

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**PROFESSIONAL ENGINEERS IN
CALIFORNIA GOVERNMENT et al.,**

Plaintiffs and Appellants,

v.

JEFF MORALES et al.,

Defendants and Respondents

**CALTROP ENGINEERING CORP.,
et al.,**

Intervenors and Respondents.

A108641

**(San Francisco County
Super. Ct. No. CPF-02-502067)**

Proposition 35, an initiative passed by California voters in 2000, allows the state to use private contractors to perform architectural and engineering services on public works. This case requires us to construe Proposition 35 and determine its effect on pre-existing statutes.

In the published part of the decision, we affirm the judgment of the trial court in part. We hold that Proposition 35 impliedly repealed or amended Government Code sections 14101, 14130-14137 and 19130 to the extent that those statutes restrict Caltrans's authority to contract with private architects and engineers beyond the

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts IV and V.

constraints of the initiative itself. Further, we hold that there is no conflict between the initiative and Caltrans's use of a qualifications based selection procedure.

In the unpublished part of the opinion we reverse in part and remand with instructions to issue a peremptory writ of mandate ordering Caltrans to refrain from applying the regulations contained in its manuals until it fully complies with the Administrative Procedure Act.

BACKGROUND

Proposition 35 was the culmination of a 14-year legal struggle over when and how the Department of Transportation (Caltrans) could contract with private architects and engineers on transportation projects. The struggle began in 1986 with a lawsuit between the main parties to the present case and played out through legislative action, trial court injunctions, court appeals and ultimately a constitutional ruling of the California Supreme Court, which struck down statutes expanding Caltrans's ability to use private contractors. (See *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 548 (*Professional Engineers*).)¹ Proponents of Proposition 35 wrote in the ballot materials that one purpose of the initiative was to reverse the effect of lawsuits that impeded Caltrans use of private contractors.

In 2000, the voters approved Proposition 35, the "Fair Competition and Taxpayer Savings Initiative" (Proposition 35).² The express intent of the initiative was to "remove existing restrictions on contracting for architectural and engineering services"; to allow

¹ Defendants to this appeal are Caltrans and its director, and the Business, Transportation and Housing Agency, a state umbrella agency that includes Caltrans, and its secretary. For convenience, we refer to defendants collectively as Caltrans.

² The initiative consists of a statement of purpose and intent, a new article to the Constitution, a new chapter to the Government Code, and two uncodified provisions. (Cal. Const., art. XXII; Gov. Code §§ 4529.10-4529.20 (Chapter 10.1); uncodified provisions reprinted following Deering's Ann. Const. (2005 Supp.) foll. art. XXII, § 1, p. 42.)

state government to use qualified private architectural and engineering firms to help deliver transportation projects safely, cost effectively and on time; and to speed the completion of a multi-billion dollar backlog of highway, bridge, transit and other projects. (Prop. 35, § 2, subs. (a), (d).)

The initiative added Article XXII to the state Constitution, which provides that 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.” (Cal. Const., art. XXII, § 1.) Section 2 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.” (Cal. Const., art. XXII, § 2.)

The initiative also enacted a new chapter of the Government Code, Chapter 10.1, sections 4529.10-4529.20.³ Because these statutes were enacted by initiative, the Legislature has only a limited ability to amend them. (Cal. Const., art. II, § 10, subd. (c); *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251.) The act may be amended only to further its purposes and only by a statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, and signed by the Governor. (Prop. 35, § 5.) The statutes enacted by Proposition 35 do not provide detailed regulations of private contracting for architectural and engineering services. Rather, they simply define architectural and engineering services; clarify that State Transportation Improvement Program (STIP) projects are subject to Article XXII; impose procedural safeguards;⁴ and ensure that the statutes are not construed to extend beyond

³ All statutory references are to the Government Code unless otherwise indicated.

⁴ Section 4529.12 requires a fair, competitive selection process with safeguards against conflicts of interest and unlawful activities. Section 4529.14 provides that architectural and engineering contracts shall be subject to audit and standard accounting practices.

contracting for architectural and engineering services.⁵ (§§ 4529.10-4529.15.) The statutes expressly provide that they are intended to comprehensively regulate the matters contained in the initiative's provisions. (§ 4529.20.) They also provide that the initiative must be liberally construed to accomplish its purposes and that it prevails over any conflicting acts of the Legislature. (§§ 4529.18-4529.19.)

Following the voters' approval of Proposition 35, Caltrans stopped complying with pre-Proposition 35 statutes that regulated private contracting (§§ 14101, 14130-14136, 19130), but continued to use a pre-Proposition 35 statutory procedure for selecting architectural and engineering contractors (§§ 4526-4529.5). The Caltrans director issued a policy statement (2001 Director's Policy) establishing criteria for the private contracting of architectural and engineering services.

