



# INFORMER

# 6, April 2007

Professional Engineers in California Government

## SUPREME COURT ISSUES RULING ON PROP 35



In the early 1900's, the people of California adopted a civil service system which is now found in Article VII of the California Constitution. The purpose was to end the favoritism and, on occasion, nepotism in appointing political friends and family to state jobs. When politicians attempted to achieve the same goal by awarding contracts to their friends for state services, the Supreme Court, beginning in 1937, stepped in. Essentially, the Court found that state services can only be outsourced to private firms if there is a specific good reason to do so, such as specialty work, urgency, a new state function, or substantial cost savings.



for state engineering services. It was approved by the voters in November 2000.

Without waiting for legislative authorization, Caltrans began outsourcing its regular design and construction inspection services under the belief that Prop 35 gave them direct authority to do so. In 2002, PECG filed suit. The basic question was whether Prop 35 gave the authority to the Legislature or to individual state departments to authorize outsourcing, but dealt with a number of other issues as well, such as the QBS outsourcing process, on-call contracts, Caltrans' procedures and regulations for contracting, statutes which limited contracting for reasons other than Article VII, etc.

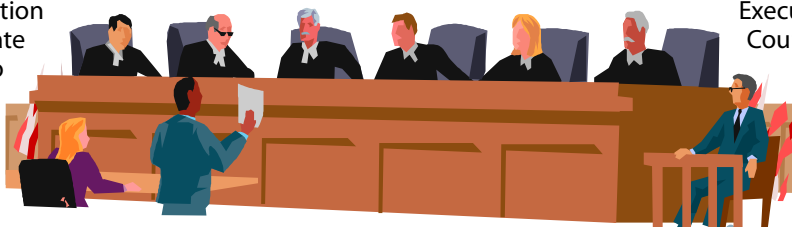
In the 1980's and 1990's, Governors Deukmejian and Wilson began contracting out substantially more engineering and related services, particularly Caltrans design, surveying, and construction inspection work. This triggered a legal battle for years in which the lower courts permitted some of the contracts and prohibited others, based on the prior rulings on Article VII.

When the Court of Appeal ruled that individual departments can proceed with contracting without legislative authorization, PECG appealed to the Supreme Court. The Legislature joined with PECG on the issue of who sets the policy for the State of California, which has historically been a legislative function. On the other side were Caltrans and CELSOC.

The Legislature passed a law which authorized more outsourcing of engineering work by Caltrans. PECG filed suit challenging the constitutionality of the law. Ultimately, in 1997, the Supreme Court reaffirmed its previous rulings on limitations on contracting and declared the law to be unconstitutional. At that point, Governor Wilson abandoned his efforts to expand contracting for engineering work.

In April, the Supreme Court issued its ruling. On the major issue of authority, the Court appeared to rule in favor of PECG, saying that "the setting of policy with respect to private contracting is a legislative matter," "the Legislature has plenary authority to regulate contracting," and "this interpretation of Proposition 35 does not endorse a shift of policy-making powers from the Legislative Branch to Executive Branch agencies." The Court also ruled that either the Legislature or the people, through the initiative process, can establish

CELSOC, the organization representing private engineering firms, turned to the ballot box, sponsoring Prop 35. The measure eliminated Article VII restrictions on contracting



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legislation and state policy, which has always been the case. However, the Court then ruled that the Legislature has already authorized Caltrans outsourcing through the statute (Government Code Section 14030) which established Caltrans 35 years ago. Therefore, Caltrans already has authority from the Legislature to contract out its services, now that the Article VII restriction has been lifted by Prop 35.

Thus, in affirming the Court of Appeal ruling, the Supreme Court did not grant PEGG's request to restrain Caltrans from contracting out engineering services until the Legislature takes additional

action. Beyond that, it's a bit fuzzy. The Legislature clearly has authority to permit or restrict contracting through the budget process when it authorizes money for staff or for outsourcing. What additional authority the Legislature has in developing other statutes is not entirely clear.

In affirming the lower court ruling, the Supreme Court appeared to affirm that portion of the ruling which said that on-call contracts (which represent almost all of Caltrans contracting) are not authorized by statute or regulation. However, the lower court merely stated its view on that without taking action, and its decision has been replaced by the Supreme Court ruling, so the status of on-call contracts is unclear. The Supreme Court did uphold the lower court ruling that Caltrans regulations on contracting were developed illegally, but Caltrans has since developed other regulations to replace them, which may or may not be appropriate.



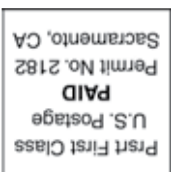
Ultimately, the decision on whether or not to outsource should be based on good public policy. Whether direct outsourcing of services (or design-build or other processes) are used, is outsourcing cost effective? Does outsourcing certain functions, such as construction inspection, result in defective work, unsafe roadways and bridges, and expensive repairs? Should competitive bidding be used on outsourcing of engineering services, as is required for outsourcing many other services?

While Article VII was a restriction on contracting which has now been removed, the ultimate decision on contracting should be made on the basis of public interest, safety, economics, timely project delivery, and other relevant factors. If those factors, rather than political influence, are used as the basis for making decisions, outsourcing of engineering and related services will be severely limited in the future.

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