Decision DRAFT DECISION OF COMMISSIONER LYNCH (mailed 10/30/2001)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion into General Order 163, relating to the Commission's contracting for Architectural, Engineering, and Environmental Services	R.01-06-022 (Filed June 14, 2001)

DECISION ADOPTING REVISED GENERAL ORDER 163A

I. SUMMARY

This decision adopts revisions and addresses comments received in response to a rulemaking we initiated in June to revise Commission General Order (GO) 163, the GO that sets forth the Commission's procedures for procuring architectural, engineering and environmental services consistent with Sections 4529-4529.5 of the Government Code. We expect that the revisions will facilitate the Commission's staff ability to perform the environmental review of projects proposed by the utilities we regulate in a timely fashion, consistent with the Commission's legal obligations under the California Environmental Quality Act (CEQA).

II. DISCUSSION

Since the adoption of GO 163[1] in 1995, the Commission has used its procedures almost exclusively to procure environmental consultant services so that it can comply with CEQA. Commission staff discovered in working with the Department of General Services (DGS), the agency that must review and ratify the CPUC's contracts,

[1] In 1995 we adopted GO 163 in order to implement regulations mandated by Government Code Sections 4525-4529.5, which specify the procedures public entities must use for the procurement of consultant services for landscape architectural, professional engineering, environmental, land surveying, and construction project management services.

that GO 163 should be revised in several ways to expedite and clarify the process for obtaining consultants. The Commission initiated a rulemaking on June 14, and circulated the rulemaking and proposed revisions for comment to the service list from the 1995 rulemaking, current contractors, and utilities with projects subject to the Commission's review under CEQA.

The rulemaking's preliminary scoping memo classified this proceeding as quasi-legislative and stated that we would consider written comments but would not hold hearings. No one has contested the conclusions of the preliminary scoping memo. We issue an official service list, which is attached to this decision.

Comments were submitted by two parties and are addressed below. In reviewing the comments we make a minor technical change to the proposed GO 163A, which does not affect the substance of the proposed revisions. We also add an additional revision that was described in the rulemaking, but which was inadvertently omitted from the proposed version of General Order 163A appended to the rulemaking.

III. COMMENTS

Metromedia Fiber Network Services Metromedia Fiber Network Services, Inc. (MFN), a provider of telecommunication services in California with a project currently pending before the Commission, filed comments generally supporting the proposed revisions to General Order 163, but suggesting additional revisions that it believes would further expedite the process for selecting consultants to complete environmental review of projects such as MFN's.

MFN suggests that the Commission should make revisions that will allow the Commission to select the same consultant for related projects, rather than issuing a separate "Request for Qualifications" (RFQs) for separate projects by the same applicant, as is currently the case. In support of that goal, MFN recommends three additional revisions to GO 163.

MFN recommends that the "on-call" provision of Section IV. A be modified to allow use of an "on-call" selection procedures for project modifications. MFN's

suggestion misapprehends the Commission's need to use "on-call" selection procedures. The Commission seeks "on-call" authority for cases in which it is not feasible to use a separate RFQ for an applicant's specific project. The Commission used the RFQ procedure for each of MFN's projects, which were identified in advance of the need to hire a consultant, so the "on-call" provision would not apply to the selection of a consultant for a related MFN project.

As MFN points out, the Commission under current General Order 163 did not use "sole source"[2] selection procedures for a second related project, even though use of the same consultant would have resulted in more efficient use of resources because of the on-going relationship developed in the course of the first project. To address such situations in the event they arise again, the Commission intends to rely on Section IV. M of the proposed revisions to GO 163 appended to this decision. Although the Commission's intent to allow the use of sole source procurement at times "when it is in the best interest of the state" was described in the rulemaking at page 2, Section IV. M was inadvertently omitted from the attachment to the rulemaking. Because we believe that Section IV. M will allow the Commission to use sole source selection procedures when it is in the best interests of the state for specific projects requiring the use of environmental consultants, we decline to adopt the changes to Section IV. A suggested by MFN.

MFN suggests that the Commission modify Section IV. F of the proposed revisions to GO 163 to clarify that in the event fewer than three submissions are received in response to an RFQ, the Commission may continue the selection procedure even if only one qualified firm has made a submission. We will adopt this suggestion to make it clear that the Commission has that option in the event only one qualified firm has made a submission.

[2] A sole source transaction includes a contract for goods or services when only a single business enterprise is given the opportunity to offer the state a price for those goods or services. State Contracting Manual, Section 5.70. p. 61.