On November 21, 2002, Professional Engineers and a California taxpayer filed this mandamus action challenging Caltrans's contracting practices since the passage of Proposition 35. They raise three main arguments in their petition. First, the pre-Proposition 35 statutes that regulated private contracting remain in effect and Caltrans's failure to comply with those statutes is unlawful. Second, Caltrans's continued use of the pre-Proposition 35 qualifications based selection procedure (often referred to as QBS) violates Proposition 35 because section 4529.12 requires adopting a new "fair, competitive selection process" that gives greater weight to cost considerations. In the alternative, they argue that Caltrans is not fully complying with the qualifications based selection procedure. Third, Caltrans is improperly enforcing "underground regulations" contained in its 2001 Director's Policy and in two Caltrans manuals without full

⁵ Section 4529.13 provides that the act shall not be construed to alter design, safety or construction standards or to restrict the Legislature's authority to provide different procurement methods for design-build and design-build-and-operate standards. Section 4529.15 provides that the initiative shall not apply to government services other than architectural and engineering services.

compliance with the Administrative Procedure Act (APA). (§ 11340 et seq.) The trial court denied the petition and entered judgment for Caltrans.

A review of the litigation history assists in our understanding of the purpose, intent and effect of Proposition 35. The constitutional context for the 1986 Professional Engineers litigation was a body of case law that interpreted Article VII of the California Constitution (Article VII) as a restriction on state agencies' authority to hire private contractors. Article VII establishes the state civil service, which was created to promote efficiency and economy in state government by requiring appointments and promotions to be made on the basis of merit, efficiency and fitness. (Cal. Const., art. VII, § 1; *Professional Engineers, supra*, 15 Cal.4th at p. 548.) Courts have construed Article VII as a restriction on private contracting, relying on the necessity, implicit in Article VII, of protecting the civil service system from dissolution and destruction. (*Professional Engineers*, at p. 548.) Under what is known as the “nature of the services” rule, which was first announced by the Supreme Court in 1937, private contracting is prohibited if the services can be performed adequately and competently by civil service employees. (*Id.* at p. 549; *State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 135 [discussing former Cal. Const., art. XXIV, predecessor of art. VII].) Under the “new function” rule, private contracting is allowed for a new function not previously undertaken by the state and not already covered by an existing department or agency. (*Professional Engineers*, at pp. 549-550.) Under the “cost savings” rule, cost savings may be considered in determining whether civil service employees can perform the tasks adequately and competently. (*Id.* at p. 549.)

In 1945, the Legislature enacted section 14101 permitting Caltrans to contract with private architects. (§ 14101, added by Stats. 1945, ch. 118, § 1.) The Legislature amended the statute in 1955, mandating that Caltrans contract with qualified architects and engineers when the agency determines that obtainable staff is unable to perform

particular work within the time the public interest requires the work to be done.

(§ 14101.) We refer to section 14101 as the Caltrans contracting law.

In 1982, the Legislature enacted section 19130, which codifies the nature of the services, cost savings and new state function rules developed in Article VII case law. (§ 19130; *Professional Engineers, supra*, 15 Cal.4th at p. 552.) Section 19130, which applies to all state agencies and to contracts for any personal services, describes the circumstances when it is permissible for agencies to hire private contractors. We refer to section 19130 as the personal services contracting statute.

In 1986, Professional Engineers in California Government (Professional Engineers), a union representing state civil service employees and a plaintiff in the instant appeal, sued Caltrans for unlawfully contracting with private architectural and engineering firms. (*Professional Engineers, supra*, 15 Cal.4th at p. 553.) Plaintiffs alleged that Caltrans had adopted a policy of using private contracting rather than hiring sufficient staff to perform the department's work; that Caltrans used private contractors to perform work traditionally performed by civil service employees and that could have been timely performed by civil service employees had Caltrans been adequately staffed; and that Caltrans failed to justify the private contracting as cost-effective. (*Id.* at pp. 553-554.)

While *Professional Engineers* was pending in the trial court, the Legislature enacted a statutory scheme to govern private contracting by Caltrans for professional and technical services. (§§ 14130-14137, added by Stats. 1988, ch. 9, § 1.) We refer to sections 14130 to 14137 as the Caltrans private contracting scheme. The scheme (which is substantially similar today to the way it was in 1988) authorizes Caltrans to contract with private architectural and engineering firms when certain conditions are met. (§ 14131.) The legislation includes findings that there is a compelling public interest in ensuring that all highway funds are captured and used in a timely manner; that in order to maximize use of those funds Caltrans needs to be "plan-ready"; that because of

significant fluctuations in project development workload, private contracting allows Caltrans to maintain a more stable workforce and avoid the costly process of short-time hiring and layoff; and that it is therefore the intent of the Legislature that Caltrans contract for architectural and engineering services whenever Caltrans is inadequately staffed to satisfactorily carry out project development work in a timely and effective manner. (§ 14130.) The statutes instruct Caltrans to adopt guidelines for private contracting that include consideration of the factors set forth in the statement of legislative findings and intent, and permit Caltrans to hire private contractors whenever the director determines that the guidelines are applicable. (§ 14131.) Private contractors shall not displace civil service employees. (§ 14131.) The statutes specifically provide that Caltrans contracts for architectural and engineering services are *not* subject to section 19130, the personal services contracting statute. (§ 14133, subd. (a).)

