

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 02-1006
	:	
of	:	April 28, 2003
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THE HONORABLE CHARLES S. POOCHIGIAN, MEMBER OF THE STATE SENATE, has requested an opinion on the following questions:

1. What legislative control exists relating to competitive bidding for the procurement of goods and services by the University of California?
2. Is the University of California required to comply with any statutes in the Public Contract Code, Government Code or Labor Code with respect to the procurement of goods or services?

CONCLUSIONS

1. Public Contract Code sections 10507.7 and 10509 control competitive bidding for the procurement of goods and services by the University of California.

2. The University of California is required to comply only with the provisions of Public Contract Code sections 10507.7 and 10509 with respect to the procurement of goods or services.

ANALYSIS

The two questions presented for analysis concern the Legislature's regulatory control over the procurement of goods and services by the University of California and its individual campuses ("University"). The first question deals with the Legislature's express constitutional authority over the University in setting competitive bidding requirements, and the second deals with the Legislature's additional regulatory control over certain areas of the University's activities.

1. Express Constitutional Authority

The first question presented concerns the extent to which the Legislature has exercised its express constitutional authority to establish competitive bidding procedures for the University in the procurement of goods and services. We conclude that the Legislature has enacted two statutes establishing such competitive bidding procedures.

Article IX, section 9, subdivision (a) of the Constitution¹ provides:

"The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services. . . ."

¹ All further references to "article IX" are to subdivision (a) of section 9 of article IX of the Constitution.

This constitutional provision has been interpreted as granting “the regents broad powers to organize and govern the university and limits the Legislature’s power to regulate either the university or the regents.” (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 788; see *Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 586, *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135.) In contrast, the Legislature possesses a comprehensive power of regulation over other state agencies. (*San Francisco Labor Council v. Regents of University of California, supra*, 26 Cal.3d at p. 788.) The “university’s general immunity from legislative regulation” (*ibid.*) has been noted by our Supreme Court on several occasions. “[T]he University is intended to operate as independently of the state as possible.” (*Regents of University of California v. Superior Court* (1976) 17 Cal.3d 533, 537.) “ “[T]he power of the Regents to operate, control, and administer the University is virtually exclusive.” ’ ” (*San Francisco Labor Council v. Regents of University of California, supra*, 26 Cal.3d at p. 788, quoting *Regents of University of California v. Superior Court* (1970) 3 Cal.3d 529, 540, quoting 30 Ops.Cal.Atty.Gen. 162, 166 (1957).)

With respect to the Legislature establishing competitive bidding procedures for the University, article IX grants “full powers of organization and government” to the University “subject only to . . . such competitive bidding procedures as may be made applicable to the university by statute for the . . . purchasing of materials, goods, and services.” At the time this language was added to the Constitution in 1976 by the voters’ adoption of Proposition 4, the University operated under its own competitive bidding procedures. In the ballot pamphlet describing the purposes and effect of Proposition 4, the Legislative Analyst stated in part:

“This proposition would permit the Legislature to specify the competitive bidding procedures used by the University of California for awarding construction contracts; selling real property; and purchasing materials, goods, and services. The proposition would not change the current bidding procedures, which closely resemble those required of other state agencies, but would make it possible for the Legislature to change these procedures in the future.

“.....

“FISCAL EFFECT:

“Competitive Bidding Procedures

“If the Legislature were to establish competitive bidding procedures significantly different from those currently used, the net fiscal effect would

depend on whether the changes resulted in lower or higher costs for items purchased.”²

In 1984, the Legislature exercised its express constitutional authority by enacting Public Contract Code sections 10507-10513 (Stats. 1984, ch. 1128, § 3),³ establishing competitive bidding procedures for the University in construction projects, the sale of real property and the procurement of materials, goods and services. With respect to the procurement of goods and services, section 10507.7 provides:

“Except as provided for in this article, the Regents of the University of California shall let all contracts involving an expenditure of more than fifty thousand dollars (\$50,000) annually for goods and materials to be sold to the University of California to the lowest responsible bidder meeting specifications, or else reject all bids. Contracts for services to be performed, other than personal or professional services, involving an expenditure of fifty thousand dollars (\$50,000) or more annually shall be made or entered into with the lowest responsible bidder meeting specifications, or else all bids shall be rejected. If the regents deem it to be for the best interest of the university, the regents may, on the refusal or failure of the successful bidder for materials, goods, or services to execute a tendered contract, award it to the second lowest responsible bidder meeting specifications. If the second lowest responsible bidder fails or refuses to execute the contract, the regents may likewise award it to the third lowest responsible bidder meeting specifications.”

Section 10509 states:

“The Regents of the University of California shall prescribe methods of procurement for goods, materials, and services to be purchased, including:

“(a) Requirements for public advertisement where feasible and practicable or for solicitation from at least three sources in other cases.

“(b) Bidder prequalification and evaluation standards.

“(c) Guidelines for negotiating contracts for unique products or

² When construing the language of a constitutional amendment, we may “refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet. [Citations.]” (*People v. Birkett* (1999) 21 Cal.4th 226, 243.)

³ All further statutory references are to the Public Contract Code unless otherwise indicated.

proprietary services.

“(d) Procedures for solicitation of vendor and service contractor interest.

“(e) Dissemination of award information.

“(f) Such other matters as may encourage the receipt of the most favorable price and conditions of purchase by the university.”