Finally, MFN suggests that we modify Section IV. H to allow the Director to negotiate a contract with other than the best-qualified firm if that would allow such a firm to complete the assignment more expeditiously than the best-qualified firm. We decline to adopt this suggestion, as we believe that the current language in Section IV. H, which allows the Director to negotiate a contract with other than the best-qualified firm in the event workload demands would prevent the most qualified firm from completing the assignment, adequately addresses the need for the Commission and applicants to obtain environmental advice on a timely basis.

Altrio Communications, Inc. Altrio Communications, Inc. (Altrio), which was recently granted limited facilities based authority to provide services as a competitive local carrier and statewide interexchange services, filed comments "generally supportive" of revisions that would "expedite the process for selecting environmental consultants," including the use of "on-call" contracts if that would eliminate the delay now caused by obtaining DGS approval of contracts. The use of on-call contracts would not eliminate the need to obtain DGS approval of contracts, although it would eliminate delay caused by issuing separate RFQs for for smaller projects that cannot be identified in advance of the need to obtain a consultant to assist staff with timely CEQA review.

Altrio also recommends with regard to revisions proposed to Section IV. C of revised General Order 163A, that the Commission obtain input from applicants in identifying conflicts of interest, and that the conflicts checking procedure be included in instructions to firms prior to commencing negotiations. Commission staff currently seeks conflict of interest information from potential contractors as part of the selection process, prior to the negotiation phase of the process so that that information can be evaluated prior to commencing negotiations with the "best-qualified" firm. We believe that this is the appropriate time for evaluating conflict of interest information.

Altrio further recommends that in Section IV. H, the Commission include a 30-day time limit for negotiating a contract with the best-qualified firm. Commission staff generally negotiates contracts with the best-qualified firm in two weeks or less, but

occasionally, additional time is required because of unusual circumstances. We decline to impose a deadline for concluding negotiations in revised General Order 163A, because we believe it would unnecessarily tie the hands of Commission staff. Moreover, General Order 163A already authorizes Commission staff to terminate negotiations with the firm ranked number one if the Director is "unable to negotiate a satisfactory contract with the firm ranked number one." We believe this allows Commission staff to terminate negotiations that have not resulted in a satisfactory contract within a reasonable time frame, based on all the circumstances.

The draft decision of the assigned Commissioner in this matter was mailed to the parties in accordance with PU Code Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

Finding of Fact

Comments to the proposed revisions to General Order 163 have been received, considered, and incorporated as appropriate.

Conclusion of Law

The revised General Order 163A should be adopted.

IT IS ORDERED that:

1. General Order 163A in Appendix A is adopted.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

GENERAL ORDER NO. 163A

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

REGULATIONS FOR THE PROCUREMENT OF PROFESSIONAL SERVICE FIRMS (REQUEST FOR QUALIFICATIONS-RFQ)

SECTION I. INTRODUCTION

These procedures implementing Government Code Sections 4525-4529.5, which govern the procurement of the professional services of private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms, have been established by the California Public Utilities Commission (Commission) to permit the issuance of Requests For Qualification (RFQ) and the subsequent selection of private professional services, as necessary, and consistent with applicable laws, to carry out the responsibilities of the Commission. Consistent with the provision of Government Code Section 4529, these procedures shall not apply in circumstances where the Commission's Executive Director determines that the services needed are more of a technical nature and involve little professional judgment and that requiring bids would be in the public interest. It is the Commission's intention that these procedures be fully understood by all agencies of government, as well as firms seeking to provide services to the State.

SECTION II. DEFINITIONS

As used in these regulations, the following definitions apply:

A. “Commission” means the California Public Utilities Commission.

B. “Director” means the Executive Director of the California Public Utilities Commission, or the person(s) designated to act on his/her behalf.

C. “Architectural, landscape architectural, engineering, environmental and land surveying services” includes those professional services of an architectural, landscape architectural, engineering, environmental, or land surveying nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.

D. "Construction project management" means those services provided by a licensed architect, registered engineer, or licensed general contractor which meet the requirements of Government Code Section 4529.5 for management and supervision of work performed on
state construction projects.[3]

E. "Environmental services" means those services to be procured outside the State of California civil service in connection with project development and permit processing to comply with Federal and State environmental laws, including the processing and awarding of claims pursuant to Chapter 6.75 (commencing with Section 25299.10) of Division 20 of the Health and Safety Code.

