

SUPPLEMENTAL FINAL STATEMENT OF REASONS
for
PROPOSALS TO AMEND REGULATIONS WITHIN
SUBCHAPTER 3, ARTICLE 6, AND SUBCHAPTER 4 OF
CHAPTER 8, TITLE 8, CALIFORNIA CODE OF
REGULATIONS, SECTIONS 16404 THROUGH 16439.

UPDATE OF INITIAL STATEMENT OF REASONS, AMENDED INITIAL STATEMENT OF REASONS, AND FINAL STATEMENTS OF REASONS

As authorized by Government Code Section 11346.9(d), the Director of the Department of Industrial Relations (“Director”) incorporates the Initial Statement of Reasons, the Amended Initial Statement of Reasons, and Final Statement of Reasons prepared in this rulemaking.

Revisions Following Initial Public Comment Period

See the Final Statement of Reasons, pages 1 through 5, for a complete list of these revisions.

Further Revisions After the First (April 4 to April 21, 2008) 15-day Public Comment Period [This listing modifies and replaces the list of Further Revisions After 15-day Comment Period found at pages 5 through 7 of the Final Statement of Reasons.]

The following sections were revised following the 15-day Public Comment Period and circulated for further public comment: 16404, 16421, 16422, 16423, Appendix following section 16423 [deleted], 16424, 16425, 16426, 16427, 16428, 16431 [revision of forms LCP-AR1, LCP-AR2, and LCP-AR3], 16432, Appendix following section 16432 [redesignated as B], 16434, Appendix following section 16434 [redesignated as C], 16435.5, 16437, Appendix following section 16437 [redesignated as D and typographical correction], and 16439.

Section 16404. In subpart (e), a comma was inserted between the words “so” and “nor.”

Section 16421. In subpart (b), at the start of the second sentence, “(b)” was inserted after the words “this subpart” for additional clarity. In subpart (c) the word “government” was changed to “governmental” to conform to the terminology used in Government Code Section 87100 and the other regulations cited in this subpart as well as with the terminology used in proposed new subpart 16426(a)(9) and new section 16430 of these regulations. In subpart (f), the citation was corrected to reflect that the relevant statutes are found in Division 2 (rather than 1) of the Labor Code. In the note following the section, a reference to Sections “1720 et seq.” of the Labor Code was deleted.

Section 16422. In the heading, the word “Programs” was changed to “Program” to conform to the style used in other section headings. In subpart (g)(1), the words “awarding body’s obligation to have a labor compliance program under any statute enumerated in

Appendix B or any other state statute” were deleted and replaced with “awarding body’s statutory obligation to have a labor compliance program that contains or meets the requirements of Labor Code Section 1771.5”. This revision was made in light of the decision not to adopt a new Appendix B enumerating those statutes following section 16423, as discussed immediately below. The revised language describes the statutes that had been enumerated in the proposed Appendix B, which instead will now be posted and updated regularly on the Department of Industrial Relations’ website.

Section 16423. In subpart (b), in the line immediately below the two indented items, “(b)” was inserted after the words “this subpart” for additional clarity. A new subpart (f) was added stating that a list of statutes that require awarding bodies to have a labor compliance program as a condition of project authorization, project funding, or use of specified contracting authority shall be maintained on the Department of Industrial Relations’ website. This subpart was added in lieu of adopting the previously proposed new Appendix B following this section that purported to list of all of these statutes. This change was made in response to a public comment and in recognition that the Appendix listing may be incomplete and could quickly go out of date as labor compliance program requirements are revised annually through new legislation.

Deletion of Appendix following section 16423 and redesignation of Appendices following sections 16432, 16434, and 16437. As noted under Section 16423 above, the new Appendix B that initially was proposed to follow section 16423 was deleted from the proposals. In light of this deletion, the new Appendix following section 16432 was redesignated as Appendix B (the same as the Audit Record Form that currently appears in that location but is being repealed); the new Appendix following section 16434 was redesignated as Appendix C; and the new Appendix following section 16437 was redesignated as Appendix D.

Section 16424. The words “web site” were changed to “website.”

