



2019 ASSEMBLY BILL 820

January 30, 2020 - Introduced by Representatives NYGREN and VOS, cosponsored by Senators PETROWSKI and FITZGERALD. Referred to Committee on Transportation.

1 **AN ACT** *to repeal* 84.062 (1) (k) and 84.062 (5) (a) 2. d.; *to renumber* 84.062 (6)
2 (f); *to renumber and amend* 84.062 (2); *to amend* 84.062 (1) (m), 84.062 (5)
3 (a) 1. a., 84.062 (5) (a) 2. h., 84.062 (5) (a) 2. i., 84.062 (5) (a) 2. k., 84.062 (5) (b)
4 and 84.062 (6) (a) 11.; and *to create* 84.062 (1) (f), 84.062 (1) (j), 84.062 (1) (L),
5 84.062 (1) (p), 84.062 (2) (b), 84.062 (2) (c), 84.062 (2) (d), 84.062 (3), 84.062 (4),
6 84.062 (5) (a) 2. f., 84.062 (5) (c), 84.062 (5) (d), 84.062 (6) (a) 14., 84.062 (6) (b),
7 84.062 (6) (c), 84.062 (6) (d), 84.062 (6) (e), 84.062 (7), 84.062 (8), 84.062 (11),
8 84.062 (13) and 84.062 (14) of the statutes; **relating to:** requirements for
9 design-build transportation projects, providing an exemption from emergency
10 rule procedures, and granting rule-making authority.

Analysis by the Legislative Reference Bureau

This bill makes numerous changes to the design-build method that the Department of Transportation is currently authorized to use for projects.

Under current law, the design and construction of projects are generally two distinct phases. Under this method, often referred to as “design-bid-build,” DOT has broad authority to accomplish the design of a project. The construction of a project

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must be executed by contract based on bids, with DOT awarding the contract to the lowest responsible bidder.

Under current law, DOT is also authorized to use a design-build method under which design, engineering, construction, and related services are procured through a single contract with a single entity capable of providing the services. Current law specifies the contents of requests for qualifications and requests for proposals solicited by DOT for design-build projects.

Under the bill, DOT must award six contracts for design-build projects every six years. The bill creates requirements for the evaluation of proposals and the awarding of design-build contracts. Under the bill, DOT must develop a design-build procurement manual. DOT must also prepare a report for the transportation projects commission and the legislature evaluating the success of the design-build program and the Joint Committee on Finance must make a recommendation as to whether the program should continue.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 84.062 (1) (f) of the statutes is created to read:

2 84.062 (1) (f) "Design professional" means a person registered under s. 443.03
3 or 443.04 or a firm, partnership, or corporation registered under s. 443.08.

4 **SECTION 2.** 84.062 (1) (j) of the statutes is created to read:

5 84.062 (1) (j) "Member" means a private legal entity that is a member of a
6 consortium or joint venture that is a design-builder.

7 **SECTION 3.** 84.062 (1) (k) of the statutes, as created by 2019 Wisconsin Act 9,
8 is repealed.

9 **SECTION 4.** 84.062 (1) (L) of the statutes is created to read:

10 84.062 (1) (L) "Project" means a project involving a highway improvement, as
11 defined in s. 84.06 (1) (a).

12 **SECTION 5.** 84.062 (1) (m) of the statutes, as created by 2019 Wisconsin Act 9,
13 is amended to read:

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1 84.062 (1) (m) “Qualified responsible bidder” means a design-builder
2 responding to a request for qualifications and that is certified by the technical review
3 committee.

4 **SECTION 6.** 84.062 (1) (p) of the statutes is created to read:

5 84.062 (1) (p) “Technical review committee” means the committee appointed
6 under sub. (3).

7 **SECTION 7.** 84.062 (2) of the statutes, as created by 2019 Wisconsin Act 9, is
8 renumbered 84.062 (2) (a) and amended to read:

9 84.062 (2) (a) The department shall administer a program for design-build
10 projects. The department may not designate a project as a design-build project
11 unless the department is able to clearly define the scope of work.