In 1990, the *Professional Engineers* trial court found that Caltrans was contracting with private architects and engineers unlawfully and it enjoined Caltrans from contracting for those services unless it complied with the Caltrans contracting directive, the Caltrans contracting scheme and Article VII. (*Professional Engineers, supra*, 15 Cal.4th at pp. 553-554.) The court specifically found that certain contracts that had been awarded by Caltrans did not satisfy the statutory criteria and it enjoined the agency from continuing those contracts. (*Id.* at p. 557.)

In 1993, the Legislature attempted to permit greater private contracting by Caltrans with amendments to the Caltrans contracting scheme, sections 14130 to 14130.3, and 14132. (Stats. 1993, ch. 433.) The 1993 bill expressed an intent to afford Caltrans “a new and independent basis upon which to justify contracting out” through January 1, 1998. (Stats. 1993, ch. 433, § 1.) It contained a set of statutes effective until January 1, 1998 and a set of statutes effective on January 1, 1998. (Stats. 1993, ch. 433.) The first set of statutes declared that the use of private contractors was a new state function that did not duplicate the existing functions of Caltrans; that the seismic retrofit program

enacted following the 1989 Loma Prieta earthquake was a short-term workload demand; and that Caltrans was not required to staff at a level that would allow the civil service to meet Caltrans's needs. (§§ 14130, subds. (a)(5), (d), 14130.1, 14130.2.) Section 14137 provided that contracts awarded on or before July 1, 1993 should not be terminated. The second set of statutes restored the law in effect before the 1993 amendments. (§ 14130, as amended by Stats. 1993, ch. 433, § 3, eff. January 1, 1998.)

After passage of the 1993 amendments, Caltrans took the position that the *Professional Engineers* trial court injunction was no longer applicable. (*Professional Engineers, supra*, 15 Cal.4th at p. 555.) However, the trial court refused to dissolve or modify the injunction and in 1997 the California Supreme Court upheld the trial court's order. (*Id.* at pp. 555-557, 563.) The Supreme Court reaffirmed decisional law that interpreted Article VII as a restriction on private contracting and held that the 1993 amendments effective until January 1, 1998 were invalid because they conflicted with Article VII. (*Id.* at p. 563.) It is against this historical backdrop that the voters passed Proposition 35.

DISCUSSION

I. *Standard of Review*

We review the trial court's rulings on questions of law de novo and its factual findings for substantial evidence. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

Our review of the legality of Caltrans's contracting practices is de novo. “ ‘In determining whether to accept a bid for a public contract, public officers as a rule perform not merely ministerial functions, but duties of a judicial or discretionary nature, and the courts, in the absence of fraud or an abuse of discretion, will not ordinarily interfere, so long as the officers comply with the controlling constitutional or legislative provisions.’ ” (*Diablo Beacon Printing & Pub. Co. v. City of Concord* (1964) 229

Cal.App.2d 505, 508, quoting 27 A.L.R.2d at p. 920.) Plaintiffs do not contest Caltrans's discretionary choice of one potential contractor over another. Rather, they argue that Caltrans is violating controlling law, Proposition 35 and other statutes and regulations, with its contracting practices. These claims are subject to nondeferential review. (*Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.) To determine the controlling law, we must construe Proposition 35, as well as other statutes and regulations. Statutory construction is a legal determination we make independently. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.)

II. *Implied Repeal of Pre-Proposition 35 Statutes Governing Private Contracting*

Plaintiffs argue that Proposition 35 simply lifted the restrictions of Article VII on the Legislature's power to authorize private contracting of architectural and engineering services on public works. Because Article VII no longer restricts the Legislature's power, plaintiffs argue, the Legislature may authorize more extensive private contracting by Caltrans or other state agencies if it chooses. Unless and until the Legislature amends or repeals the pre-Proposition 35 statutes that govern private contracting, those statutes remain in effect and are binding on state agencies. We disagree.

