

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

Final Statement of Reasons Including Summary of Comments and Agency Responses

PUBLIC HEARING TO CONSIDER AMENDING PROPOSED REGULATIONS FOR ARCHITECTURAL AND ENGINEERING SERVICES (R-00-03)

Public Hearing Date: August 5, 2002

I. UPDATE OF INITIAL STATEMENT OF REASONS

The Initial Statement of Reasons released as part of the 45-day hearing process concerning the Architectural and Engineering (A&E) services regulations is incorporated by reference herein with a correction (refer to the response to comment "a.") to the first paragraph of the ALTERNATIVES CONSIDERED section as follows:

Without adopting regulations, the Department of Toxic Substances Control (DTSC) will not be able to directly contract for A&E services related to response actions at hazardous substances sites and corrective actions at hazardous waste facilities. The Department of General Services (DGS) would have to procure the contract and manage the work. This in essence would put DGS in charge of remediating response actions at hazardous substances sites and corrective actions at hazardous waste facilities. In addition, DGS would charge a minimum of 20 percent additional management and overhead charges to the A&E contract, thus increasing project costs while reducing the number of sites that can be remediated. Therefore, adopting regulations is the only alternative.

II. ALTERNATIVES CONSIDERED

DTSC has further determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by DTSC.

III. LOCAL MANDATE DETERMINATION

The Department of Toxic Substances Control (DTSC) has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the State pursuant to Part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

IV. COMMENTS SUBMITTED BY THE OFFICE OF SMALL BUSINESS ADVOCATE AND THE TRADE AND COMMERCE AGENCY

No comments were submitted by the Office of Small Business Advocate or the Trade and Commerce Agency.

V. SUMMARY OF COMMENTS AND AGENCY RESPONSES

Written and oral comments were received during the 45-day comment period beginning June 21, 2002. Oral testimony was provided by Melinda L. Williams, who represents two organizations—Professional Engineers in California Government (PECG), and the California Association of Professional Scientists (CAPS). Additionally, written comments were also submitted for these same organizations. (A copy of these letters is attached.) Following is DTSC's response to the testimony and written comments:

Response to Comments from Professional Engineers in California Government (PECG)

- a. **Comment:** "Specifically, in the "Initial Statement of Reasons" (ISR) under "Alternatives Considered" DTSC states that the regulations are needed to directly contract for architectural and engineering (A&E) services for State orphan sites. However, under the ISR "Purpose and Scope" section, and included in the proposed language for the regulations under section 67900.1, "Purpose and Scope," the "procedures for procurement ...[are] related to response actions at hazardous substance sites and corrective actions at hazardous waste facilities." This language is broad in its scope and would seem to apply to all hazardous substances sites and corrective actions at hazardous waste facilities, instead of only orphan sites. Therefore, PECG is concerned that these regulations, as written, may have a negative effect on its members who provide services "related to response actions at hazardous substance sites and corrective actions at hazardous waste facilities..."

Response: The comment is correct concerning the Initial Statement of Reasons identifying "State orphan sites" and then later in the same document identifying a different type of site. The Initial Statement of Reasons should not have specified "State orphan sites." The first section of this Final Statement of Reasons document, "I. UPDATE OF INITIAL STATEMENT OF REASONS" corrects the statement. This change did not affect the regulation text nor the 45-day notice process.

The comment also indicates the scope of these regulations is too broad. In fact, the scope of these regulations is exceptionally narrow since the vast majority of the architectural and engineering contracts managed by DTSC are under \$1 million. In order for these regulations to be operative, the following must occur: (1) DTSC would need to determine that it could not accomplish the work

in-house based on the criteria in Government Code section 19130, subdivision (b)(3); (2) the type of project would have to be a public works contract according to Public Contract Code section 10105; and (3) the cost of the architectural and engineering services would need to be in excess of \$1 million.

There are few DTSC projects that would meet the above criteria. There is nothing specific in the comment indicating what would constitute a “negative effect” on state employees. DTSC has added clarifying language to section 69700.1 of the regulation text referencing Government Code section 19130.

- b. Comment:** “Whereas it is true that PEGG members do not provide clean-up expertise at hazardous waste sites, members do participate in site investigations and oversight and approval of remedial environmental activities. The proposed regulations “Definitions” section 67900.2(a), is ambiguous as it relates to the services “which would lead to, or result in, instruments of service for the construction of a ‘project’.” Site investigations lead to work to remediate a hazardous substance site and corrective action at hazardous waste facilities. Oversight of such activities is a service to be performed. Therefore, even though reference to Public Contract Code Section 10105 implies the physical remediation activities of the impacted sites, as the regulations are written, the services seem to be broader than that. Therefore PEGG objects to these regulations, as written, since they may have an impact on the creation or elimination of jobs within the state in California, if these services are contracted out. This is contrary to the “preliminary determination” by DTSC in the “Notice” for the proposed regulations that “no jobs [would] be created or eliminated in California as a result of the proposed regulations.”