12 **SECTION 8.** 84.062 (2) (b) of the statutes is created to read:

13 84.062 (2) (b) The department shall award 6 design-build contracts every 6
14 years, beginning on the effective date of this paragraph [LRB inserts date].
15 During each 6-year period, the department shall award at least one low bid
16 design-build contract, one best value design-build contract, and one fixed price
17 variable scope design-build contract and 3 additional contracts that may be any
18 combination of low bid design-build, best value design-build, and fixed price
19 variable scope design-build contracts. The combined cost of the 6 design-build
20 contracts awarded under this paragraph in each 6-year period may not exceed
21 \$250,000,000 and the combined cost of all low bid design-build contracts awarded
22 under this paragraph in each 6-year period may not exceed \$25,000,000.

23 **SECTION 9.** 84.062 (2) (c) of the statutes is created to read:

24 84.062 (2) (c) For each project designated under par. (a), the department shall
25 solicit requests for qualifications, requests for proposals, and cost proposals as

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1 provided in this section and, subject to sub. (7) (c) and (d), let each project by contract
2 to a qualified responsible bidder.

3 **SECTION 10.** 84.062 (2) (d) of the statutes is created to read:

4 84.062 (2) (d) No more than 6 months following the completion of a
5 design-build project designated under this subsection, the department shall prepare
6 a report, with input from the design-builder and the technical review committee,
7 detailing the project, the decision to designate the project as a design-build project,
8 the type of design-build contract let, and recommendations for statutory changes,
9 if any. The department shall provide this report to the transportation projects
10 commission, the joint committee on finance, and the senate and assembly standing
11 committees having jurisdiction over transportation matters. The senate and
12 assembly standing committees having jurisdiction over transportation matters shall
13 schedule a hearing on the report not more than 30 days following distribution of the
14 report by the chief clerks of the senate and the assembly. This paragraph does not
15 apply to projects awarded after December 31, 2026.

16 **SECTION 11.** 84.062 (3) of the statutes is created to read:

17 84.062 (3) TECHNICAL REVIEW COMMITTEE. (a) The secretary shall appoint 5
18 individuals to a technical review committee to evaluate proposals submitted under
19 this section. The committee shall consist of the following:

- 20 1. Three employees of the department.
- 21 2. Two individuals who are not employees of the department and who are
22 chosen in compliance with a memorandum of understanding entered into by the
23 department with a state association of architectural, engineering, or design
24 companies and a state association of transportation construction companies.

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1 (b) The secretary may not appoint to the technical review committee any person
2 associated, as defined in s. 19.42 (2), with a design-builder. No person appointed to
3 the technical review committee may review proposals under this section when the
4 proposed project could benefit the appointee or the appointee's immediate family, as
5 defined in s. 19.42 (7).

6 (c) A person appointed to the technical review committee is an agent of the
7 department under s. 895.46.

8 (d) Except as otherwise provided in this section, all records of the technical
9 review committee are open to public inspection and copying under s. 19.35 (1).

10 **SECTION 12.** 84.062 (4) of the statutes is created to read:

11 84.062 (4) SELECTION. The department shall solicit design-build proposals in
12 2 phases. In the first phase, the department shall solicit requests for qualifications
13 under sub. (5) and requests for proposals under sub. (6). The technical review
14 committee shall certify responsible bidders as provided in sub. (5) (c) and shall score
15 technical proposals as provided in sub. (6) (b). In the 2nd phase, the department shall
16 solicit cost proposals and the technical review committee shall evaluate cost
17 proposals as provided in sub. (7).

18 **SECTION 13.** 84.062 (5) (a) 1. a. of the statutes, as created by 2019 Wisconsin
19 Act 9, is amended to read:

20 84.062 (5) (a) 1. a. The design and construction experience of the
21 design-builder or member, personnel, and contractors who will manage the design,
22 engineering, and construction aspects of the project. The department may not
23 require a level of experience that will unreasonably restrict competition.

24 **SECTION 14.** 84.062 (5) (a) 2. d. of the statutes, as created by 2019 Wisconsin
25 Act 9, is repealed.