Section 16425. In subpart (c), the word “operation” was deleted and replaced with the words “approval based on factors limiting its capacity and ability to operate an effective Labor Compliance Program or conflict of interest concerns.” The purposes for this revision were to clarify that restrictions imposed by the Director apply to the program’s approval status and further clarify, through more specific language, that conditions or restrictions placed on a program’s approval will be based on the same factors used to evaluate an entity’s capacity and ability to operate an effective Labor Compliance Program under subpart (a). In subpart (f), the words “Labor Compliance Programs” have been capitalized to conform to the style used for programs that are governed by these regulations,¹ and the relevant expiration date has been changed from October 1, 2008 to January 30, 2009, in light of the fact that most initial approvals have now been extended to the latter date. At the end of subpart (f)(4), “(f)” was inserted after the words “this subpart” for additional clarity.

¹ This was erroneously designated as a change in the proposals sent out for further public comment on October 20, 2008. In fact, the words had been capitalized in this location but not in subpart (f)(4) in the revisions previously sent out for comment on April 4, 2008. In either case, this is strictly a non-substantive typographical revision.

Section 16426. In subpart (a)(3), the word “above” was inserted after “subpart (2)”, and in subparts (a)(4) and (a)(5), the word “above” was inserted after “subpart (3)” for additional clarity. In subpart (a)(8), the word “government” was changed to “governmental” to conform to the terminology used in Government Code Section 87100 and the other regulations cited in this subsection as well as with the terminology used in proposed new subpart (a)(9) of this section and proposed new section 16430 of these regulations. In subpart (c), the word “operation” was deleted and replaced with the words “approval based on factors limiting its capacity and ability to operate an effective Labor Compliance Program or conflict of interest concerns.” The purposes for this revision were to clarify that restrictions imposed by the Director apply to the program’s approval status and further clarify, through more specific language, that conditions or restrictions placed on a program’s approval will be based on the same factors used to evaluate an entity’s capacity and ability to operate an effective Labor Compliance Program under subpart (a). In subpart (f), the relevant expiration date has been changed from October 1, 2008 to January 30, 2009, in light of the fact that most initial approvals have now been extended to the latter date. In subpart (f)(4), the words “Labor Compliance Programs” have been capitalized to conform to the style used for programs that are governed by these regulations. At the end of this subpart, “(f)” was inserted after the words “this subpart” for additional clarity.

Section 16427. In subpart (a), the word “below” was inserted after “subpart (b)” for additional clarity.

Section 16428. At the end of subpart (a)(3), the initial letter in “section” was changed to lower case to conform to the style used throughout these regulations in which the word “section” is capitalized only when denoting a statute and in lower case when denoting a regulation. At the end of subpart (a)(5), “Program” was changed to “Program’s approval.” The purpose of this revision was to clarify that terms, conditions, and restrictions are placed only on an entity’s status as an approved program and not on other factors that are unrelated to its approval status. In subpart (b)(1), the word “above” was inserted after “subpart (a)” at the end of each sentence for additional clarity. At the beginning of subpart (f), the initial letter in “sections” was changed to lower case to conform to the style used throughout these regulations in which the word “section” is capitalized only when denoting a statute and in lower case when denoting a regulation. At the end of subpart (f), “restrictions on the operation or continued operation of a Labor Compliance Program in lieu of revoking its approval” was revised to read “restrictions on a Labor Compliance Program’s approval in lieu of revocation.” The purpose of this revision was to clarify that conditions and restrictions are placed on an entity’s status as an approved program and not on other factors that are unrelated to that status.

Section 16431. The annual report forms LCP-AR1, LCP-AR2, and LCP-AR3 were revised by deleting the word “Suggested” before the word “Format” in the line immediately below the title on each form. This change was made because use of the forms will be mandatory rather than optional for most programs under the proposed revisions to section 16431. On LCP-AR3, the wording of item 7 was revised by changing the phrase “certifi-

cate of compliance with the conflict of interest disclosure requirements per 2 CCR § 18701,” to “certificate of compliance with conflict of interest disclosure requirements by employees and consultants who participate in making governmental decisions (as defined under 2 CCR § 18701)”. The purpose for this revision is to make both the certification requirement and regulatory reference more understandable, so that programs will certify to compliance *by program personnel who have disclosure responsibilities* as opposed to the program certifying to its own compliance.