An express purpose of the initiative is to remove existing restrictions on private contracting for architectural and engineering services. (Prop. 35, § 2, subd. (a).) California Constitution, Article XXII expressly removes the *constitutional* restriction on private contracting that courts had inferred from Article VII. (Cal. Const., art. XXII, § 2.) The initiative contains no parallel provision expressly repealing existing specific *statutory* restrictions on private contracting, but it does include several provisions that can only be given meaningful effect if the initiative as a whole is construed as impliedly repealing those statutory restrictions.

Ordinarily, repeals or amendments by implication are strongly disfavored and will be found only when two acts are “irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.” (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 569; see *McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 219-220 [statutes may be amended by implication under same principles governing repeals by implication].) Nevertheless, an implied repeal or amendment will be found if the later-enacted statute constitutes “ ‘a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.’ [Citation.]” (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.) Proposition 35 expresses an intent to comprehensively regulate the subject of private contracting for architectural and engineering services on public works. (§ 4529.20.) It also expresses an intent to remove existing restrictions; provides that it is to be liberally construed to accomplish its purposes; provides that it prevails over conflicting acts of the Legislature (§§ 4529.18; Prop. 35, § 2, subd. (a), § 6); and provides that it can only be amended to further its purposes (§ 4529.19; Prop. 35, § 5). Collectively, these provisions compel the conclusion that Proposition 35 effected an implied repeal or amendment of existing statutes to the extent that they limit Caltrans’s ability to hire private contractors to perform architectural and engineering services beyond the limitations of Proposition 35.

The pre-existing Caltrans contracting scheme (§§ 14130-14137) limits Caltrans’s ability to use private contractors more restrictively than Proposition 35 because it requires that civil service staff not be displaced and it authorizes Caltrans to use private contractors only when certain guidelines apply. (§§ 14131, 14134.) Section 19130 also limits Caltrans’s ability to use private contractors more restrictively than Proposition 35 by imposing the same nature of services, new state function and cost savings rules that had been developed in Article VII case law. Finally, to the extent that the Caltrans contracting directive might be construed as a restriction on Caltrans’s authority to

contract with private firms (i.e., authorizing private contracting *only* when obtainable staff is unavailable), it limits Caltrans's ability to use private contractors beyond the intended limits of Proposition 35. (§ 14101.)

Our conclusion that the pre-existing statutory restrictions have been impliedly repealed or amended is bolstered by the observation that otherwise Proposition 35 would have little practical effect. An express intent of the initiative is to speed delivery of transportation projects. (Prop. 35, § 2, subd. (d); see also subds. (a) and (b).) Because the pre-Proposition 35 statutory restrictions mirror the restrictions imposed by Article VII, which were expressly removed by California Constitution Article XXII, the initiative would have no immediate practical effect if those statutory restrictions remained in force.

Plaintiffs argue that Caltrans has no power to contract with private firms until the Legislature enacts legislation specifically authorizing them to do so. We are unpersuaded.

Plaintiffs rely on case law holding that state agencies may only exercise such power as has been expressly delegated to them by the Legislature. Those cases, however, do not require delegations of power at the level of specificity plaintiffs propose. Rather, the cases stand for the general proposition that agencies exceed their powers only when their actions are inconsistent with acts of the Legislature. In *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864 at pages 872-873, for example, the court held that the Board of Prison Terms exceeded its authority by revoking parole based solely on a parolee's psychiatric problems. The court did not rely on an absence of enabling legislation that specifically authorized the agency to revoke parole on this basis, but on a conflict between the Board's rule and the Legislature's statutory scheme for addressing the problems of mentally disordered offenders. (*Id.* at p. 878.) Similarly, in *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017 at page 1040, the Supreme Court held that the Unemployment Insurance Appeals Board

exceeded its authority by awarding prejudgment interest not because there was no law expressly authorizing it to do so, but because an award of interest was inconsistent with the controlling legislative scheme. Here, Caltrans has statutory authority to plan, design and construct transportation systems. (§ 14030, subd. (d).) Using private contractors to perform architectural and engineering services on transportation systems falls within that grant of authority and is consistent with the constitutional and statutory scheme adopted by Proposition 35. Therefore, Caltrans does not exceed its statutory authority when it hires private architectural and engineering contractors on transportation projects.

Moreover, Proposition 35 impliedly repealed or amended existing statutes that restricted private contracting by Caltrans. Section 14131 provides that Caltrans may contract with private contractors under certain conditions; it has been impliedly amended to remove those restrictive conditions, but it survives as an authorization for Caltrans to hire private contractors, consistent with the intent of Proposition 35.

Finally, Article XXII is not one of those rare constitutional provisions that requires legislative action before it takes effect. (Cal. Const., art. XXII.) Constitutional provisions are presumed to be self-executing and to have effect without implementing legislation, unless a contrary intention is clearly expressed. (*People v. Vega-Hernandez* (1986) 179 Cal.App.3d 1084, 1092.) Ordinarily, a contrary intention is expressed with words directing the Legislature to act. (*Ibid.*) No such language appears in Proposition 35.

