trial court's determination is not supported by substantial evidence. Where the sufficiency of the evidence is challenged, the appellant must set forth all

of the evidence, not just the evidence in the appellant's favor, and show how the evidence is deficient. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) It is not enough to merely point out that substantial evidence would support a judgment in the appellant's favor. PECG has done only the latter. It simply says substantial evidence establishes that implementation of the MOU will not result in any injury to the public or private sector because the MOU provides it shall not be interpreted or applied in a manner that results in a disruption of services. PECG does not discuss any of the evidence submitted by CELSOC to support its contention that it and the public would be injured by the implementation of the MOU. Thus, the claim of error is forfeited. (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.)

In any event, applying the venerable substantial evidence test (*Shapiro v. San Diego City Council, supra,* 96 Cal.App.4th at p. 912), we conclude that ample evidence supports the trial court's finding that implementation of provision 24 of the MOU will result in great and irreparable harm to the public and the parties to existing contracts for engineering services.

CELSOC submitted the expert opinion of Dan Masdeo, an engineer who discussed existing multi-million dollar private engineering services contracts with the state and the likely effects of their termination. He explained that terminating these contracts, which were in the inspection and materials testing phases, would hamper inspections for compliance with the plans and specifications for projects, delay completion of the projects, adversely affect the process for paying claims for services rendered, and "put[] the

State of California at serious risk of economic loss . . . ." And because nothing in the MOU provides that the mandatory preference for using Unit 9 employees for future projects is inapplicable if it would be more cost effective to use outside engineers, the public would be deprived of any cost savings that accrues from the award of future contracts to private engineering firms.

CELSOC's evidence, the terms of the MOU, and the logical inferences arising therefrom support the trial court's finding that "injury to the public arises from the disruption of ongoing projects and waste of scarce funds that would be caused by termination of existing contracts, as well as the loss of the benefits that would flow to it from future contracts, none of which are readily susceptible to measurement in monetary terms. The injury to the parties to existing contracts arises from the threatened loss of investments that have been made in order to perform contracts that may not be recoverable if their contracts are terminated pursuant to [provision 24 of the MOU] before their full anticipated term."

IV

In concluding that provision 24 of the MOU does not violate article XXII, our dissenting colleague seizes on an argument that is not properly before us (see pp. 15-16, fn. 1, *ante*) because it was not raised in the trial court and, without good cause, PECG waited until its reply brief to raise it on appeal. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

Saying that article XXII does nothing more than "allow" state entities to contract with private companies for architectural and engineering services for public works of improvement, the dissent reasons that provision 24 of the MOU does not violate article XXII because the MOU constitutes the affected state entities' *choice* to limit their ability to do so.

The dissent errs for three reasons. First, PECG forfeited this purported basis for relief by failing to raise it in the trial court and by waiting, without good cause, until its reply brief to raise it on appeal. Second, the record does not show that all of the affected state entities agreed to the MOU. And third, even if the entities did agree to the MOU, it runs afoul of the public policy decision the voters made when they adopted article XXII.

The proponents of article XXII asserted, and the voters agreed, that the state and its taxpayers would benefit from the unrestricted contracting out for architectural and engineering services for public works projects because such public/private partnerships would be less costly and more efficient; would speed up completion of backlogged highway, bridge, transit, and other projects; and would eliminate undue political influence in the contracting process. (Initiative Measure, Prop. 35, § 2.) In this light, article XXII's directives that state entities "shall be allowed" to contract out for such services and that nothing in the Constitution shall be construed to "limit, restrict or prohibit" state entities from doing so, mean the voters decided, as a matter of public policy, that there must be *no limits* on a state entity's ability to so contract out. Surely, allowing state agencies to impose upon themselves general

limitations on such contracting out runs afoul of this public policy decision of the voters.

The dissent is also wrong in saying our decision "transforms language permitting the state to contract with private entities into language compelling it to do so." Nothing in our decision suggests state entities must contract out for architectural and engineering services for public works projects. We simply accept the voters' decision that limitations, such as provision 24 of the MOU, cannot be placed on the ability of state entities to so contract out.

DISPOSITION

The judgment enjoining implementation of provision 24 of the MOU is affirmed.

SCOTLAND, P.J.

I concur:

BUTZ, J.

Raye, J.

I respectfully dissent.

"A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 (*Amador Valley*).) "Accordingly, where it does not appear that words used in a constitutional amendment were used in a technical sense, the voters must be deemed to have construed the amendment by the meaning apparent on its face according to the general use of the words employed." (*In re Quinn* (1973) 35 Cal.App.3d 473, 482-483.)

The wording of California Constitution, article XXII (article XXII) is neither dense nor obscure. It is as clear and transparent as language can be. Section 1 of article XXII reads, in pertinent part, as follows: "The State of California and all other governmental entities, . . . shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. The choice and authority to contract shall extend to all phases of project development . . . [and] shall exist without regard to funding sources whether federal, state, regional, local or private, whether or not the project is programmed by a state, regional or local governmental entity, and whether or not the completed project is a part of any state owned or state operated system or facility." Section 2 of article XXII provides: "Nothing contained in Article VII of this Constitution shall be

construed to limit, restrict or prohibit the State or any other governmental entities, . . . from contracting with private entities for the performance of architectural and engineering services."

Appellant's protestations to the contrary notwithstanding, there is no doubt that the challenged memorandum of understanding (MOU) imposes restrictions on contracting with private entities for the performance of architectural and engineering services. The MOU reflects appellant's belief that entities were contracting out work appropriately done by its members, resulting in unnecessary additional costs to the state. The state apparently agreed and under terms of the MOU assented to a requirement that "[e]xcept in extremely unusual or urgent, time-limited circumstances, or under other circumstances where contracting out is recognized or required by law, Federal mandate, or court decisions/orders, the State must make every effort to hire, utilize and retain Unit 9 employees before resorting to the use of private contractors."