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1 **SECTION 15.** 84.062 (5) (a) 2. f. of the statutes is created to read:

2 84.062 (5) (a) 2. f. The design-builder or a member has been in business for at
3 least 12 months.

4 **SECTION 16.** 84.062 (5) (a) 2. h. of the statutes, as created by 2019 Wisconsin
5 Act 9, is amended to read:

6 84.062 (5) (a) 2. h. The design-builder can provide information to the technical
7 review committee upon request about ownership, management, and control of the
8 design-builder.

9 **SECTION 17.** 84.062 (5) (a) 2. i. of the statutes, as created by 2019 Wisconsin Act
10 9, is amended to read:

11 84.062 (5) (a) 2. i. The design-builder or a member has not been debarred from
12 any government contracts and has not been found to have committed tax avoidance
13 or evasion in any jurisdiction in the previous ~~10~~ 5 years.

14 **SECTION 18.** 84.062 (5) (a) 2. k. of the statutes, as created by 2019 Wisconsin
15 Act 9, is amended to read:

16 84.062 (5) (a) 2. k. No design professional employed by the design-builder or
17 a member ~~or~~ who is assigned to the design-build project and no design professional
18 that the design-builder will contract with for the design-build project has been
19 disciplined in any jurisdiction in the previous 5 years under a license that is currently
20 in use.

21 **SECTION 19.** 84.062 (5) (b) of the statutes, as created by 2019 Wisconsin Act 9,
22 is amended to read:

23 84.062 (5) (b) The ~~office~~ department shall advertise the request for
24 qualifications.

25 **SECTION 20.** 84.062 (5) (c) of the statutes is created to read:

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1 84.062 (5) (c) The technical review committee shall certify at least 2 but not
2 more than 5 design-builders as qualified responsible bidders. If the department does
3 not receive at least 2 responses to the request for qualifications or if the technical
4 review committee certifies only one design-builder as a qualified responsible bidder,
5 the department may re-advertise or cancel the project.

6 **SECTION 21.** 84.062 (5) (d) of the statutes is created to read:

7 84.062 (5) (d) In making determinations under this subsection, the technical
8 review committee may not consider whether a design-builder or member exercised
9 legal rights specified in statute or rule or under a contract with the department.

10 **SECTION 22.** 84.062 (6) (a) 11. of the statutes, as created by 2019 Wisconsin Act
11 9, is amended to read:

12 84.062 (6) (a) 11. Amount of stipend, if any.

13 **SECTION 23.** 84.062 (6) (a) 14. of the statutes is created to read:

14 84.062 (6) (a) 14. A requirement that the design-builder perform not less than
15 30 percent of the construction services under the contract with labor provided by
16 employees of the design-builder or member and equipment owned or rented by the
17 design-builder or member.

18 **SECTION 24.** 84.062 (6) (b) of the statutes is created to read:

19 84.062 (6) (b) The technical review committee shall evaluate each technical
20 proposal, which may include a confidential interview, and shall assign points in
21 accordance with the request for proposals and subject to all of the following:

22 1. For a project that will be awarded as either a low bid design-build contract
23 or a fixed price variable scope design-build contract, the technical review committee
24 shall determine whether technical proposals are responsive to the request for
25 proposals without ranking or scoring the proposals.

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1 2. For a project that will be awarded as a best value design-build contract, the
2 technical review committee shall determine whether technical proposals are
3 responsive to the request for proposals and score each responsive technical proposal
4 as required by the request for proposals. The technical review committee may award
5 not more than 20 percent of the points awarded to a technical proposal based on the
6 design-builder's qualifications and ability to design, contract, and deliver the project
7 in accordance with any deadline established in the request for proposals. The
8 technical review committee may award a technical proposal not less than 25 percent
9 and not more than 60 percent of the maximum number of combined points that may
10 be awarded to a technical proposal and cost proposal.

11 **SECTION 25.** 84.062 (6) (c) of the statutes is created to read:

12 84.062 (6) (c) The department shall allow design-builders to include
13 alternative technical concepts and value engineering changes in their proposals by
14 describing the process for submission and evaluation of alternative technical
15 concepts and value engineering changes in the request for proposals.

