California’s Proposition 35: State Contracts For Professional Architectural and Engineering Services and the Federal Model For Competitive Sourcing

By Bruce Shirk, Esq.

Introduction

In November 2000 the voters of California enacted Proposition 35, a law that did away with a long-standing state constitutional restriction on the authority of state agencies to contract with private entities for services that can be performed by the state’s civil service. Proposition 35’s impact was at once profound and limited in that it removed the restriction on the authority of state agencies to contract with private firms for architectural and engineering services on public works projects while leaving the restriction intact for other types of services.

The California Transportation Agency, or Caltrans, began taking advantage of Proposition 35 immediately after its enactment by contracting with private architectural and engineering firms to expedite certain highway projects.

The Professional Engineers in California Government, the certified collective bargaining representative for state civil service employees working as professional engineers, sued to challenge the new Caltrans practice. The group argued that because Proposition 35 was not self-executing the Legislature had to replace existing statutes restricting private contracting with new statutes before Caltrans could contract with private firms.\(^1\)

On April 12 the California Supreme Court ruled unanimously in Professional Engineers in California Government v. Kempton, No. S139917, that Proposition 35 was self-executing and that its enactment specifically repealed the existing restrictive statutes as to contracting with private architectural and engineering firms.\(^2\)

This article summarizes the California Supreme Court’s ruling and discusses its significance in light of the restriction’s purpose of protecting the integrity of the state’s civil service and the 70-year history of consistent judicial and legislative adherence to that purpose.\(^3\) The article also addresses various judicially created exceptions to the restriction and concludes by comparing and contrasting the long-standing California approach to contracting for services with the recently established federal policy of acquiring services through competitive sourcing.

The Supreme Court’s Holding

The California Supreme Court’s decision — the second in a decade in which the Professional Engineers has been a party arguing in favor of the restriction\(^4\) — could ultimately “steer substantial amounts of a voter-approved, $19.9 billion transportation bond to the private sector.”\(^5\)

The court also held that Proposition 35 did not invalidate California’s prior procedure for selecting private architectural and engineering, or A/E, contractors, which involves a qualifications-based selection, or QBS, of A/E firms in compliance with the federal Brooks Act, as a precondition of state eligibility for federal funds supporting design and construction of state public works.\(^6\)

At first glance, the decision appears to be a resolution, at least in part, of a long-standing California turf war between private and public sector architects and engineers. What should be of interest to the rest of us, however, is that Proposition 35 only applies to architectural or engineering services and does not eliminate or even
amend the broad restriction against California state agencies contracting with private entities for provision of other types of services.

Indeed, the authors of Proposition 35 made certain that they would avoid any possibility of a direct confrontation with the several powerful California State civil service unions by drafting the initiative so that it “only applies to architectural and engineering services” and explicitly excludes, among others, “fire, ambulance, police, sheriff, probation, corrections or other peace-officer services.”

The limited scope of Proposition 35 provides a prism through which to view the history of California’s constitutional policy of preserving the integrity of its civil service and, indeed, the state’s pride in one of the best civil service systems in the nation. California’s well-defined yet not prohibitive approach to “contracting out” also is in stark contrast with the much less restrictive, less defined and, some would say, muddled policy in place at the federal level.

Thus, this article first discusses Professional Engineers with a view to understanding how California’s approach is informed by a conception of the civil service that necessitates limiting state agency contracting and then compares that approach with the current federal competitive-sourcing policy established in Office of Management and Budget Circular A-76, Revised May 20, 2003.

Background: California’s Commitment To Its Civil Service System

On Nov. 7, 2000, California voters approved Proposition 35, the Fair Competition and Taxpayer Savings Act, which “expressly removed a constitutional restriction on the ability of governmental entities to contract with private firms for architectural and engineering services on public works projects.”

Proposition 35 was the symbol for a turf war between architects and engineers on public agency staffs and those in private consulting practice and was in large part the private-sector response to pressures to further limit the participation of private A/E firms in public construction projects.

State Compensation Insurance Fund v. Riley

California’s restrictions on contracting are not evident from the face of Article VII of the state constitution, but nevertheless reflect a broad policy establishing, in some ways, the state’s civil service as an inviolable monopoly. California enacted the constitutional provision establishing the state’s civil service in 1934 by vote of the people. In 1937 the California Supreme Court decided State Compensation Insurance Fund v. Riley, the first of several decisions affirming the constitutional restriction on contracting.