The Legislature’s competitive bidding procedures are inapplicable when the conditions of sections 10508 and 10510 are present. Section 10508 states:

“The requirements of this article shall not be applicable when the regents determine that a brand or trade name article, thing, or product or proprietary service is the only one which will properly meet the needs of the University of California because the item or service is unique, available only from a sole source, or is designated to match others, used in, or furnished to, a particular installation, facility, or location. Contracts for unique products or services, or personal or professional services, shall not be made unless the regents determine that the proposed price therefor is reasonable.”

Section 10510 provides:

“The requirements of this article shall not be applicable to the procurement of goods, materials, or services funded exclusively by federal agencies to the extent that the requirements of this article are in conflict with mandatory requirements of such federal agency.”

No other statute is relevant to our inquiry. We thus conclude in answer to the first question that the terms and conditions of sections 10507.7 and 10509, enacted pursuant to the Legislature’s express constitutional authority, control competitive bidding for the procurement of goods and services by the University.

2. Additional Regulatory Authority

The second question differs from the first in that it is not limited to competitive bidding procedures but relates generally to the procurement of goods and services by the University. Are there any statutes, other than sections 10507.7 and 10509, that are applicable to such procurement? We conclude that only sections 10507.7 and 10509 are applicable to the University.

As discussed in answer to the first question, sections 10507.7 and 10509 have been enacted by the Legislature pursuant to its express constitutional authority contained in article IX. However, the Legislature is not limited to these specific provisions of the Constitution in regulating the activities of the University. The courts have found three areas of legislative regulation over the University in addition to the authority conferred by article IX.

In *San Francisco Labor Council v. Regents of University of California*, *supra*, 26 Cal.3d 785, the Supreme Court described the three areas of additional regulation as follows:

“It is true the university is not completely free from legislative regulation. In addition to the specific provisions set forth in article IX, section 9, there are three areas of legislative regulation. First, the Legislature is vested with the power of appropriation, preventing the regents from compelling appropriations for salaries. [Citations.]

“Second, it is well settled that general police power regulations governing private persons and corporations may be applied to the university. [Citations.] For example, workers’ compensation laws applicable to the private sector may be made applicable to the university.

“Third, legislation regulating public agency activity not generally applicable to the public may be made applicable to the university when the legislation regulates matters of statewide concern not involving internal university affairs. [Citations.]” (*Id.* at p. 789.)

Are there any statutes in the Public Contract Code, Government Code or Labor Code regarding the procurement of goods or services that are applicable to the University due to their placement in one of these additional areas of legislative regulation?

With respect to the first category, we are not concerned in this opinion with the University “compelling appropriations for salaries.” We know of no law regarding the procurement of goods or services that would be applicable to the University due to the Legislature’s exercise of its “power of appropriation.” (See *San Francisco Labor Council v. Regents of University of California*, *supra*, 26 Cal.3d at pp. 789-790; *California State Employees’ Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 233; *California State Employees’ Assn. v. State of California* (1973) 32 Cal.App.3d 103, 109-110.)

Regarding the second and third categories of additional regulatory control, the court in *Scharf v. Regents of University of California* (1991) 234 Cal.App.3d 1393, examined these categories in the context of whether the University could be held subject to a statutorily prescribed peer review process for faculty members seeking tenure. Relying on *San Francisco Labor Council v. Regents of University of California, supra*, 26 Cal.3d 785, the court found that the statute did not meet the test of either category:

“The array of diverse and conflicting state statutes pertaining to employee inspection of personnel files is as disparate as those pertaining to the prevailing wage and does not constitute a coherent state scheme uniformly applicable to public and private employers. . . . [F]or reasons that are not apparent, section 92612 subjects the University of California to a different and more restrictive regulation regarding disclosure than applies to most other employers in the public and private sectors. Section 92612 is not the sort of generally applicable police power regulation that may be applied to the University. It is as much in conflict with article IX, section 9 of the California Constitution, as the statute stricken in *San Francisco Labor Council*.

“To be sure, a powerful state interest within the police power of the state which cannot be effectuated without application to the University will override a parochial concern of the University. Thus, for example, a statute prohibiting the matriculation of unvaccinated persons at all institutions of higher learning would prevail over a University regulation dispensing with such a requirement. [Citation.] Although the statute relates to the admission of students, a matter ordinarily within the exclusive domain of the University, the need for uniform application and universal enforcement of an important health measure justifies a relatively minor intrusion into the prerogatives of the University. But that is very different from the situation presented by this case. As indicated, the statute with which we are here concerned applies only to the University, is more restrictive than most other state statutes that regulate in this area, and constitutes a very significant intrusion into the academic arena.

“.....

“. . . The process of peer review, which is closely related to academic freedom [citation], is undoubtedly more essential to the separate and independent existence of the University than some acts that have been found to be within the self-governing authority of the University, such as the fixing of minimum salaries [citation], and is of comparable academic importance to the establishment of the educational curriculum, long ago found to be within the full power and authority of the Regents.” (*Id.* at pp. 1403-1405, fn. omitted.)

Applying the tests for category two and category three regulations contained in *Scharf*, we know of no statute with respect to the procurement of goods or services that would meet the test of either category as (1) a general police power regulation governing private persons and corporations or (2) a regulation of public agency activity that is not generally applicable to the public and that regulates matters of statewide concern not involving internal university affairs. (See, e.g., *Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160 [University not subject to statutory overtime wage regulations].)

Nothing in the Public Contract Code, Government Code or Labor Code is applicable to the University through the Legislature's exercise by its regulatory control powers in the three areas in question. We thus conclude in answer to the second question that the University is required to comply only with the provisions of sections 10507.7 and 10509 with respect to the procurement of goods or services.