In effect the state, which is permitted by article XXII to contract with private entities for certain services performed by appellant's members, agreed to restrictions on its authority. This agreement, according to the majority, is not merely unwise; it is unconstitutional. The state *must* contract with private entities for the performance of architectural and engineering services.

Certainly, in light of the Constitution, the contracting limitations set forth in the MOU could not have been forced on

the state. However, in this instance, the limitations were not imposed; the state *agreed* to them. The majority does not explain the alchemy that transforms language permitting the state to contract with private entities into language compelling it to do so. I do not question the majority's conviction that contracting out makes great sense. However, the majority's paean to "best value," "fair competition," and "common sense" cannot substitute for constitutional analysis. It is the language of the Constitution and not notions of public policy that should control. Simply put, the language of the Constitution does not support the majority's views.

Nor does the history of Proposition 35. As the majority opinion recounts, prior to article XXII various court decisions construed California Constitution, article VII (article VII) as forbidding the state from contracting with private companies to perform services of the kind that persons selected through civil service could perform "adequately and competently." (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 135.) Though exceptions to this prohibition had been recognized, the Supreme Court declined to recognize an exception for work performed by Caltrans engineers. (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 547, 572 (*Professional Engineers*).)

I agree with my colleagues that Proposition 35 was designed to fix this problem -- to remove the obstacle to contracting out created by prior court decisions generally and by the *Professional Engineers* case in particular. The fix worked.

Under the language of article XXII, section 1, the state is now "allowed" to contract with private entities for engineering and architectural services through all phases of project development, no matter the funding source, or that the project is programmed, operated, or owned with other governmental entities. Under article XXII, section 2, the strictures of article VII are no longer an obstacle to such contracts. The burden is no longer on the state to "'show that contracting out is warranted by considerations of economy or efficiency.'" (*Professional Engineers*, *supra*, 15 Cal.4th at pp. 547, 561.) The historical problems that gave rise to Proposition 35 are addressed by reading article XXII in its natural and ordinary sense. Constitutional history does not support the expansive reading proposed by the majority.

The language of article XXII is also what distinguishes this case from *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO* (2005) 36 Cal.4th 758 (*California State Employees*), a case cited by the majority. There, the Legislature approved an MOU that made seniority the sole consideration for appointment and promotion of certain employees. The MOU clearly flouted the mandate of article VII, providing that "permanent appointment and promotion shall be made under a general system based on merit . . . ." (Cal. Const., art. VII, § 1, subd. (b).) The Supreme Court appropriately condemned the overreaching. (*California State Employees*, *supra*, 36 Cal.4th at p. 774.) Unlike article XXII,

article VII did not merely "allow" merit promotions; it mandated selection based on merit.

Perhaps the majority opinion would be supportable if the language of the Constitution were subordinated to expressions of intent extracted from Proposition 35 and the ballot arguments. "The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." (*Amador Valley, supra*, 22 Cal.3d at p. 245.)

While the language of article XXII is permissive, it could be argued that the secondary sources evince an intent to put private contractors on an even footing with public employees in providing for certain architectural and engineering services. The drafters intended article XXII to remove all obstacles to private contracting -- not merely those imposed by past court cases –- and to mandate a new regime where decisions on whether to contract out would be based solely on cost considerations. A policy that grants a preference to public employees, even with the assent of the state agency and the Legislature, would be contrary to this intent.

There are two problems with this argument. First, abstract expressions of the drafters' intent are not self-executing. The language that counts is the language of the Constitution itself, which is the clearest and best expression of the people's intent. If the clear language of the Constitution and the intent language of the proponents of Proposition 35 are in conflict, the language of the Constitution must prevail. Only if the language is absurd or ambiguous may we resort to other

expressions of intent in order to ascertain its meaning.[2] There is nothing absurd or ambiguous about the language of article XXII.

Second, this generous interpretation of the framer's intent is not supported by the record.[3] Properly read, the expressions

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[2] I appreciate the holding in *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 that "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." However, this rule does not give courts license to divine "the spirit" of a provision in derogation of its language. Words have meaning and should control except in rare instances of linguistic malfunction.

[3] Section 2 of Proposition 35 provides: "It is the intent of the people of the State of California in enacting this measure: [¶] (a) To remove existing restrictions on contracting for architectural and engineering services and to allow state, regional and local governments to use qualified private architectural and engineering firms to help deliver transportation, schools, water, seismic retrofit and other infrastructure projects safely, cost effectively and on time; [¶] (b) To encourage the kind of public/private partnerships necessary to ensure that California taxpayers benefit from the use of private sector experts to deliver transportation, schools, water, seismic retrofit and other infrastructure projects; [¶] (c) To promote fair competition so that both public and private sector architects and engineers work smarter, more efficiently and ultimately deliver better value to taxpayers; [¶] (d) To speed the completion of a multi-billion dollar backlog of highway, bridge, transit and other projects; [¶] (e) To ensure that contracting for architectural and engineering services occurs through a fair, competitive selection process, free of undue political influence, to obtain the best quality and value for California taxpayers; and [¶] (f) To ensure that private firms contracting for architectural and engineering services with governmental entities meet established design and construction standards and comply with standard accounting practices and permit financial and

of intent set forth in the ballot arguments and the uncodified language of Proposition 35 are consistent with the language of article XXII, which removes previous obstacles to contracting out while preserving the option to rely on public employees for such services.

For these reasons, I would reverse the judgment of the trial court.

RAYE, J.

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performance audits as necessary to ensure contract services are delivered within the agreed schedule and budget." This language is aspirational and thus is consistent with a literal construction of the constitutional language.