The California Constitution is a restriction on the Legislature's otherwise plenary lawmaking powers. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) It must be liberally construed in favor of the Legislature's powers. (*Ibid.*) Specifically, a constitutional provision such as Article XXII that *removes* a restriction on the Legislature's powers must be construed in favor of the Legislature's powers. (*Methodist Hosp.* at p. 691.) Plaintiffs invoke these principles to argue that Article XXII expanded the Legislature's powers to authorize private contracting, but did not directly

expand Caltrans's authority to use private contractors. They argue that it is for the Legislature, now freed from the restrictions of Article VII, to decide whether to authorize greater contracting by Caltrans. Until the Legislature does so, Caltrans is not free to use private contractors beyond pre-existing statutory authorizations.

Plaintiffs' analysis might be persuasive if Article XXII had been adopted in isolation, but the article was adopted as part of an act and must be construed in context. Other parts of the act provide that it must be liberally construed to accomplish its purposes, which include removal of existing restrictions on private contracting, and the initiative explicitly restricts the Legislature's prospective power to regulate private contracting.⁶ (§ 4529.19; Prop. 35, §§ 2, 5.) Article XXII authorizes private contracting by the State of California "and all other governmental entities," which includes both local governments (cities and counties) and local agencies. (Cal. Const., art. XXII, § 1.) We construe Article XXII to affirmatively authorize state agencies to contract with private entities for architectural and engineering services. (Prop. 35, § 5.)

In sum, Proposition 35 provides that the "State of California and all other governmental entities," including Caltrans, shall be allowed to contract with private architectural and engineering firms. It enacted a new, albeit skeletal, statutory scheme to replace pre-Proposition 35 statutes that restricted Caltrans's power to contract in ways that are inconsistent with the purposes of the initiative. We hold that the initiative impliedly repealed or amended sections 14101, 14130-14137, and 19130 to the extent

⁶ Plaintiff's argument ignores the fact that the initiative contains statutory provisions not subject to the Legislature's ordinary powers of statutory amendment. The statutes enacted by Proposition 35 may be amended by the Legislature only to further the purposes of the initiative and only by a two-thirds vote and with the concurrence of the governor. (Prop. 35, § 5.) If the Legislature cannot prospectively enact a statute that conflicts with the purposes of the initiative, it makes little sense that pre-Proposition 35 statutes conflicting with the purposes of the initiative (which were enacted with the requirement of only a simple majority vote) would remain in effect.

those statutes limit Caltrans's authority to contract with private architects and engineers beyond the constraints of the initiative itself.

III. *Contractor Selection Procedure*

Plaintiffs contend the initiative mandates a new selection process that gives greater weight to cost considerations than the pre-Proposition 35 qualifications based selection procedure because Proposition 35 requires a "fair competitive selection process" and costs savings to the taxpayer. (§ 4529.12.)

There is no inconsistency between Caltrans's use of the qualifications based selection procedure and section 4529.12's requirement of a fair competitive selection process. The qualifications based selection procedure requires firms to compete on the basis of their qualifications and requires state agencies to reject firms that are unwilling to agree to a fair and reasonable contract price. (§§ 4525-4529.5.) Regulations require Caltrans to prepare its own cost estimate for a project before commencing price negotiations, an additional procedural mechanism to ensure the state pays a fair price. (Cal. Code Regs., tit. 21, § 1520.3.) Although cost may be a less salient consideration in the qualifications based selection procedure than in a competitive bidding process, it is a consideration nevertheless.

Further, section 4529.16 mandates that the initiative not be applied in a manner that results in the loss of federal funding. Federal law requires the use of a qualifications based selection procedure on state highway projects that receive federal aid. Federal law requires that where the construction of federal-aid highways is to be performed by a state transportation department or under its supervision, contracts for architectural and engineering services must be awarded pursuant to the Brooks Act (40 U.S.C. § 1101 et seq.) or an equivalent state qualifications based selection procedure. (23 U.S.C. § 112(b)(2)(A).) The Brooks Act establishes a qualifications based selection procedure virtually identical to Chapter 10. (40 U.S.C. § 1101 et seq.) About 84 percent of

Caltrans's architectural and engineering contracts are subject to these federal requirements. At a minimum, as to federally funded projects, section 4529.16 compels a construction of section 4529.12 that allows the use of the qualifications based selection procedure.

Caltrans's use of the qualifications based selection procedure does not conflict with the initiative's statement of purpose and intent. Although the statement refers to cost-effectiveness, better or best value for taxpayers, and taxpayer savings, the references neither promise nor mandate that private contractors will be used only when they are less expensive than civil service employees. Moreover, the concepts of value and cost-effectiveness encompass more than simply the amount of personnel hours that can be purchased at a price. The concepts include considerations of quality of services, efficiency and speed of delivery, all referenced in the statement of purpose and intent.