16 **SECTION 26.** 84.062 (6) (d) of the statutes is created to read:

17 84.062 (6) (d) The technical review committee may not consider a proposal
18 responsive unless the proposal includes a conceptual design, critical path method,
19 bar schedule of the work to be performed or similar schematic, design plans and
20 specifications, technical reports, and all other information required by the request
21 for proposals. The technical review committee may not consider any price or fee
22 included in the technical proposal.

23 **SECTION 27.** 84.062 (6) (e) of the statutes is created to read:

24 84.062 (6) (e) The department shall notify the design-builder for each proposal
25 that is determined to be responsive under par. (b) that the design-builder may

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1 submit a cost proposal under par. (7). The department shall reject all proposals that
2 are determined to be nonresponsive under par. (b).

3 **SECTION 28.** 84.062 (6) (f) of the statutes, as created by 2019 Wisconsin Act 9,
4 is renumbered 84.062 (7) (f).

5 **SECTION 29.** 84.062 (7) of the statutes is created to read:

6 84.062 (7) COST PROPOSALS. (a) Design-builders notified under sub. (6) (e) may
7 submit a cost proposal and the proposal shall include a fixed cost of design,
8 engineering, and construction services prepared by a design professional that
9 contains all design, engineering, construction, and quality assurance and quality
10 control costs of the project.

11 (b) The technical review committee may open cost proposals only after the
12 technical proposals have been reviewed as provided in sub. (6). At the time and place
13 specified in the request for proposals, the technical review committee shall open cost
14 proposals, read the proposals aloud, and, for a project that will be awarded as a best
15 value design-build contract, make public the committee's scoring of the technical
16 proposals.

17 (c) Following a review of cost proposals, the department may issue a notice of
18 intent to award a contract, subject to all of the following:

19 1. For a low bid design-build contract, the contract shall be awarded to the
20 qualified responsible bidder that submitted a responsive technical proposal and also
21 submitted the lowest responsive cost proposal.

22 2. For a fixed price variable scope design-build contract, the contract shall be
23 awarded to the qualified responsible bidder that submitted a responsive technical
24 proposal and that submitted a responsive cost proposal that provides the maximum

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1 amount of services for the maximum fixed price set by the department or for an
2 amount that is less than the maximum fixed price.

3 3. For a best value design-build contract, the contract shall be awarded to the
4 qualified responsible bidder with the highest adjusted score, which shall be
5 calculated by adding the bidder's technical proposal score to the bidder's cost
6 proposal score. The technical review committee shall award the lowest qualified
7 responsible bidder the maximum number of points that may be awarded to a cost
8 proposal under the request for proposals, but not less than 40 percent and not more
9 than 75 percent of the maximum number of combined points that shall be awarded
10 to a technical proposal and cost proposal. For each remaining qualified responsible
11 bidder, the technical review committee shall calculate the score for the cost proposal
12 by reducing the maximum number of points that may be awarded to the cost proposal
13 by 1 percent for each percentage point by which the cost proposal exceeds the lowest
14 cost proposal.

15 (d) Following a review of cost proposals, the department may reject all
16 proposals. If the department rejects all proposals or does not execute a contract after
17 issuing an intent to award a contract under par. (c), the department may reissue the
18 request for proposals and allow only the qualified responsible bidders originally
19 notified under sub. (6) (e) to submit new proposals. The department shall pay a
20 reasonable stipulated fee to each design-builder that provides a responsive but
21 unsuccessful proposal in response to the reissued request for proposals. If the
22 reissued request for proposals specifies a maximum fixed price, the department may
23 not award a stipend to a design-builder whose proposal exceeds that price.

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1 (e) Not less than 5 working days prior to executing a design-build contract, the
2 department shall provide notice to each unsuccessful qualified responsible bidder
3 that a notice of intent to award a contract has been issued.