Response: The comment indicates that the definition in Section 67900.2, subsection (a), appears ambiguous; however, this language is taken from the Public Contract Code section 10105. DTSC believes the term “project” is clearly defined. Additionally, the comment that “these regulations, as written, ...may have an impact on the creation or elimination of jobs within the state in California, if these services are contracted out” has no basis in fact. In order for these regulations to be operative, DTSC would need to determine that it could not accomplish this work in-house based on the criteria in Government Code section 19130, subsection (b)(3). See above responses to comments also.

The process for selecting any such contractor is extensive and relies upon the technical and professional experience and expertise of DTSC’s engineers, geologists and scientists (program staff) . DTSC’s program staff and its contracting staff work together in the development of the contract and/or solicitation document; in providing the scope of work; participating in the solicitation evaluation and selection process; participating in the negotiation of all A&E contracts; and in serving as contract project manager and/or contract manager. The purpose of contracting out for services that cannot be provided in-house is to provide DTSC’s civil service staff with the necessary tools to carry out

the mission of the Department and to provide the oversight needed to protect the interests and public health of the State. These regulations will not result in the creation or elimination of jobs in California. DTSC has added clarifying language to section 69700.1 of the regulation text referencing Government Code section 19130.

- c. Comment:** “PECG is concerned about the effect on the state in proposing to contract out these services. State employees, having no economic conflict of interest, have an overriding mandate to serve the best interests of the State, whereas private contractors have profit and increasing future business as their paramount motives. Therefore, PECG regards it as creating potential conflict and abuse of the State’s well-being for private contractors to provide investigatory and oversight services, in general, unless adequate state supervision and review are also provided. From these regulations, it is not clear what limits on the contractors may be.”

Response: DTSC agrees that State employees have an overriding mandate to serve the best interests of the State. However, in order for these regulations to be operative, DTSC would need to determine that it could not accomplish this work in-house based on the criteria in Government Code section 19130, subdivision (b) (3). See above responses to comments also. DTSC has added clarifying language to section 69700.1 of the regulation text referencing Government Code section 19130.

- d. Comment:** “PECG has consulted statutes referenced within the proposed regulations and finds no limits placed on this contracting authority by those references, except for emergency situations, which are exempted. Under the proposed “Definitions” section 67900.2(a), “architectural, landscape architectural, engineering, and environmental and land surveying services” include “the type which would lead to, or result in, instruments of service for the construction of a ‘project’...” Again, this language seems ambiguous and confusing. However, it seems to refer to services, which would enable a “project,” as defined by Public Contract Code Section 10105. Since these services enable an alteration or state improvement, the services may include site investigations and oversight and other functions which PECG members provide to the state as “services.” Therefore, this language also fails to provide any limits or clarification.”

Response: DTSC’s believes that the statutory authorities and references are clear and appropriate for the scope and purpose of these regulations. In fact, the scope of these regulations is exceptionally narrow since the vast majority of the architectural and engineering contracts are under \$1 million. See above responses to comments also. DTSC has not made changes to the proposed regulations based on this comment.

- e. Comment:** “If, in fact, these regulations are intended to allow DTSC to contract for services to “orphan sites” then the regulations should be changed to state

that. Additionally, the regulations should be clarified as to the type of services to which these regulations apply. PEGC urges the Department to keep in mind that the best interests of the state are served by State oversight of private contractors to assure compliance with the intent of the laws and regulations.”

Response: See response to comment “a.” regarding correcting the Initial Statement of Reasons to delete the reference to “State orphan sites.” The comment also indicates that the intent of the regulations is unclear. DTSC disagrees that the intent of the regulations is unclear. DTSC also disagrees that the type of services covered by the regulations are unclear or ambiguous. See also response to comment “d.” above. DTSC has not made changes to the proposed regulations based on this comment.

- f. **Comment:** “Given the above comments, PEGC requests that the proposed code changes be revised to clarify ambiguous areas and address these concerns.”

Response: DTSC believes that the statutory authorities and references are clear and appropriate for the scope and purpose of these regulations. See above responses to comments also. DTSC has not made changes to the proposed regulations based on this comment.

Response to comments from the California Association of Professional Scientists (CAPS)

- g. **Comment:** “CAPS has concerns about the stated purpose and scope of these proposed regulation. Specifically, in the “Initial Statement of Reasons”...states that the regulations are needed to directly contract for architectural and engineering (A&E) services for State orphan sites... included in the proposed language for the regulations under section 67900.1... the “procedures for procurement...[are] related to response actions at hazardous substance sites and corrective actions at hazardous waste facilities.” This language is broad in scope... Therefore CAPS is concerned...”

