

TITLE 23
DIVISION 2. DEPARTMENT OF WATER RESOURCES
CHAPTER 1. DAMS AND RESERVOIRS

NOTICE OF PROPOSED RULEMAKING

The Department of Water Resources (Department) is proposing to amend the regulations that explain how its Architectural and Engineering (A&E) contracting program operates pursuant to the Government Code sections 4525-4529.5, Public Contract Code sections 6106 and 10335. The Department will conduct a public hearing at the time and place noted below to receive comments on the proposed regulation.

Public Hearing

Interested members of the public may present comments on the proposed regulations orally or in writing at the hearing. If you choose to attend the hearing, you must bring a photo ID. The Department requests but does not require that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing. The hearing will be held in accordance with the requirements in Government Code section 11346.8. The hearing details are as follows:

Date: Tuesday, December 12, 2023

Time: 10 am – 11 am

Location: Ziggurat Building Auditorium
707 3rd Street

West Sacramento, CA 95605

Americans with Disabilities Act: It is the policy of the state to make every effort to ensure that its programs, activities, and services are available to all persons, including persons with disabilities. Persons with disabilities requiring reasonable modification to participate in the event must provide their request to Kristen Martin with Division of Division of Engineering Kristen.Martin@water.ca.gov or (916) 712-6623. You may also contact the California Relay Service at 800-735-2922 or 888-877-5979; TTY at 900-735-2929 or 888-877-5978, or Speech to Speech at 800-854-7784. It is recommended that the Department receive the request at least six working days prior to the event.

Written Comment Period

Interested members of the public may submit comments by email or postal mail before the hearing. The public comment period for this regulatory action will begin on October 13, 2023. To be considered by the Department, written comments submitted before the hearing must be submitted on or after October 13, 2023 and **received no later than 5:00 pm on December 12, 2023** and must be addressed to the following:

Email

Kristen Martin
Division of Engineering
AERegs@water.ca.gov
(916) 712-6623

Postal Mail

Kristen Martin
Division of Engineering
P.O. Box 942836
Sacramento, CA 94236-0001
(916) 712-6623

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Authority and Reference

Water Code sections 1976 through 1982 authorize the Department to adopt the proposed regulations. The proposed regulations implement, interpret, and make specific Public Contract Code sections 6106 and 10335 and Government Code sections 4525-4529.5 and 4529.10-4529.20.

Informative Digest and Policy Statement Overview

The proposed amendments clarify the A&E regulations to streamline the A&E contracting program within DWR to make it easier for those preparing Statements of Qualifications (SOQs) for contracts and eliminate all exclusions, and allow for DWR to post a "Look-Ahead Report" which constitutes publishing estimated ranges of contract values for upcoming A&E contracts. 23 CCR § 390 is proposed to be eliminated since regulations require clarity, necessity, and non-duplication. As this section accomplishes none of these objectives it should be eliminated to prevent confusion.

Summary of Existing Laws and Regulations

The Department's Division of Engineering (DOE) implements Chapter 10 of Division 5 of the Government Code and Part 1 of Division 2 of the Public Contract Code, which is commonly referred to as the Architectural and Engineering (A&E) Contracting Program.

Effect of Proposed Rulemaking

The proposed regulation amendments clarify how the Department's A&E Contracting Program operates. This clarification will benefit the architectural and engineering consulting industry who submit qualifications for A&E contracts. In addition, the Department wants to clarify its ability to publish a "Look-Ahead report" which should result in more transparency, increased submittal volume, and higher quality submittals from consultants. This will benefit the people of California by increasing the number and variety of consultants to select.

Differences from Comparable Federal Regulations

The Brooks Act (40 U.S.C.A. §§ 1101 to 1104) and Federal Acquisition Regulation (FAR) Subpart 36.6, (48 C.F.R. Pt. 36, Subpt. 36.6) governs the procurement of architectural and engineering services by federal agencies. This federal authority is very similar to the statutes and regulations that govern the Department's procurement of architectural and engineering services. The additions of Article XXII "Architectural and Engineering Services" to the State of California Constitution and Government Code §§ 4529.10 - 4529.20, Chapter 10.1, "Architectural and Engineering Services" in November 2000 were patterned after the federal Brooks Act. Both the federal regulations and those of DWR require the selection of architectural and engineering firms based on professional qualifications before the negotiation of any fair and reasonable compensation for services.