4 **SECTION 30.** 84.062 (8) of the statutes is created to read:

5 84.062 (8) CONTRACT AWARD. (a) In this subsection:

6 1. "Construction services" means work necessary to construct a project,
7 including trucking services and materials purchased regardless of whether the
8 materials are installed by the design-builder.

9 2. "Specialty services" means work related to sanitary sewer systems, water
10 main systems, staking, electrical, landscaping and erosion control, traffic control,
11 signing, pavement marking, fencing, and other work identified by the department.

12 (b) No later than 10 days following the issuance of a notice of intent to award
13 a design-build contract, the department shall verify that the design-builder will
14 perform not less than 30 percent of the construction services under the contract with
15 labor provided by employees of the design-builder or member and equipment owned
16 or rented by the design-builder or member.

17 (c) The design-builder shall submit to the department in the form prescribed
18 by the department documentation of the construction services the design-builder or
19 members will perform and the dollar value of the services.

20 (d) The department shall calculate the percentage of total construction services
21 identified in the contract to be performed by the design-builder or members by
22 subtracting the value of specialty services to be performed from the total contract
23 amount and dividing the dollar value of construction services to be performed by the
24 design-builder or members by the difference. If the value of construction services
25 to be performed by the design-builder or members is less than 30 percent of the value

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1 of all construction services required under the contract, the department shall cancel
2 the contract award.

3 **SECTION 31.** 84.062 (11) of the statutes is created to read:

4 84.062 (11) STIPULATED FEE. (a) The department shall award a stipulated fee
5 of not less than three-tenths of 1 percent of the department's estimated cost of design
6 and construction as follows:

7 1. To each qualified responsible bidder that provides a responsive but
8 unsuccessful proposal when the department issues a notice of intent to award a
9 contract. If the request for proposals specifies a maximum fixed price, the
10 department may not award a fee to a proposal that exceeds the maximum fixed price.

11 2. To all qualified responsible bidders that provide a responsive proposal, if the
12 department does not issue a notice of intent to award a contract.

13 3. To all qualified responsible bidders if the department cancels the solicitation
14 before the technical review committee reviews technical proposals.

15 (b) The department shall pay the fee to each qualified responsible bidder under
16 par. (a) no later than 90 days after the department issues a notice of intent to award
17 a contract, determines that it will not issue a notice of intent to award a contract, or
18 cancels the solicitation.

19 (c) In consideration for paying the fee, the department may use work product
20 contained in an unsuccessful proposal in connection with any proposed or awarded
21 design-build project without making any additional compensation to the
22 design-builder. If an unsuccessful design-builder waives the stipulated fee, the
23 department may not use work product in the design-builder's unsuccessful proposal.

24 **SECTION 32.** 84.062 (13) of the statutes is created to read:

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1 84.062 (13) APPEALS. (a) Any person aggrieved and directly affected by a
2 decision of the department to issue a request for qualifications or a request for
3 proposals under this section shall be entitled to judicial review of the decision as
4 provided in ch. 227, subject to the procedural requirements of s. 227.53 (1). A person
5 shall be considered a person aggrieved and directly affected by a decision of the
6 department if any of the following applies to a request for qualifications or a request
7 for proposals issued by the department under this section:

8 1. The request does not include qualifications, requirements, or other items
9 required under this section.

10 2. The request does not comply with procedural requirements under this
11 section.

12 3. The request contains material errors or omissions.

13 4. The request contains material discrepancies, deficiencies, or ambiguities
14 that prevent a person from submitting a responsive proposal.

15 5. The request indicates a bias against or preference for a specific
16 design-builder.

17 6. The request exceeds the department's authority.

18 (b) Any person aggrieved and directly affected by a decision of the department
19 to issue a notice of intent to award a contract under this section shall be entitled to
20 judicial review of the decision as provided in ch. 227, subject to the procedural
21 requirements of s. 227.53 (1). A person shall be considered a person aggrieved and
22 directly affected by a decision of the department if any of the following applies to a
23 notice of intent to award a contract under this section:

24 1. The design-builder that received the notice of intent to award a contract was
25 improperly certified as a qualified responsible bidder.