The court held that Article VII of the California Constitution imposes a restriction on the contracting of out-of-state activities or tasks to the private sector and enjoined the State Compensation Insurance Fund from retaining a private attorney, noting that the constitution’s civil service provisions are so comprehensive as to require everyone working for the state to be a member of the civil service, thereby establishing a general rule precluding the private sector from providing services of any type to the state:

When [the predecessor provision of Article VII] was adopted in 1934 by vote of the people, it was unequivocally declared to be the policy of this state that every employee and officer of the state should be included [in the civil service]. All types of service were included... therein — no distinction between professional and nonprofessional, or between temporary and permanent employment was made either in the constitutional provision or in the [implementing] act.

Subsequent rulings have consistently confirmed the restriction, holding, “The restriction on ‘contracting out’ does not stem from an express constitutional prohibition... but emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction.”

The decisions have reiterated the court’s function of protecting the integrity of the state’s civil service.

‘Were the rule otherwise, the civil service system could be entirely undone by a system of contracting; and the state’s work force could be dominated by independent contractors who would be hired from job to job.’ Such a system, operating without regard to considerations of economy or efficiency, and open to a ‘patronage/spoils system’ method of contracting, would conflict with the electorate’s probable intent in adopting Article VII and its predecessor.

Despite the adamant tone of the courts when protecting the state’s work force, they have recognized the distinction between restricting private contracting and prohibiting it. In so doing, the California Supreme Court provides in Riley a simple, straightforward test for determining when the restriction does and does not preclude such contracting:

There undoubtedly is a field in which state agencies may enter into contracts with independent contractors. But the true test is not whether the person is an “independent contractor” or an “employee,” but whether the services contracted...
for, whether temporary or permanent, are of such a nature that they could be performed by one selected under the provisions of civil service. If the services could be so performed then in our opinion it is mandatory upon such appointing power to proceed in accordance with the provisions of the Constitution … the petition does not allege that the services here involved could not be performed satisfactorily by an attorney selected under civil service. The services contracted for are the services of an attorney. Attorneys are included within the civil service, and in the absence of a showing to the contrary we must assume that such services could be adequately and competently performed by one selected within the mandate of the Constitution. Any other construction … would have the effect of weakening, if not destroying, the purpose and effect of the provisions.15

It is thus apparent that the turf war between public- and private-sector architects and engineers involves a policy that reaches every other potential provider of services to the state.

California courts have held that the purpose of the restriction on contracting is to ensure the integrity of the state’s civil service. This is reflected in the California Supreme Court’s oft-repeated opinion that the two main purposes of Article VII of the state Constitution are “to promote efficiency and economy” in state government and “to eliminate the ‘spoils system’ of political patronage.”16

According to the courts, both these purposes require a means of assuring “that the state civil service is not neglected, diminished, or destroyed through routine appointments to ‘independent contractors’ made solely on the basis of political considerations or cronism.”17 The means of assurance is the restriction on private contracting.18

The California Constitution Revision Commission confirmed the restriction in 1996 when it considered whether the proposed revision of Article XXIV, the predecessor to Article VII, should grant the Legislature full authority to exempt state agencies from the contracting restriction. The commission decided the answer was no, emphasizing the importance of maintaining the integrity and efficiency of one of the best civil service systems in the nation:

The first question discussed in considering Article XXIV was whether the matters treated in the article, and particularly the enumeration of exemptions [from civil service] in Section 4, ought to be retained in the Constitution. It was concluded that California has one of the best civil service systems in the nation and that constitutional treatment of the basic elements of the system is essential to ensure continuance of its high quality. It was recognized, for example, that the alternative of placing the entire exemption power with the Legislature would [subject] the legislators to unduly severe pressures to carve out various exceptions to the application of civil service laws and that much strain on the integrity and efficacy of the civil service system could result.19

The Exceptions

Beginning with Riley, courts construed Article VII as a restriction, but not a total prohibition, of private contracting by public agencies, and developed three exceptions. The first was the test from Riley, called the “nature of the services” rule, which considers “whether … the services contracted for … could be performed by … the … civil service.”20

In a 1970 decision the court restated the Riley test in the negative: “If the services cannot be adequately rendered by an existing agency of the public entity the contract is permissible.”21 However stated, the test is practical, practicable and represents “a concrete principle … capable of systematic application.”22

The second exception is the “new state function” rule, which renders the restriction “inapplicable if the state seeks to contract for private assistance to perform new functions not previously undertaken by the state or covered by an existing department or agency.”23

The third is the so-called “cost savings exception,” which allows the state to contract with private entities to perform personal services to achieve cost savings if it can do so without ignoring other applicable and specifically enumerated civil service requirements.

