Bond Case Briefs

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Has The California State Treasurer's Office Gone Underground?

Late last month, the California State Treasurer's Office announced a "move to stop 'Pay-to-Play' school bond campaigns". According to the announcement:

> Municipal finance firms seeking state business will be required to certify that they make no contributions to bond election campaigns. Firms that fail to do so will be removed from the state's official list of acceptable vendors and barred from participating in state-issued bonds.

The Treasurer's office has sent a letter to prospective underwriters advising them of the imposition of this "new minimum qualification" and requesting that they return a certification form by August 31, 2016.

However well intended, I question whether this action is legal. California's Administrative Procedure Act provides:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Cal. Gov't Code § 11340.5(a). A "regulation" is broadly defined as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Cal. Gov't Code § 11342.600. It cannot be gainsaid that the Treasurer's "new minimum qualification" is a "standard of general application" and hence a "regulation" within the meaning of the APA.

I contacted the Treasurer's office and received the following response:

> The Treasurer's Office has the sole authority to establish a pool of qualified underwriters for State bond work and enter into agreements in connection with State bond sales. (Government Code section 5703.) As a matter of longstanding practice, the Treasurer's Office has established such pools not just for underwriters, but also for bond counsel firms and financial advisors. Generally speaking, the pools are "re-established" every two years via a Request for Qualifications process. Much like any other procurement process initiated by government agencies, the Treasurer's Office issues an RFQ that outlines the types of services the office may contract for, minimum qualifications for both entrance into and on-going membership in the pools, and proposal requirements. Interested firms then submit proposals and those firms that meet the minimum requirements are admitted to the pools. The recently announced requirement for municipal finance firms was introduced in conjunction with this process. It is an on-going requirement for current pool members and

> will be incorporated into the next round of RFQs, when the pools are re-established in the near future.
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> Because this is a procurement process relating to this office's need to contract for services with municipal finance firms, the Administrative Procedures [sic] Act does not apply, as it does not apply to other procurement processes utilized by government agencies throughout California. Generally speaking, the requirements and qualifications for procurements are laid out in the procurement documents themselves and not through regulations adopted pursuant to the Administrative Procedures Act.

The Treasurer's office may think it has a good dog, but I don't think it will hunt.

Government Code Section 5703 does not exempt the Treasurer's office from compliance with the APA. As explained in this determination from the California Office of Administrative Law (OAL):

> Provisions of a contract, which are rules of general applicability interpreting a statute (or a regulation), are not shielded from APA challenge. There is no express statutory language which provides that agency rules placed in contract provisions are exempt from the APA. Applying Government Code section 11346, which requires that exemptions be expressly stated in statute, OAL presumes that no such exemption exists.
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> In addition, it appears the Legislature intended that there be no exemption for contract provisions. Exempting public contracts was – and is – a clear policy alternative. The federal APA first enacted in 1946, exempted "matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts" (emphasis added) from rulemaking requirements. In enacting the California APA in 1947, the Legislature rejected a proposal to exempt "any interpretative rule or any rule relating to public property, public loans, public grants or public contracts" (emphasis added) from APA notice and hearing requirements. It therefore seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting rules contained in public contracts from notice and comment requirements.

1998 OAL D-30 (footnotes omitted). See also 2000 OAL D-17 ("The fact that a rule or criteria may have been issued or utilized as part of a bidding and proposal process does not insulate them from scrutiny under the APA.").

Readers with a long memory may recall that in 2009 I challenged a CalPERS' attempt to impose disclosure requirements on placement agents without complying with the APA. After the OAL accepted my petition for review of the requirements, CalPERS backed down and adopted regulations under the APA. See CalPERS' Proposed Placement Agent Disclosure Rule Likely to be Amended.

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