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1 2. A mathematical error was made in scoring any of the proposals that resulted
2 in an improper intent to award a contract.

3 3. There is evidence of collusion or fraud involving either the design-builder
4 who received the notice of intent to award a contract or a member of the technical
5 review committee.

6 4. There is evidence of bias of a member of the technical review committee.

7 5. There is evidence that a member of the technical review committee has a
8 conflict of interest because the committee member, a member of his or her immediate
9 family, as defined in s. 19.42 (7), or any organization or business with which the
10 member is associated, as defined in s. 19.42 (2), may benefit from the intent to award
11 a contract.

12 6. The technical proposal or cost proposal submitted by the design-builder who
13 received the notice of intent to award a contract is not responsive to the request for
14 proposals, contains conditions or qualifications not provided for in the request for
15 proposals, or does not assign costs to all services identified in the technical proposal
16 or is otherwise materially unbalanced.

17 (c) If the department prevails upon judicial review, following any protest and
18 appellate court proceedings, the department shall be entitled to recover all costs and
19 charges included in the final order or judgment, excluding attorney fees. Upon
20 payment of costs and charges by the protester, the bond shall be returned. If the
21 protesting party prevails, the protesting party shall be entitled to recover from the
22 department all costs and charges included in the final order or judgment, excluding
23 attorney fees. The entire amount of the bond shall be forfeited if the hearing officer
24 determines that a protest was filed for a frivolous or improper purpose, including but

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1 not limited to the purpose of harassing, causing unnecessary delay, or causing
2 needless cost for the department or parties.

3 **SECTION 33.** 84.062 (14) of the statutes is created to read:

4 84.062 (14) DELIVERABLES. (a) No later than 9 months after the effective date
5 of this section [LRB inserts date], the department shall prepare a report that
6 establishes a program structure for delivering projects as required under this
7 subsection. The report shall specify the types of highway improvement projects to
8 be considered and procedures and timelines for the bid process. The department may
9 not designate a highway improvement project as a design-build project prior to the
10 completion of the report.

11 (b) The department shall prepare a design-build procurement manual that
12 incorporates the requirements under this subsection and any applicable
13 requirements under federal law.

14 (c) No later than December 31, 2027, the department shall submit a report to
15 the transportation projects commission, the joint committee on finance, and the
16 senate and assembly standing committees having jurisdiction over transportation
17 matters summarizing observations of the process utilized for alternative project
18 delivery methods and describing the effectiveness of the alternative project delivery
19 methods contracting procedures. The report shall include discussion on scope of
20 work, history of projects selected, evaluation criteria, selection process, contract
21 administration, work progression, and time and cost comparisons between the
22 traditional contracting method and alternative delivery methods, claims, and
23 changes.

24 (d) No later than 6 months after receipt of the report required under par. (c),
25 the joint committee on finance shall determine whether the alternative project

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1 delivery program was successful in providing the department with additional tools
2 that allow innovation, reduced project completion time, cost certainty, or reduced
3 cost or other advantages or benefits and shall make a recommendation to the
4 legislature as to whether the program should continue.

5 **SECTION 34. Nonstatutory provisions.**

6 (1) EMERGENCY RULES RELATING TO ALTERNATIVE PROJECT DELIVERY. The
7 department of transportation may use the procedure under s. 227.24 to promulgate
8 emergency rules under s. 84.062 (5) to (7) for the period before the date on which
9 permanent rules under s. 84.062 (5) to (7) take effect. Notwithstanding s. 227.24 (1)
10 (c) and (2), emergency rules promulgated under this subsection remain in effect until
11 the first day of the 25th month beginning after the effective date of the emergency
12 rule, the date on which the permanent rules take effect, or the effective date of the
13 repeal of the emergency rule, whichever is earlier. Notwithstanding s. 227.24 (1) (a)
14 and (3), the department of transportation is not required to provide evidence that
15 promulgating a rule under this subsection as emergency rules is necessary for the
16 preservation of public peace, health, safety, or welfare and is not required to provide
17 a finding of emergency for a rule promulgated under this subsection.

18

(END)