The above three judicial exceptions “defined the scope of the Legislature’s statutory efforts to permit some contract out of government functions prior to the enactment of Proposition 35,” specifically including “the statutes involved in … [the Proposition 35] matter, [Cal. Gov’t Code] §§ 14101, 14130 et seq. and 19130,” all of which incorporate both the restriction on contracting with private entities and the above exceptions to it.24

Since the establishment of the state’s civil service, California courts have consistently held to the view that the California Constitution requires substantial restrictions on contracting. The courts have noted that, “like California, most of the states have substantial restrictions and ‘efficiency and economy’ requirements to protect their civil service systems from deterioration through private contracting.”
and observed further that, while the federal government actively encourages private contracting, “applicable legislation” calls for provision to the government of “property and services of the requisite quality, within the time needed, at the lowest reasonable cost.”

The courts have also expressed the belief that California’s restriction on contracting is “typical of the restraints many other jurisdictions, including the federal government, have imposed on private contracting.”

The Electorate Eliminates the Restriction as to Architects and Engineers

Caltrans’ decision to use private A/E contractors immediately after the passage of Proposition 35 is understandable in light of its long-standing position that the restriction on contracting greatly hampered the timely completion of its projects. Its decision to continue using the QBS process is also understandable in light of the certain loss of federal funding the agency would have sustained had it not done so.

For their part, the Professional Engineers in California Government readily understood the threat presented by Caltrans’ actions and filed a petition for writ of mandamus in the San Francisco County Superior Court just two weeks after the passage of Proposition 35.

Their petition and subsequent pleadings did not directly attack the concept that Proposition 35 impliedly repealed the statutory provisions limiting contracting out and instead argued that:

- (a) prior to the enactment of Proposition 35 the Legislature had “plenary power in this area,” circumscribed only by Article VII’s constitutional restriction on its authority to authorize state agencies to contract with private parties, and therefore
- (b) when Proposition 35 eliminated the Article VII restriction it merely struck the shackles from the Legislature’s power to authorize such contracts, thereby
- (c) leaving the statutes implementing the contracting restriction in place until such time as the Legislature chooses to repeal them.

Caltrans argued that Proposition 35 was “self-executing” and that its decision to enter into contracts with private A/E was appropriate and did not violate the statutes because they were no longer in effect.

The Supreme Court, reviewing the petition de novo, agreed with Caltrans that Proposition 35 was self-executing and rejected the Professional Engineers’ notion that only the Legislature may regulate private contracting by public agencies. Noting that plenary authority and exclusive authority are not synonymous concepts, the court held that if the Legislature has authority to regulate private contracting, then so does the electorate, and that the latter has, through Proposition 35, exercised its authority to eliminate the restriction on such contracting and repealed the statutes in question as they applied to contracting with private-sector architects and engineers.

The Professional Engineers maintained throughout these proceedings that the pre-Proposition 35 selection procedure by which private entities were awarded contracts for architectural and engineering services prohibits competitive bidding and does not include cost considerations, both of which are required by Proposition 35.

In response, Caltrans argued that, as incorporated in California statutes, the QBS process is explicitly competitive, clearly takes consideration of costs into account, and must be used because failure to do so would cause the loss of significant federal funds.

The Supreme Court again agreed with Caltrans, noting as to competitive bidding that “the official summary clearly states that … bidding … is permitted but not required under Proposition 35” and as to cost savings that the “argument in favor of the initiative specifically informed voters that existing selection statutes [QBS] would be utilized to provide architectural and engineering services.”