Section 16432. In the heading, the word “Programs” was changed to “Program” to conform to the style used in other section headings. In the third sentence of subpart (c), the second “furnished” was deleted because it was redundant. In the second sentence of subpart (e), the initial letter in “Sections” was capitalized to conform to the style used throughout these regulations in which the word “section” is capitalized when denoting a statute. In subpart (f), the second sentence was revised to read as follows: “The contractor and affected subcontractor shall be provided at least 10 days following such notification to submit exculpatory information . . .” The purpose for this revision, which was made in response to comments expressing confusion over the meaning of the earlier proposed language, was to clarify that 10 days is a minimum standard for allowing a contractor or subcontractor to provide exculpatory information before making a final liability determination and a recommendation to the Labor Commissioner on the amount of penalties to be assessed under Labor Code Section 1775.

Section 16434. In subpart (b)(1), a comma was inserted after the opening phrase “Within 15 days after receipt of a complaint” for clarity and grammatical style consistency. In the note following the section, the citation to the prevailing wage hearing regulations was deleted.

Section 16435.5. In the heading, the word “Or” was changed to “or” for style consistency and specifically to conform to how it previously appeared when part of the heading of section 16435.

Section 16437. At the end of the introductory sentence of subpart (a), “following information:” was revised to read as follows: “information specified in subparts (1) through (9) below. Appendix D is a suggested format for a Request for Approval of Forfeiture under this section.” The purposes of this revision are to make the language more precise and to include an express reference within the regulation to the accompanying Appendix, as suggested by one of the commenters.

Section 16439. In subpart (c), the word “above” was inserted after “subpart (b)” for additional clarity.

Further Revisions After the Second (October 20 to November 4, 2008) 15-day Public Comment Period

Typographical changes were made to sections 16425(f)(4), 16428(a)(2), and 16432(e), after the Second 15-day public comment period. These revisions are all nonsubstantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1).

Section 16425(f)(4). The words “Labor Compliance Programs” have been capitalized to conform to the style used for programs that are governed by these regulations.²

Section 16428(a)(2). The initial letter in “section” was changed to lower case to conform to the style used throughout these regulations in which the word “section” is capitalized when denoting a statute and in lower case when denoting a regulation.

Section 16432(e). In the second sentence, a comma was inserted after the words “amounts paid” for grammatical style consistency.

UPDATE OF LOCAL MANDATES DETERMINATION

See the Local Mandates Determination in the Final Statement of Reasons at page 7. No modification of this determination is being made.

SUMMARY AND RESPONSE TO ADDITIONAL COMMENTS:

See the Final Statement of Reasons, pages 7 through 78, for summaries of the comments received through the end of the first 15-day public comment period and the Director’s responses to those comments. On October 20, 2008, further modifications to the proposed regulations were circulated for an additional 15-day public comment period. The notice of these modifications also specified that an Amended Initial Statement of Reasons and excerpts of two Legislative Analyst’s Office’s reports pertaining to labor compliance programs had been added to the rule-making record. Three sets of comments (two timely and one untimely) were received in response to this notice. Because these comments are relatively limited and narrowly focused, the complete text of each is reprinted below and will be responded to individually by commenter rather than by topic or section.

California’s Coalition for Adequate School Housing [C.A.S.H.]:

The Coalition for Adequate School Housing (C.A.S.H.) thanks the Department of Industrial Relations (DIR) for the opportunity to comment on proposed amendments to the labor compliance program (LCP) regulations. We strongly believe that the primary goal of proposed regulatory changes should be to provide, and not hinder, the necessary authority of school districts, as awarding bodies, to enforce prevailing wage laws for public works. Be-

² This change appeared in the proposals that were sent out for further public comment on October 20, 2008, but it was not delineated as a change through appropriate bold type with double underlining or double lining out.

low are our specific concerns pertaining to the proposed regulations.