F. "Firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions enumerated in paragraphs C, D, and E, above.

G. "Project Manager" means the Commission staff member assigned to oversee the scope of the project, as defined in the contract.

H. "Project" means either a specific planned undertaking, such as the transfer, sale, construction or upgrade of utility facilities, or a detailed plan or proposal for the types of services that the Commission may require in connection with the future transfer, sale, construction, upgrade of utility facilities, or other specific planned undertaking, when such activities have not yet been identified.

I. A "small business" firm is one that has been certified by the State Office of Small and Minority Business (OSMB).

SECTION Ill. STANDARDS OF CONDUCT

A. It is the Commission's intent that all parties interested and/or involved in the implementation

[3] 'Government Code Section 4529.5 provides:
"Any individual or firm proposing to provide construction project management services pursuant to this chapter shall provide evidence that the individual or firm and its personnel carrying out onsite responsibilities have expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project."

of these professional service procurement procedures, including but not limited to Commission employees and principals and employees of prospective and contracted professional service firms, fully understand the consequences of engaging in unlawful activity. Such unlawful activity may include, but is not limited to, offering or giving rebates, kickbacks, or other unlawful consideration toward securing a contract or favorable treatment with respect to compensation, terms, amendment, or the evaluation of contract performance. If it is found, after notice and hearing by the Director, that any such activity was undertaken by a contractor, the Director may terminate the right of the contractor to proceed, provided that the facts upon which the Director makes such findings may be reviewed in any competent court. In such event, the Commission may also pursue the same remedies against the contractor as it could in the event of contract breach, as well as penalty and exemplary damages. Commission employees found by the Director to have participated in such unlawful activity will be subject to appropriate disciplinary and legal action by the Commission.

B. No participant in the Commission's contractor selection or contract negotiation process shall have a personal, business, or financial interest in a person or business entity seeking a contract under this General Order. Failure of a participant to remove him/herself from the process once aware of such a conflict of interest will be cause for appropriate disciplinary and/or legal action by the Commission.

C. Commission employees found by the Director to have knowingly imparted unauthorized information to one or more prospective contractors during the selection or contract negotiation process will be subject to appropriate disciplinary and legal action by the Commission.

D. Commission appointees and employees shall comply with all applicable laws including, but not limited to, conflict of interest and ethics requirements.

SECTION IV. PROCESS FOR PROCURING CONSULTANTS TO PROVIDE PROFESSIONAL SERVICES

A. When the Project Manager requires professional services for a project at a particular site or sites that can be identified at the time the Request for Qualifications (RFQ) is prepared, s/he shall develop a detailed scope of the professional services required, which will serve as a guide in the identification of selection criteria as well as the appropriate range for compensation. The project scope will be incorporated into the professional services contract. When the Project Manager requires professional services for a project with a site or sites that cannot be identified at the time the RFQ is prepared, s/he shall develop a scope of services that specifies the type of activities that the contractor might be expected to complete on an as-needed, on-call basis, without reference to a particular site or sites. Proposals for such “on-call” contracts shall specify with as much detail as possible the anticipated nature of the services required and the expected location where services may be needed.

B. The Director may publish an annual notice that solicits statements of qualifications and

performance data from firms that provide services covered by this General Order 163A that the Commission expects to utilize over the next year. The general criteria shall include such factors as professional excellence, demonstrated competence, specialized experience of the firm, education and experience of key personnel, staff capability, workload, ability to meet schedules, nature and quality of completed work, reliability and continuity of the firm, professional awards, the potential for conflicts of interest, familiarity with pertinent regulatory processes, familiarity with project locale, and any other considerations deemed relevant.

C. The Director shall establish criteria for selecting a firm for each project. Such criteria shall include, but need not be limited to: professional excellence, demonstrated competence, specialized experience of the firm, education and experience of key personnel, staff capability, workload, ability to meet schedules, principals to be assigned, nature and quality of completed work, reliability and continuity of the firm, location, professional awards, actual or potential conflicts of interest, and compliance with all applicable laws in force during the relevant time period. The Director shall weight the established criteria according to the nature, complexity, and special requirements of the specific project.

D. The Director shall determine the State's estimated value of services to be provided. The estimated value shall be held confidential until the award of the contract or abandonment of any further procedure for the services to which it relates. If at any time the Director determines the State's estimate to be unrealistic, s/he may direct that such estimate be reevaluated.