Comparing the California and Federal Models

The California organic civil service model has been in operation for more than 70 years and has been repeatedly tested and refined. In contrast, the current federal competitive sourcing model is essentially new and untested, although it does incorporate older elements, specifically the long-standing concept of an “inherently governmental function,” which it combines with the relatively new idea of public-private competition.

This article compares the two models, illustrates and highlights the key differences between them and suggests how the federal approach might be informed by and benefit from the California experience.

Three Exceptions Define the Scope of the California Model’s Restriction

As discussed above, the California model is defined in part by three exceptions: the “nature of the service” and “new state function” rules and the “cost savings” exception.

The first two rules operate through application of a concrete, objective standard that asks a simple question,
The third exception is not quite as straightforward, as it entails the projection of cost savings that, in the view of some authorities, are at best informed estimates and at worst “guesstimates” that are “neither guaranteed nor particularly reliable.” Also, the cost-savings exception does not appear to be a truly separate exception in that it is subject to a number of clearly stated conditions independent of cost-savings considerations. More importantly, when considering the costs-savings exception, the Supreme Court took special care to adhere to its prior analyses of the constitutional restriction by holding in California State Employees Association v. California that cost-savings considerations are an element of the nature-of-the-services test.

An established exception to the mandate of civil service exists where the nature of the services in question is such that they cannot be performed “adequately or competently or satisfactorily” by employees selected through civil service. ... Under a constitutional scheme which commends efficiency and economy it is reasonable to postulate that at some point a service which is more costly when performed under civil service than when contracted out may on that account be one which cannot be performed satisfactorily, adequately or competently.

Projected cost savings clearly do not, standing alone, provide an exception or a basis for avoiding the constitutional restriction against contracting out. Stated otherwise, projected cost savings can be a relevant though not conclusive factor in applying the nature-of-the-services test.

As discussed above, the California model is informed by a commitment to protecting the organic civil service against dissolution and destruction, from which “emanates an implicit necessity” for a restriction on contracting to avoid, among other things, “domination of the state’s work force by independent contractors.”

The restriction is implemented by the “true test” the California Supreme Court explained in Riley, which asks “whether the services contracted for ... could be performed by ... [the civil service].”

If civil service personnel can perform the service adequately, then contracting out is not permissible. The test is simple, practicable and has the merit of at once protecting the civil service and defining the “field in which state agencies may enter into contracts with independent contractors.”

The test is also sufficiently concrete to be capable of systematic application, as the California Supreme Court demonstrated in its 1947 decision in Burum v. State Compensation Insurance Fund, an early progeny of the court’s 1937 decision in Riley.

A law firm, presumably attorney R.Y. Burum and his partners, represented the widow and three minor children of E.E. Davis, who was killed in an industrial accident. The fund was the insurance carrier for Davis’ employer and paid $6,300 to the widow and children. It subsequently entered into a contract with the Burum firm to recover the amount of the death benefit through “the lien method of recovery,” which the firm did to the extent of $5,800, of which it was entitled to 25 percent, or $1,450. The fund later refused to pay the firm on the grounds that the contract was invalid under the Riley rule because the fund had attorneys who could have done the work.

In its ruling the Supreme Court demonstrated the flexibility of the nature-of-the-services rule, first noting that the plaintiff’s petition in Riley did not allege that the services could not be provided by an attorney selected under the civil service. In this case, Burum’s complaint did make such an allegation, the force of which stemmed “from the fact that in the conduct of its insurance business the fund operated on a ‘fairly competitive basis’ with private insurance carriers” and had broad authority to enter into contracts and to sue in its own name.

The plaintiff alleged that by electing the lien method and engaging a private firm to prosecute the lien, the fund had avoided any prejudice which might accrue were it to appear before a jury seeking to recover reimbursement for itself against an insurance loss and proceeded appropriately to protect its interest in the lien by providing, via the 25 percent contingency fee, an incentive to the firm to discover additional amounts from which a lien judgment could be satisfied.

The plaintiff also alleged that the fund “as a matter of tactics and in recognition of certain practical considerations affecting its status with reference to the death action,” negotiated its contract with the firm “in pursuance of one of the approved methods designed to keep its losses to a minimum.”

The court found the Burum firm’s contract to be valid because its allegations would, if proven, be sufficient to establish that the services “could not be performed adequately or completely or satisfactorily” by attorneys selected under civil service, thereby satisfying the “true test” or nature-of-the-services rule.