Due Process

The most significant concern C.A.S.H. has about the proposed regulations is the absence of due process. Specifically, we are concerned that due process is lacking in Section 16425(c) and Section 16426(c), pertaining to the temporary or restricted status of labor compliance programs for awarding bodies or third party entities respectively. The amended regulations stipulate at the Initial Approval of either an awarding body's or third party's labor compliance program, the Director of the Department of Industrial Relations may grant interim or temporary approval status and impose restrictions on the Program "based on factors limiting its capacity and ability to operate an effective Labor Compliance Program or conflict of interest concern." This amended proposed regulation is problematic because it *presumes* at most an LCP's limited capacity to perform while ignoring an entity's right to due process to demonstrate materially the ability to perform all required duties. We, therefore, believe that inserting such provisions in the regulation countervail general assumptions of law by inhibiting approval status based on a presumption of guilt.

Secondly, due process is absent in Section 16428 on Revocation of Approval. C.A.S.H. has and continues to assert that whenever an LCP is facing the potential of revocation or restricted approval status, the LCP should be granted the right to a hearing *before* the Director makes a final status determination. Mandating a hearing process assures public accountability and transparency.

Responsibility of Awarding Bodies

C.A.S.H. is compelled to restate our comment on the issue of the role and responsibility of an awarding body on a public work project, whether or not the awarding body administers or contracts to administer its LCP through a third party contractor. The proposed regulation suggests that when an awarding body contracts with a third party LCP to initiate, enforce and administer an LCP on its behalf that it "fully contracts out its responsibilities and *decision-making authority...*" Third party LCP providers are not public entities empowered to award public works projects and are hired by public entities, such as school districts, to serve as a consultant akin to other contracted services such as architectural or construction management. Although a public entity may opt to use a third party LCP provider in lieu of using its own staff to administer its LCP, that public entity fully retains its decision-making authority as an awarding body.

Mandatory Site Visits

C.A.S.H. maintains its position on mandatory site visits. As we have expressed in the past, relative to the requirement of an LCP to conduct on-site visits, C.A.S.H. believes that on-site visits are part of confirmation or audit proceedings conducted when the LCP deems them necessary. Mandated site visits ensure no positive results. Such mandated site visits erode the real work to be conducted and bespeak of bureaucracy rather than professionalism.

Conversion of Initial or Extended Approval

Finally, the amended regulations extend the deadline to convert an LCP's initial or extended approval to January 1, 2009 [sic]. We respectfully request that the regulations be amended to extend the conversion deadline to "sixty (60) days after the date that the regulations became effective." The provision of sixty (60) days gives LCPs the necessary time to administratively prepare for the approval conversion, as well as avoids future amendments to the regulation on this matter because it does not define a specific date.

Director's Response: The Director notes first that the due process concerns raised by C.A.S.H. are largely addressed in the Final Statement of Reasons in response to comments on sections 16425(c), 16426(c), and 16428. By statute and regulation, labor compliance programs are approved to enforce state prevailing wage statutes, a function that otherwise is normally reserved to the state through the Division of Labor Standards Enforcement. No statute or regulation confers in any entity the right to be approved as a labor compliance program; nor does any statute or regulation require such approval to be unqualified and unlimited. In practice, all programs have gone through a probationary period under the existing "initial approval" system, while other kinds of conditions and restrictions have been imposed only rarely on a case-by-case basis, principally to address conflicts of interests that could arise if a contractor-sponsored labor compliance program regulated its sponsor's own public works contracts. There is no presumption of limited capacity in the language of the proposal, nor is there any record of such a presumption being applied in practice. It should also be noted that "guilt" is not an operative concept in the approval or non-approval of a labor compliance program any more than guilt would be imputed to an individual not hired for a job or who does not pass a licensing test.

The comments about due process in section 16428 are not focused on the most recent modifications to the text of that section. The issues of due process and the right to a hearing in the revocation process have already been addressed in the Final Statement of Reasons at pages 34 to 35.

C.A.S.H. acknowledges that its comments about awarding body responsibilities are a restatement of past comments. Those comments do not pertain to the most recent modifications and have already been responded to in the Final Statement of Reasons, especially at pages 25 to 26. Similarly, the comments on site visits do not pertain to the most recent modifications and have already been addressed at length in the Final Statement of Reasons at pages 47 through 51.