Response: See above response to PEGC comment “a.” DTSC has not made changes to the proposed regulations based on this comment.

- h. **Comment:** “CAPS members do not conduct the physical clean-up process at the hazardous waste sites. They do provide the clean-up expertise for regulating the clean-up as well as environmental analysis for project development, environmental analysis and identification, permit processing, and oversight for hazardous waste removal and mitigation planning. Under the proposed regulations “Definitions” section 67900.2(e), the “environmental services” covered by these proposed regulations include “those services performed in connection with project development and permit processing in order to comply with Federal and State environmental laws.” This would include services for

environmental impact reports (EIR's) in compliance with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). CAPS members provide expertise in this area. Since CAPS members provide all these "services," CAPS objects to these regulations, as written, since they may have an impact on the creation or elimination of jobs within the state in California, if these services are contracted out. This is contrary to the "preliminary determination" by DTSC in the "Notice" for the proposed regulations that "no jobs [would] be created or eliminated in California as a result of the proposed regulations."

Response: DTSC believes the proposed regulations are in compliance with the statutory requirements of the Government Code and the Public Contract Code. The proposed regulations are also narrow in scope and would not become operative unless DTSC made the determination that it could not accomplish this work in-house based on Government Code section 19130, subdivision (b)(3). DTSC does not agree that the proposed regulations "may have an impact on the creation or elimination of jobs within the State of California." See above responses to comments also. DTSC has added clarifying language to section 69700.1 of the regulation text referencing Government Code section 19130.

- i. **Comment:** "Furthermore, CAPS is concerned about the effect on the state in proposing to contract out these "environmental services." State employees, having no economic conflict of interest, have an overriding mandate to serve the best interests of the State, whereas private contractors have profit and increasing future business as their paramount motives. Therefore, CAPS regards it as creating potential conflict and abuse of the State well-being for private contractors to provide "project development and permit processing" services, in general, unless adequate state supervision and oversight are also provided."

Response: Refer to the response to comment "c." DTSC has not made changes to the proposed regulations based on these comments.

- j. **Comment:** "CAPS has consulted statutes referenced within the proposed regulations and finds no limits placed on this contracting authority by those references, except for emergency situations, which are exempted. Under the proposed "Definitions" section 67900.2(a), "environmental and land surveying services" include "the type which would lead to, or result in, instruments of service for the construction of a 'project'..." Again, this language seems ambiguous and confusing. However, it seems to refer to services which would enable a "project," as defined by Public Contract Code Section 101051. Since these services enable an alteration or state improvement, the services may include permit processing, environmental analysis and review, EIR processing, determining hazardous waste removal and mitigation planning, and other functions which CAPS members provide to the state as "services." Therefore, this language also fails to provide any limits or clarification."

Response: See above response to comment “d.” DTSC has not made changes to the proposed regulations based on this comment.

- k. Comment:** “If, in fact, these regulations are intended to allow DTSC to contract for services to “orphan sites” then the regulations should be changed to state that. Additionally, the regulations should be clarified as to the type of services to which these regulations apply. CAPS urges the Department to keep in mind that the best interests of the state are served by State oversight of private contractors to assure compliance with the intent of the laws and regulations.”

Response: See response to comment “e.” above. DTSC has not made changes to the proposed regulations based on these comments.

- l. Comment:** “Given the above comments, CAPS requests that the proposed code changes be revised to clarify ambiguous areas and address these concerns.”

Response: DTSC believes that the statutory authorities and references are clear and appropriate for the scope and purpose of these regulations. See above responses to comments also. DTSC has not made changes to the proposed regulations based on these comments.

III. NONSUBSTANTIAL CHANGES TO THE REGULATION TEXT

- a.** Section 67900.5 of the regulation text as presented in the package provided to the public, has errors in the spacing of the document and some underlining of the proposed new text was omitted in error. Following is the corrected text:

Section 67900.5. Selection of Architects, Engineers or Land Surveyors

After expiration of the announcement period stated in the publications, the Director shall evaluate statements of qualifications and performance data on file in the Department. The Director shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required service. From the firms with which discussions are held, the Director shall select no less than three, in order of preference, based upon the established criteria, who are deemed to be the most highly qualified to provide the services required.

NOTE: Authority cited: section 4526, Government Code. Reference: sections 4526 and 4527, Government Code.

- b.** Section 67900.8 of the regulation text as presented in the package provided to the public, did not have underlining of the authority and reference information at the end of the section. Following is the corrected format:

NOTE: Authority cited: section 4526, Government Code and section 6016, Public Contract Code. Reference: sections 4526 and 4528, Government Code.

These typographical corrections do not change the substance of the regulations or the effectiveness of the 45-day notice process.