The court thus demonstrated the practicability and flexibility of the rule articulated in Riley by addressing its
question not to the technical or professional competence of the civil service attorneys, but to the facts and circumstances surrounding its effort to recover its disbursement, which precluded effective representation of the fund by its own attorneys. The court further demonstrated that, while flexible, the test can be applied objectively using readily understandable criterion: Could the civil service attorneys, however competent as a technical and professional matter, have done the job satisfactorily in light of all the surrounding facts and circumstances?

In California State Employees Association v. Williams the California Supreme Court permitted the state to hire private insurance carriers to administer the California State Medicaid program, holding with Riley that protecting the existing civil service structure does not compel the state to fulfill every new state function through its own agency. Here again, the exception is simple and practicable and can be easily applied through a review of current functions.

The Federal Model

The Office of Management and Budget is responsible for implementing federal acquisition policy. OMB Circular A-76 “establishes federal policy for the competition of commercial activities” and provides on the one hand that “the long-standing policy of the federal government has been to rely on the private sector for needed commercial services” and, on the other, that “commercial activities should be subject to the forces of competition,” i.e., competition between the government and the private sector for performance of commercial activities, also known as “competitive sourcing.”

The federal competitive-sourcing policy — now barely four years old — is the most recent of various separate and distinct federal efforts to enhance the performance of the federal work force. Paul C. Light, the Paulette Goddard professor of public service at New York University and the Douglas Dillon senior fellow at the Brookings Institution, has noted that the new competitive-sourcing model is the most recent of a number of concepts that have been “hot in this town” over the last 15 years, beginning with total quality management, passing through reinventing government, and “[n]ow we have competitive sourcing … [as] the topic of the day,” all of which indicates that “[w]e have a problem with perseverance [in the federal] government.”

The new competitive-sourcing scheme delineated by OMB Circular A-76 incorporates two conflicting propositions: first, that reliance on the private sector for needed commercial services is a good thing and deserving of deference; and second, that there is value in “salutary competition between the public and private sectors.”

The circular directs agencies first to identify all activities performed by government personnel as either commercial or inherently governmental; second, to perform inherently governmental activities with government personnel; and third, to use a streamlined or standard competition to determine if government personnel should perform a commercial activity.

Taken together, these three directions mean ongoing competition between the public and private sectors, which is directly in conflict with the prior statement regarding the private sector. Yet nothing in the circular indicates any effort to reconcile these “two competing policy statements,” thereby suggesting that the federal government is willing to construct a new model for acquiring services that at least implicitly incorporates both “a putative government policy not to compete with its citizens” and “a regime where the government competes with its citizens where monetary savings might result.”

This approach contrasts sharply with California’s consistent adherence over 70 years to the clearly stated principle of protecting its organic civil service through a restriction on contracting while retaining flexibility in its application by recognizing that a restriction is not a prohibition.

The Federal Model’s ‘Inherently Governmental’ Criterion vs. California’s Tests

As noted above, OMB A-76 incorporates the long-standing concept of “inherently governmental” into the process of competitive sourcing, providing what one hopes would be a bright-line test distinguishing commercial work from that should be done by the government. Unfortunately, there is no such bright-line test. To the contrary, the concept of what constitutes an inherently governmental function is not an easy question to answer either in the general or the particular.

The House Permanent Select Committee on Intelligence very recently noted this definitional difficulty in a May 2007 assessment under the heading “Accountability in Intelligence Contracting,” observing that “intelligence community leaders do not have an adequate understanding of the size and composition of the contractor work force” and expressing concern that “the intelligence community does not have a clear definition of what functions are ‘inherently governmental’ and, as a result, whether there are contractors performing inherently governmental functions.”

Thus, functions that one might think are obviously inherently governmental in nature, such as defense and law enforcement, have long been the subject of privatization.
For its part, the U.S. Supreme Court likely further limited the scope of what might be considered inherently governmental functions when it held in *Flagg Brothers v. Brooks* That a warehouseman’s proposed private sale of goods was not an intrusion into an area reserved to the state, noting that the resolution of private disputes is not a function exclusively reserved for the state and that in fact very few functions have been so reserved.