C.A.S.H.'s recommendation to extend the approval status conversion deadline to sixty (60) days after the regulations become effective was not accepted as a regulatory change. To begin with, the modified date in sections 16425(f) and 16426(f) – which is January 30 [not 1], 2009 – is not a deadline date. Rather it is the date on which the extended initial approval of most but not all programs is currently set to expire. Programs will need to comply with the new regulations as soon as they become effective; and thus, it is anticipated that programs will begin updating manuals and operations, as needed, as soon as they receive notice that new regulations have been filed with the Secretary of State. However, the conversion or updating process in sections 16425(f) and 16426(f) involves as-

sembling and submitting information for the Department's review so that the current time limitation on approval status may be removed. Some programs may choose not to extend their approval status, while other programs that were first approved in the past year and have initial approval extending beyond January 30, 2009, may choose to wait before seeking approval without a time limitation. In light of these factors and the uncertainty over when the regulations might become effective, the Director did not propose a specific regulatory deadline for seeking a status change. Nevertheless, for the majority of programs whose approval is set to expire on January 30, the Director believes that sixty days is a reasonable time frame for programs to assemble and submit and for the Department to evaluate and approve the update information. Programs likely will be given a specific date within which to submit their updates (rather than requiring them to calculate that deadline in relation to some other event). If it is not feasible to complete the conversion process in advance of the January 30, 2009 expiration date, the Director anticipates further extending initial approvals as needed to allow for updates to be prepared, submitted and fairly evaluated.

California Department of Transportation [Caltrans]:

The California Department of Transportation (Caltrans) has reviewed the October 17, 2008, additional modifications to the proposed amendments to the labor compliance program regulations set forth in Title 8, California Code of Regulations. Chapter 8, Subchapter 3, Article 6, and Subchapter 4 (Sections 16404 [proposed] and 16421 -16439). Caltrans has no specific comments on the posted modifications.

Caltrans provided extensive written comments and attended the public hearing on January 23, 2008 to provide its perspective on the affects of these proposed regulations on its long standing approved program. After reviewing the Final Statement of Reasons posted on the Department of Industrial Relations (DIR) website as part of the final rulemaking file, Caltrans believes many of its comments were considered by the Director of DIR and clarifications were provided. However, the Final Statement of Reasons did not accept Caltrans' position that these specific regulatory requirements will require additional staff to ensure compliance and avoid instances of revocation complaints.

In its written comments, Caltrans indicated it would require a minimum of four additional enforcement positions in each of its seven districts/regions for a total of twenty eight additional positions with a cost of approximately \$2 million annually to comply. Although DIR did revise portions of the regulations, Caltrans must still comply with all of the stipulated minimum enforcement requirements on all of its contracts for which prevailing wages are applicable to remain in compliance. This includes enforcement activities on over one thousand contracts receiving over 8,000 certified payroll records within a thirty-day period. At its current level of enforcement under the existing regulatory requirements, Caltrans has over fifty staff in its statewide offices conducting compliance activities.

With the need to administer Proposition 1B projects in addition to its current projects, Caltrans is vigorously seeking additional ways to meet the increasing demands of ensuring

contractor compliance under the current regulations. As the only State agency with an approved program, Caltrans is also seeking ways to contribute to the reduction of the State's current fiscal crisis. For a labor compliance program as large and complex as Caltrans, the adoption of many of the specific minimum enforcement activities will require additional staff to ensure compliance.

As provided in comments submitted in January 2008, Caltrans again respectfully requests that the Director adopt language exempting Caltrans and those awarding body LCPs with "extended authority" and contracting dollars in excess of \$1 billion or more.

Director's Response: As noted, Caltrans has offered no comments on the most recent modifications, but reiterates its request for an exemption from minimum enforcement standards in light of its concern that the standards otherwise will require Caltrans to hire additional staff. This suggestion is not being accepted at this time for the following reasons. First, according to the information Caltrans made available to the Department, the revised minimum standards will not alter Caltrans' existing monitoring and enforcement practices. In its earlier comments, Caltrans tied its projected need for additional staff to three specific standards: (1) the requirement to review certified payroll records within 30 days (section 16432(b)); (2) the requirement for confirmation of certified payroll records (section 16432(c)); and (3) the procedure for responding to written complaints (section 16434(b)). The subpart on confirmation was redrafted to clarify that this process was required on a specified random basis and not for every payroll record, as Caltrans and other commenters had feared. On the other hand, the other proposed standards on payroll record review and complaint handling turned out to be consistent with Caltrans' existing practices and did not require revision. Caltrans' latest comments now refer specifically only to the thirty-day payroll record review requirements as impacting its staffing levels. However, in a colloquy with the presiding officer at the public hearing on these proposals, Caltrans acknowledged that its current practice is to require certified payroll records to be submitted weekly and to review all such records within 30 days of receipt. (Transcript of public hearing held on January 23, 2008, at pages 29 to 30.) Consequently, insofar as Caltrans anticipates a need for increased staff for labor compliance work, this need appears to be a function of increased highway construction activity, such as for Proposition 1B projects, rather than of the new regulatory standards. While the Director acknowledges the severe impacts the current fiscal crisis is having on all state agencies, deciding where a sister agency like Caltrans may or must economize in its performance of essential functions is beyond the authority and expertise of this Department.