Although the federal and Department's statutory and regulatory schemes operate similarly, the Department's procurement of architectural and engineering services are only affected by federal rules if the Department's subject procurement is federally funded.

Compatibility with Existing State Regulations

The Department determined that the proposed regulations are consistent and compatible with existing State A&E regulations. The Department is aware that the California Department of Transportation (CalTrans), California Department Corrections and Rehabilitation (CDCR), Department of General Services (DGS), California Parks and Recreation (Parks), the Department of Boating and Waterways (no longer in existence and is now the Division of Boating and Waterways within Parks), California High-Speed Rail Authority, have similar A&E contracting programs. CalTrans publishes a Look Ahead Report on their A&E website online, similar to one of the changes being proposed by DWR in this current rulemaking. Caltrans, CDCR, DGS, Parks, the Department of Boating and Waterways, and California High-Speed Rail Authority do not have a section on Exclusions, which DWR is eliminating in this current rulemaking as it simply restates existing law.

Documents Incorporated by Reference

The proposed regulations will not incorporate any documents by reference.

Mandated by Federal Law or Regulations

The proposed regulations are not mandated by federal law or regulations.

Other Statutory and Legal Requirements

There are no other statutory or legal requirements.

Local Mandate

The Department has determined that the proposed regulations changes will not impose a mandate on local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of the Government Code.

Fiscal Impact

Based on the findings of little or no direct economic impacts to A&E firms and given that DWR would not change its A&E solicitation, review, and contracting process, it would follow that there would be little or no related fiscal impacts to DWR.

There are no expected costs or savings to local agencies or school districts, nor to any state agency, nor non-discretionary cost or savings imposed upon local agencies, nor cost or savings in federal funding to the state.

Housing Costs

The Department has made the initial determination that the proposed regulatory action will not have a significant effect on housing costs.

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including Ability to Compete

The Department has made an initial determination that the proposed action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Statement of the Results of the Economic Impact Assessment (EIA)

The proposed action will neither create nor eliminate jobs within the state. The proposed action will neither create nor eliminate businesses within the state. The proposed action will not expand businesses within the state. As stated above, the proposed regulations will benefit Californians generally through the streamlining of A&E contracting program and increasing the number and variety of consultants to select. The proposed regulations are not expected to affect worker safety or the state's environment.

A&E firms spend upwards of \$194,400 per SOQ prepared. However, given that DWR is not changing its A&E solicitation, review, and contracting process, there are no anticipated changes in the total number of SOQs prepared each year. There also are no anticipated changes to negotiated contract values. Therefore, there are expected to be little or no economic impacts.

Cost Impacts on a Representative Person or Business

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Business Reporting Requirements

There are no new business reporting requirements as a result of the proposed regulations.

Effect on Small Business

The proposed regulations will not affect small business because there are no anticipated changes to negotiated contract values. Therefore, there are expected to be little or no economic impacts.

Alternatives Statement

The Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department

- would be more effective in carrying out the purpose for which the action is proposed,
- would be as effective and less burdensome to affected private persons than the proposed action, or
- would be more cost-effective to affected private persons and equally effective in implementing statutory policy or other provision of law.

Department Contact Persons and Availability of Documents

Department Contact Persons

Questions regarding the proposed regulatory action may be directed to:

Kristen Martin
Division of Engineering
715 P Street, 4th Floor
Sacramento, CA 95814
(916) 712-6623
AERegs@water.ca.gov

Backup contact person:

Alannah Chapman
Division of Engineering
715 P Street, 4th Floor
Sacramento, CA 95814
(916) 764-9779
Alannah.Chapman@water.ca.gov

Availability of Proposed Documents

The Department has prepared an initial statement of reasons (ISOR) for the proposed regulations. This notice, the ISOR, the express terms, and all information upon which the proposed regulations are based are available on the DOE's A&E Program website at <https://water.ca.gov/Programs/Engineering-And-Construction/AandEContractsProgram>.

If substantial changes are made to the proposed regulations, the full revised text will be made available on the website for at least 15 days prior to adoption. All subsequent regulatory documents, including the final statement of reasons, when completed, will be made available on the website.