The difficulty of using the concept of “inherently governmental” as a standard is illustrated, perhaps inadvertently, by OMB A-76 itself. Thus, Attachment A to the circular implements the Federal Activities Inventory Reform Act, 31 U.S.C. § 501, which requires the conduct of inventories of all agency activities to determine whether they are commercial or inherently governmental.

OMB obviously tried very hard to develop clear instructions for performance of this task, but its difficulty and complexity is illustrated by the instruction in Attachment A relating to the role played by the exercise of substantial discretion in an activity that is truly inherently governmental.

While inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision-making is not already limited or guided by existing policies, procedures, directions, orders and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.

It would be inaccurate and unfair to characterize the above instruction as incomprehensible or nonsensical. However, when compared with the simple and practical rules California has used for many decades, it does appear to be complicated and difficult to apply. It is probably no more complicated than it must be under the circumstances and probably not wholly unworkable, but neither is it capable of systematic application. In this it is like the rest of the federal competitive-sourcing model — and very much unlike the California civil services model.

**Conclusion**

The California model with its restriction on contracting has functioned for more than 70 years, to the apparent general satisfaction of the state and its citizens. At least, that is, if one judges by the California Constitution Revision Commission’s 1996 characterization of the California civil service as one of the best in the nation and its recommendation to preserve the restriction on contracting. More recently, we see the care taken by the drafters of Proposition 35 to limit its application strictly to architectural and engineering services so as to avoid abrogating the restriction in other areas.

By contrast, the current federal model is in essence a grafting of a relatively new concept — public-private competition — onto the traditional concept of “inherently governmental.” Viewed next to California’s civil service model, the current federal scheme appears to be an experimental hybrid.

The experimental nature of the federal competitive-sourcing model is perhaps ironic in light of the now-common observation that state governments serve as laboratories for the nation.

Justice Brandeis said it first in *New State Ice Co. v. Liebman*: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”

It is now the federal government that is the single laboratory for acquisition for the nation. And its novel experiment cannot yet be said to be without risk to the country.

In light of this upside-down state of affairs, what practical, usable lessons might be taken from the comparison of the California and federal models? First, those who work in the area of federal acquisition policy may wish to consider looking to California, at least as a way of assessing the effectiveness of the constant changes being made at the federal level. While it is certainly too late for the federal government to adopt the California model, there is at least a possibility that some of its elements may be applicable to the federal system.

For example, it would be interesting to ascertain the extent to which California’s clearly defined restriction on contracting out has achieved its purpose of protecting and, presumably, enhancing the production by the state’s civil service. If it has, then we may wish to revisit and reassess the current aggressive federal approach to contracting out.

Second, the practicability of the California model vis-à-vis determinations as to contracting out could provide a basis for assessing the potential value to the federal acquisition process of developing and implementing simple, concrete, practicable rules capable of systematic application for making such determinations at the federal level.
Such an undertaking would be wholly consistent with Principal 5 of the Comptroller General’s Commercial Activities Panel: “Federal sourcing should be based on a clear, transparent and consistently applied process.\textsuperscript{58}

In this regard, it is remarkable that in all the discussion of the crisis in federal acquisition, there is only modest reference to the activities of the states, and specifically to California. If California were a country, it would be the world’s seventh-largest in terms of gross product — surely its approach to contracting out would have some value to the federal government, even if only as an inspiration to simplify and develop workable rules. This scarcity of reference gives off a whiff of a new — and to those outside the Beltway somewhat odd — form of American exceptionalism whereby those of us who earn our daily bread working for or otherwise dealing with the federal government implicitly view ourselves as the only true source of knowledge and expertise as to its acquisition policy, shutting out and ignoring the potentially successful practices of its own constituent states.

Perhaps another lesson is that we should consider returning to a time when the states, not the federal government, were the laboratories of the nation with a view to developing a federal acquisition policy informed by their best practices, possibly including the elements of California’s organic civil service model.

Notes

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\item The statutory provisions in question and repealed by implication as to state agency contracting with private architects and engineers are Cal. Gov’t Code §§ 14101, 14130, 14131, 14131.1, 14131.2, 14132, 14133, 14134, 14135, 14136, 14137 and 19130. See Professional Engineers II, 155 P.3d at 232, 237-240 (“While the initiative does not expressly repeal [these] sections … we conclude that … the provisions of the initiative, viewed in the context of the initiative as a whole, impliedly repeal these statutes.”).