No specifics have been offered on how a large agency exemption from minimum performance standards should work, including whether it would implicate certain standards but not others or whether it would have the effect of leaving large programs unregulated. In this regard the Director further notes that the inability or unwillingness of any labor compliance program to carry out all of its enforcement responsibilities would likely result in the filing of more prevailing wage complaints with the Division of Labor Standards Enforcement, contrary to one of the fundamental purposes for authorizing or requiring awarding bodies to have separate labor compliance programs.

Association of Labor Compliance Professional (ALCP) [received November 6, 2008]:

On behalf of the Association of Labor Compliance Professionals (ALCP), I am submitting comments on the inclusion of the Legislative Analyst's Office (LAO) documents:

- LAO Report entitled *Implementing the 2006 Bond Package: Increasing Effectiveness Through Legislative Oversight* (January 22, 2007) – section addressing labor compliance programs.
- LAO Analysis of the 2007-08 Budget Bill, Capital Outlay Chapter (February 21, 2007) – section addressing labor compliance programs.

These reports have been used as support for proposed revisions to the Labor Compliance Program (LCP) in a number of administrative and legislative contexts. However, it is important to recognize two important limitations on those reports.

The LAO Recognizes That Its Report Does Not Account For the Bulk of Recoveries

The existing LCP reduces formal enforcement actions and resulting costs and delays by encouraging voluntary compliance. The LAO report specifically recognizes "these measures of wage recovery activity do not capture any voluntary compliance or reduction of complaints to DIR that may be the result of LCP's work." (LAO Report, page 14, January 22, 2007.) Existing law works because most qualified LCPs are experienced in the construction industry and able to bring a common sense resolution to mistaken underpayment issues. Voluntary compliance protects projects and construction schedules. The new DIR regulations will further enhance the quality of LCPs and increase the level of voluntary compliance.

The LAO Report Miscalculates the Annual Cost/Benefit of LCPs

There are problems with relying on the LAO report for guidance on LCP policy. The LAO reports \$70 million in LCP funding. However, the State Allocation Board (SAB) which funds the program and audits the funding, reported in March 2007 that cost data was unavailable for all but 7.3% of projects (Report of the Executive Officer, Labor Compliance Program Grants, SAB Meeting, March 28, 2007). This should be the same database relied on by the LAO's January 2007 report. Thus, the \$70 million amount is inaccurate. Further, the \$70 million amount appears to be based on the total theoretical multiple-year amount permitted. That amount is then compared to single-year recoveries of enforcement actions. So it appears that a multiple-year expenditure is compared to single-year recoveries. The math is just wrong in the LAO report. ALCP has polled its members to determine the amount of voluntary compliance funding that LCPs produce. The amount of funding that goes directly to workers as a result of LCP reviews is many times the amount studied by the LAO report as recovered by enforcement actions. This data has been previously presented to representatives of the Labor Agency.

Director's Response: The Director understands that ALCP is putting these comments on

the record in light of recent legislative proposals that might change or curtail the role of labor compliance programs. Because these comments were received after the close of the latest public comment period and do not address the latest modifications or any specific findings in this rulemaking, no response is required. The Director further notes and acknowledges ALCP's support for these specific regulatory proposals, which ALCP believes "will further enhance the quality of LCPs and increase the level of voluntary compliance."

ALTERNATIVES DETERMINATION

The Director has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective as and less burdensome to affected private persons than these regulations.