E. The Director shall publish, either electronically or in print, a Request for Qualifications (RFQ) for each proposed project in the State Contracts Register and in the publications of relevant professional societies. The notice shall include the nature of the services required, submittal requirements and deadlines, the criteria upon which the award will be made, and a statement that the contract will be awarded without discrimination based on race, color, religion, sex, or national origin. The Director shall endeavor to provide to all small business firms who have indicated an interest in receiving such, a copy of each RFQ for projects for which the Director concludes that small business firms could be especially qualified. A failure of the Director to send a copy of an RFQ to any firm shall not operate to invalidate any contract.

F. The Director shall evaluate any current statements of qualifications and performance data on file with the Commission, together with those that may be submitted by other firms regarding the proposed project; shall conduct discussions with no less than three firms, including key personnel who would perform the work, regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services; and then shall select therefrom, in order of preference, based upon criteria established and published by her/him, no less than three of the firms deemed to be the most highly qualified to provide the services required. If an RFQ results in submissions by fewer than three qualified firms, the Commission may, at its option, discontinue the selection process, extend the selection process and provide supplemental notice to attract additional firms, or continue the selection process with submissions received, even if it receives a submission from only one qualified

firm.

G. A letter shall be signed by the Director and sent to all RFQ respondents, which lists the ranking firms and identifies the participants in the selection process. This letter shall be the only communication to RFQ respondents about the ranking of firms, and shall designate an authorized Commission representative for questions.

H. The Director shall negotiate a contract with the best-qualified firm at compensation that the Director determines is fair and reasonable to the State of California. If the Director is unable to negotiate a satisfactory contract with the firm ranked number one, at a price the Director determines to be fair and reasonable, negotiations with that firm shall be formally terminated. The Director shall then undertake negotiations with the second most qualified firm. Should no satisfactory contract be reached, then the Director shall terminate negotiations and shall thereafter undertake negotiations with the third most qualified firm. Should the Director be unable to negotiate a satisfactory contract with any of the selected firms, the Director shall select additional firms in order of their competence and qualification and continue negotiations until an agreement is reached. For contracts that involve as-needed, on-call services, the Director may negotiate a contract(s) with the firm(s) other than the best-qualified firm, which may be used in the order of qualification in the event that the Director determines that the most qualified firm is unable to complete a particular assignment because the existence of a conflict of interest, or work load demands, or any other reason that would prevent the most qualified firm from completing a particular assignment.

I. Prior to commencing contract negotiations as described in Subsection G, the Director shall provide written instructions to each successive firm, as applicable, for the negotiations that are to follow. These instructions shall provide the firm with information necessary to allow the negotiations to proceed in an orderly fashion, including the designation of the authorized Commission representative(s). Negotiations shall begin within 14 days after the successful firm has been notified of its selection or upon receipt of its cost proposal. The firm should be notified if additional time is necessary to begin negotiations.

J. Upon the completion of contract negotiations, the Director and the successful firm shall proceed to execute a contract within 45 days, including all applicable approvals required by the State. The firm should be notified if additional time is necessary to complete the contract. The Commission and the firm shall work together to ensure the successful delivery of the requested services in a timely fashion.

K. Where the Director determines that it is necessary or desirable for a project to be performed in separate phases, the Director may negotiate a contract for the initial phase of work. To establish a contract price for the initial portion of phased work, the Director must first determine that the chosen firm is best qualified to perform the entire project at reasonable cost to the State. This approach will be used in negotiating an “on-call” contract, and the determination regarding reasonable cost will be based on the information provided by the firm regarding any initial assignments or its described approach to past tasks. A contract for work to be performed in phases without a negotiated total contract price must provide that the State

may, at its option, require that firm to perform other phases of the work and that the firm will accept a fair and reasonable price for that subsequent phased work to be later negotiated and reflected in a subsequent written instrument.

L. Amendments may be used to adjust the negotiated compensation or any other term of the contract, by amendment, if the Director and firm agree mutually, in writing, to do so when the Commission effects a necessary change in the project that is justified under the circumstances.

M. Where the Director determines it is in the best interest of the State, s/he may negotiate a second contract with a contractor for a subsequent portion of a project or a related project that was not described in the initial RFQ. Among the factors that the Director may consider in determining whether such a contract is in the best interest of the state are the unique expertise gained by the contractor in completing the initial part of the project, the public interest in moving forward quickly with the subsequent portion of the project, as well as any other pertinent factors. When the Director determines that it is the best interest of the State based on exigent circumstances, s/he may negotiate a contract without following the procedures that are otherwise required by Section IV of this General Order.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

By WESLEY M. FRANKLIN Acting Executive Director