Although the title of the initiative mentions taxpayer savings, the ballot materials put voters on notice that the initiative might not result in cost savings to the taxpayer. The official summary of the initiative prepared by the Attorney General, and the Legislative Analyst's analysis of the initiative both indicate that the fiscal impact of the initiative was unknown. The Legislative Analyst specifically notes that in some cases costs may be higher when an agency contracts out services. "It may still be in the state's best interest to do so, however, because of other considerations" such as avoiding the delay of formally hiring and training state employees to meet a short-term surge in workload, and the financial benefits derived from completing construction projects more quickly. Moreover, the official summary clearly states that competitive bidding on the contracts (the prevailing method of public contractor selection that gives prominent weight to cost) is permitted but not required under Proposition 35. Caltrans's use of a qualifications based selection procedure does not conflict with Proposition 35.

IV. *Administrative Procedure Act*

Plaintiffs argue that Caltrans violates the APA (§ 11340 et seq.) when it awards architectural and engineering contracts using the 2001 Director’s Policy, the 1992 Consultant Services Manual, and the 2003 A&E Handbook (collectively, the manuals). Plaintiffs contend that the manuals contain regulations that were not promulgated pursuant to the APA. It is undisputed that the 2001 policy and 1992 manual and the 2003 handbook were not promulgated pursuant to the APA. Caltrans argues that the manuals do not contain regulations within the meaning of the APA and that it did not use the latter two manuals in awarding the contracts after passage of Proposition 35.

A. *All Three Manuals Contain Regulations Subject to the APA*

The APA defines a regulation as any “rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” (§ 11342.600.) A regulation has two principal identifying characteristics. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 (*Tidewater*)). “First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally [Citation.] Second, the rule must ‘implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.’ [Citation.]” (*Ibid.*) A regulation that “relates *only* to the internal management of the state agency” is exempt from APA requirements. (§ 11340.9, subd. (d) (italics added).)

The trial court held that all three manuals are exempt from the provisions of the APA because their *primary purpose* is the internal management of an agency. This is not the rule. The statute exempts a regulation that relates *only* to internal management. A careful review of the challenged manuals demonstrates that they do not relate solely to

internal management. They are standards of general application that implement, interpret or make specific Proposition 35 or the statutory qualifications based selection procedure and thus are regulations within the meaning of the APA.

The 2001 Director's Policy establishes criteria for determining when Caltrans will privately contract for architectural and engineering services rather than use civil service employees. After reviewing the purpose and intent of Proposition 35, the policy declares that it is appropriate to use private contractors in order to ensure that available highway funds are captured and timely used; to eliminate short-term fluctuations in Caltrans's workload; to achieve the benefits of timely or early construction of transportation projects; and to obtain specialized services unavailable within Caltrans. These are standards of general application that implement Proposition 35 and govern Caltrans's contracting procedures. (§ 11342.600; *Tidewater, supra*, 14 Cal.4th at p. 571.) The contracting criteria relate to Caltrans's contractual relationships with private architectural and engineering firms who are not part of the Caltrans's staff. Thus, the policy does not relate solely to internal management.

Similarly, the 1992 Consultant Services Manual and the 2003 A&E Handbook contain regulations subject to APA requirements. These manuals interpret and implement the qualifications based selection procedure.⁷ The manuals include many standards that go beyond the statutes and formal regulations that govern the qualifications based selection procedure. (See for example §§ 4526-4529.5; Cal. Code Regs., tit. 21, § 1502 et seq.) They include provisions that authorize both project-specific and on-call

⁷ The statutes establishing the qualifications based selection procedure specifically direct agencies to "adopt by regulation procedures that assure that [architectural and engineering] services are engaged on the basis of demonstrated competence and qualifications for the types of services to be performed and at fair and reasonable prices." (§ 4526.) Caltrans promulgated regulations pursuant to this directive in 1975, but they are much more limited in scope than the challenged manuals. (Cal. Code Regs., tit. 21, § 1502 et seq.)

contracts, establish various payment methods, detail the process of ranking contractor applicants based on their qualifications, and detail the process of negotiating a fair and reasonable price with the highest ranked firm. The 1992 manual establishes four different selection methods. Although some parts of the manuals relate solely to internal management (for example sections that delegate responsibility among Caltrans staff and describe how to process contract paperwork) other parts relate to Caltrans's contractual relationships with private architectural and engineering firms.⁸

Notably, all three manuals establish criteria and procedures that have historically been governed by statute or formal regulations. (See §§ 4525 et seq., 14101, 14130 et seq., 19130.) In adopting the standards contained in the manuals, Caltrans exercises “quasi-legislative power conferred by any statute,” conduct that is expressly subject to the APA. (§ 11346, subd. (a).)