\item The restriction applies only to state government agencies. California local governments “generally [could] … contract for architectural and engineering services” prior to the passage of Proposition 35. Professional Engineers II, 155 P.3d at 253-254.

\item The two cases are Professional Engineers in California Government v. Department of Transportation, 936 P.2d 473 (Cal. 1997) (hereinafter Professional Engineers I) and Professional Engineers II, 155 P.3d 226 (Cal. 2007).

\item Id.; Egelko, supra note 1.

\item Professional Engineers II, 155 P.3d at 247-249. The Brooks Act is codified at 40 U.S.C §§ 1101-1104.

\item Professional Engineers II, 155 P.3d at Appendix A.


\item OMB Circular A-76, Revised May 20, 2003 (hereinafter OMB A-76).

\item Professional Engineers II, 155 P.3d at 230, 236. The statutes implementing the constitutional restriction were themselves “impliedly repealed” by Proposition 35. Professional Engineers II, 155 P.3d at 239-247. As will be discussed below, the restriction arises from judicial interpretations of Article VII of the California Constitution. Article VII is the successor provision to Article XIV of the California Constitution as enacted in 1934. The two articles are identical. See generally Professional Engineers I, 936 P.2d at 473.


\item Id. at 989 (emphasis added).


\item Professional Engineers II, 155 P.3d at 236, citing Professional Engineers I, 936 P.2d at 485.

\item Riley, 69 P.2d at 989 (emphasis added).

\item Professional Engineers I, 936 P.2d at 476, citing Williams at 397 (internal citations omitted).

\item Professional Engineers I, 936 P.2d at 485, citing Williams at 397.

\item Id.


\item Professional Engineers I, 936 P.2d at 506, quoting Riley.

\item Williams, 7 Cal. App. 3d at 397.

\item Schooner, supra note 8, at 273. This phrase is Schooner’s, who uses it in a different context, i.e., to characterize a “putative government policy not to compete with its citizens” as “a concrete principle … capable of systematic application.”

\item Professional Engineers I, 936 P.2d at 476, citing Williams at 397-399.

\item Professional Engineers II, 155 P.3d at 237.

\item Professional Engineers I, 936 P.2d at 486 (internal citations omitted).

\item Professional Engineers I, 936 P.2d at 487.

\item Professional Engineers II, 155 P.3d at 233-235, 246-247.

\item Professional Engineers II, 155 P.3d at 241-243.

\item Professional Engineers II, 155 P.3d at 233-235, 246-247.

\item Professional Engineers II, 155 P.3d at 236, 242-243.
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31 Professional Engineers II, 155 P.3d at 235.
33 Schooner, supra note 8, at 273.
34 See supra note 28.
36 Professional Engineers I, 936 P.2d at 476.
37 Riley, 69 P.2d at 989.
38 Id.
40 Id. at 506-507.
41 Id. at 508.
42 Id. The trial court had sustained the fund’s special and general demurrers, i.e., motions to dismiss the plaintiff’s petition for failure to state a claim on which relief could be granted. The Supreme Court was thus considering plaintiff’s appeal from judgment for the fund entered “in consequence of the [trial court’s] sustaining” of the demurrers.
43 Williams, 7 Cal. App. 3d at 392.
44 OMB A-76.
46 Schooner, supra note 8, at 271-272.
47 Id. at 271.
48 Id. at 273.
49 Id. at 272.
52 Guttman, supra note 50, at 339.
54 Id., at 157; see also Guttman, supra note 50, at 338.
56 Cf. Light, supra note 45, at 315.

Bruce Shirk is a partner in the Washington office of Powell Goldstein LLP, where he chairs the firm’s government contracts practice and focuses on construction contract law and litigation, including the related areas of intellectual property, criminal law and health care contracting, with special emphasis on Medicare and Medicaid law. His experience includes reviewing contracts for and advising both public- and private-sector clients, negotiating and administering contracts and grants, and conducting internal investigations. He also has performed assessments of the practical impact of the law on his clients’ business dealings with the government. He can be reached at bshirk@pogolaw.com or (202) 624-7227.