APA case law supports our conclusion that the three Caltrans manuals contain regulations. *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001 (*United Systems*) is particularly instructive. At issue in that case was a section of the State Administrative Manual that governed how the Department of General Services

⁸ We reject Caltrans's argument that the manuals “embod[y] the only legally tenable interpretation” of Proposition 35 or the qualifications based selection procedure and thus fall within another exemption from APA requirements. (See § 11340.9, subd. (f).) The “Background” section of the 2001 policy simply restates the purposes of Proposition 35, but the contracting criteria in the “Policy” section interprets and implements rather than restates those purposes. The criterion of avoiding short-term fluctuations in Caltrans staffing, for example, is not mentioned in Proposition 35; its antecedent is a statutory criterion of the Caltrans contracting scheme that was impliedly repealed by Proposition 35. The director of Caltrans readopted the criterion in implementing Proposition 35. (See §§ 14130, subd. (a)(3), 14134, subd. (a)(2).) Similarly, the 1992 Consultant Service Manual and the 2003 A&E Handbook restate many of the requirements of the qualifications based selection procedure statutes, but they also go beyond the statutory scheme by authorizing both project-specific and on call contracts, for example, and requiring pre-award audits in some circumstances. Therefore, none of the three manuals falls within the section 11340.9, subdivision (f) exemption.

processed appeals by vendors who protested contract awards in a competitive bidding process. (*United Systems*, at pp. 1008-1009.) The court held that the protest rule was a regulation because it interpreted and implemented the statute that established the appeal process. (*Id.* at p. 1010.) The rule established two different procedures for appeals, depending on the procurement process that had been used. Therefore, it “create[d] a new rule, rather than simply applying an existing rule. This new rule is a regulation.” (*Ibid.*) Similarly, the 1992 manual and 2003 handbook establish two different types of contracts (project-specific and on-call), four different payment methods and impose a new requirement of pre-award audits. These rules constitute regulations. The *United Systems* court specifically rejected the argument that the appeal processing rule related only to the internal management of the agency. “Since the protest procedures affect the protest rights of third party bidders, they do not fall within the narrow internal management exception.” (*Ibid.*) Here too, the manuals affect Caltrans’s relations with third party contract applicants and contractors. *United Systems* held that because of the public participation goals of the APA any doubt as to the applicability of the APA should be resolved in favor of coverage. (*United Systems*, at p. 1010.) Other cases have similarly broadly construed the APA and concluded that certain personnel policies were regulations that did not relate solely to the internal management of the agency. (See *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 203-204; *Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583, 588.) The 2001 Director’s Policy, 1992 Consultant Services Manual and the 2003 A&E Handbook all contain regulations that are subject to the rulemaking requirements of the APA.

B. *Caltrans Is in Violation of the APA*

A state agency violates the APA if it uses or enforces any guideline, manual or other rule that qualifies as a regulation unless it has been adopted as a regulation pursuant

to the act. (§ 11340.5.) The trial court found that Caltrans did not use the 1992 Consultant Services Manual or the 2003 A&E Handbook in procuring the contracts.

We review the trial court's factual findings for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) "Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) Substantial evidence, however, must be evidence of ponderable legal significance; it is not synonymous with any evidence. (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) " 'It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' [Citation.]" (*Ibid.*)

In support of its finding, the trial court cited a June 2004 declaration by Steven Alston, Chief of the Division of Procurement and Contracts for Caltrans since August 2003, who stated that he was familiar with Caltrans's contracting procedures for A&E contracts. He averred that the 1992 Consultant Service Manual "is" not used by Caltrans. From his use of the present tense we learn that Caltrans was not using the 1992 manual in June 2004 when he wrote his declaration. We do not learn whether Caltrans used the manual before 2004. Alston further stated that Caltrans did not use the 2003 A&E Handbook in the procurement of any of the contracts that were attached as exhibits to plaintiffs' petition, filed in November 2002. We do not learn whether Caltrans was using the handbook from November 2002 to June 2004. Notably, Alston concludes that the 2003 A&E Handbook superseded the 1992 Consultant Services Manual. The inference drawn from the evidence, however, is that the 1992 manual was used until the 2003 handbook took effect. Thus the declaration does not support the trial court finding.

The Requests for Qualifications (RFQ) clearly reflect reliance on regulations that are contained in the Caltrans manuals. The RFQ for Contract No. 04A1552 issued in March 2002, for example, requests proposals for an on-call contract. On-call contracts

are authorized by the manuals but not authorized by statute or regulation. This contract example identifies the selection process as a “One Step” process, a term used in the 1992 manual but not in the pertinent statutes, and requires a pre-award audit, a requirement imposed by the manuals but not by statute. This RFQ even lists the “A&E Consultant Services Manual” as a document that shall be used in the performance of the contract. Other RFQ’s in the record seek applications for an on-call contract, refer to a “One Step” selection process, and require a pre-award audit. These RFQ’s are direct evidence that Caltrans applied the regulations in the challenged manuals.

Moreover, it is simply not credible that Caltrans incorporated most of the regulations from the 1992 manual into a 2003 update of the manual, yet never applied those regulations following the passage of Proposition 35 in 2000. If the regulations were not being used, they would have been abandoned rather than readopted in the 2003 update.

The trial court, looking only to the contracts attached to the petition, found that the 2003 A&E Handbook could not have been used with respect to the disputed contracts because the action was filed in November 2002, before the 2003 handbook went into effect. However, plaintiffs’ writ petition challenges Caltrans’s contracting practices since the passage of Proposition 35 and seeks prospective relief. The scope of the action is not limited by the filing date of the petition. It encompasses contracting during the period when the 2003 handbook was in effect.

There is not substantial evidence in the record supporting the trial court determination. The record demonstrates that Caltrans has used regulations that are contained in both the 1992 and 2003 manuals since the passage of Proposition 35. Because those regulations were not promulgated pursuant to the APA, Caltrans’s use of the regulations was unlawful.

C. *Caltrans Enjoined*

Caltrans may not use the regulations included in the 2001 Director's Policy, the 1992 Consultant Services Manual, or the 2003 A&E Handbook until it promulgates them as regulations pursuant to the procedural requirements of the APA. (§ 11340.5.) Accordingly, we shall vacate the trial court judgment and remand with instructions that the court order Caltrans to refrain from using any of the regulations contained in these manuals until it fully complies with the APA.

Caltrans's compliance with the APA may resolve other issues plaintiffs raise in this appeal. Plaintiffs argue that Caltrans's practice of awarding multiple contracts and on-call contracts is inconsistent with the qualifications based selection procedure. These are potentially meritorious arguments we are confident Caltrans will seriously consider when it reviews its regulations under APA procedures. APA procedures are designed to ensure meaningful participation by persons directly affected by proposed regulations and the creation of an administrative record that assures effective judicial review. (*Tidewater, supra*, 14 Cal.4th at pp. 568-569; *Pacific Gas and Electric Co. v. Department of Water Resources* (1996) 112 Cal.App.4th 477, 504.) The procedures include public notice, public comment, a reasoned written defense of the regulations by the department, review by the Office of Administrative Law, and judicial review. (§§ 11346.1-11346.9, 11349-11349.6, 11350-11350.3.) We decline to address the substantive validity of regulations until those procedures have been followed.

V. *Remaining Issues*

Three remaining issues raised in plaintiffs' appeal are summarily resolved.

First, Caltrans is not required to use civil service employees to perform all of the project components listed in section 14529, subdivision (b). Section 14520.3, which provides that Caltrans is the "responsible agency for performing all state highway project components specified in subdivision (b) of Section 14529," is a statement of legislative

intent that also provides that nothing in the bill enacting section 14529 is intended to alter Caltrans's responsibilities for the state highway system. (§ 14520.3, subds. (a)-(c).) Neither the plain language nor the apparent purpose of section 14520.3 requires Caltrans to carry out those responsibilities using civil service personnel rather than private contractors.

Second, Executive Order D-55-02, which generally requires state agencies to submit contracts for \$100,000 or more to competitive bidding, does not apply to Caltrans's contracting for architectural and engineering services. A Department of General Services memorandum interpreting Executive Order D-55-02 expressly provides that the executive order does not apply to contracts for architectural and engineering services.

Third, the trial court's finding that Caltrans did not execute contracts prior to completion of the selection process is supported by substantial evidence. Each of the contracts plaintiffs challenge includes printed language stating that the contract was executed on a date before the selection process was completed. Each such contract, however, is signed on a date following completion of the process. Other documents in the record corroborate that the selection process was completed before the contracts were signed. Aside from the printed date on the contracts, nothing in the record suggests that the contracts were executed prematurely.

DISPOSITION

The judgment of the trial court is affirmed in part and reversed in part. The matter is remanded with instructions to the trial court to issue a peremptory writ of mandate ordering Caltrans to refrain from applying the regulations contained in the 2001 Director's Policy, the 1992 Consultant Services Manual or the 2003 A&E Handbook without first complying with the rulemaking procedures of the Administrative Procedure Act. In all other respects, the judgment is affirmed. Each side shall bear its own costs.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.

Professional Engineers v. Morales, A108641

Trial court: San Francisco City and County Superior Court

Trial judge: Hon. James L. Warren

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