

TITLE 8. DEPARTMENT OF INDUSTRIAL RELATIONS

NOTICE OF PROPOSED EXTENSION OF EMERGENCY ACTION

The Acting Director (“Acting Director”) of the Department of Industrial Relations (“Department”) proposes to extend the emergency regulatory action taken on November 4, 2010, in OAL File No. 2010-1028-01 E, for an additional ninety (90) days pursuant to section 11346.1 of the Government Code.

Emergency Regulatory Action: On November 4, 2010, the Office of Administrative Law approved the former Director’s emergency rulemaking action to repeal Subchapter 4.5 (commencing with section 16450) of Chapter 8 of Division 1 of Title 8 of the California Code of Regulations and to amend section 16423 (within Subchapter 4 of the same chapter and division) in order to eliminate references to Subchapter 4.5. The Acting Director proposes to extend this action in order to provide additional time to commence a regular rulemaking to repeal or amend all or some of the regulations in Subchapter 4.5.

Basis for Prior Action: Emergency action was taken for the purpose of suspending and postponing the commencement of fee-based compliance monitoring and enforcement by the Department on public works projects pursuant to sections 1771.3 and 1771.55 of the Labor Code and related statutes. It was necessary to take this action on an immediate emergency basis due to questions raised over the legality of using bond funds to pay the fees set forth in section 16452, which in turn prevented the state from selling bonds to fund public works construction due to bond counsel’s unwillingness to write an unqualified opinion for the sale of any bond that may be subject to the fee. Because the applicability of sections 1771.3 and 1771.55 of the Labor Code and related statutes were conditioned upon the Director’s adoption of implementing regulations, the suspension and postponement of the effective date of those regulations had the effect of suspending and postponing implementation of the underlying statutes and removing the impediment to selling bonds until the legal questions were addressed.

Basis for Extension of Emergency Action: The situation described above continues to exist; that is, questions are still being raised over the legality of using bond funds to pay the fees set forth in section 16452, and these questions in turn prevent bond counsel from issuing the unqualified opinion letters that are needed in order for the state to be able to sell bonds to fund public works construction. Although bond counsel now agrees that bond funds may be spent to monitor and enforce prevailing wage requirements on bond-funded public works projects, bond counsel remains unwilling to write unqualified opinion letters due to questions over some of the terminology in sections 1771.3 and 1771.55 of the Labor Code and related statutes, and in the Subchapter 4.5 regulations. The Acting Director in consultation with bond counsel and other interested parties is now in the process of drafting and sponsoring proposed legislation that will fully resolve these issues. However, until such legislation is proposed and adopted, and the implementing regulations revised, the previously adopted regulations must remain in suspense or be repealed.

Substantial Progress and Due Diligence Toward Repeal or Replacement of Suspended Regulations through Regular Rulemaking: The legal questions that prevented bond counsel from writing unqualified opinion letters were first raised in oral conversations during the last week of July of 2010 and first expressed writing in correspondence to the State Treasurer and the Director of Finance dated October 19, 2010. (A copy of this letter was included along with other correspondence related to the emergency in the record for the emergency regulatory action taken on November 4, 2010.) In response to the issues raised by bond counsel, the Department prepared a “white paper” on the historical development of California’s Prevailing Wage Law, the obligations of awarding bodies in public works construction, and industry-recognized construction practices. The purpose of this white paper, which was transmitted by the former Director to the Attorney General on December 10, 2010, was to establish that the monitoring and enforcement of prevailing wage requirements was a long-recognized activity and cost attendant to public works construction rather than a new obligation imposed by SBX2-9.

In a formal response letter dated February 9, 2011,¹ bond counsel accepted the white paper’s central premise that prevailing wage enforcement was an expense associated with public works construction and accordingly that bond funds legally could be used for this purpose. However, bond counsel also expressed the belief that statutory and regulatory revisions were still “necessary to the issuance of unqualified general bond opinions in the future by the Attorney’s General Office.” The Department has followed up by drafting proposed statutory amendments to address specific concerns raised by bond counsel. These proposals were forwarded to bond counsel for review on February 25, 2010, and were the subject of a follow-up meeting on April 6, 2011, with bond counsel anticipating providing a written response to the Department by approximately April 22, 2011.

Because any regulatory changes are necessarily subordinate to and dependent upon whatever amendments are made to the statutes, the Acting Director cannot at this time predict what substantive regulatory changes will be proposed or their precise timing. Since Government Code section 11346.1(h) limits an agency to a maximum of two 90 day extensions of an emergency regulatory action, there is no reasonable possibility of first having statutory changes introduced and enacted and then being able to propose and adopt substantive regulatory revisions through the regular rulemaking process, all within the maximum effective period for the emergency repeal. What the Acting Director anticipates instead is commencing a regular rulemaking within the next month to permanently repeal any regulatory provisions within Subchapter 4.5 (commencing with section 16450) of Chapter 8 of Division 1 of Title 8 of the California Code of Regulations, that continue to be an impediment to the issuance of unqualified bond opinions by the Attorney General’s Office.

FINDING OF CONTINUING EMERGENCY

The Director finds that the emergency described in the Notice of Proposed Emergency Action issued on October 21, 2010 and incorporated herein by reference continues. For the reasons explained in that Notice and underlying correspondence, as supplemented by bond coun-

¹ The conclusion reached in the letter was first expressed orally and tentatively in a meeting on December 15, 2010.

sel's letter of February 9, 2011 (referred to above), bond counsel will be unwilling to provide unqualified bond opinions if Subchapter 4.5 goes back into effect or if revisions are not made to the underlying legislation. Without unqualified bond opinions, the state's public works bonds will be unmarketable, which will leave the state unable to pay for public works projects and result in a loss of employment and economic stimulus to the community at a time of continuing stress to the local, state, and national economies.

INCORPORATION OF PRIOR EMERGENCY REGULATORY ACTION

In further support of this Notice of Proposed Extension of Emergency Action, the Acting Director incorporates herein by reference the Notice of Proposed Emergency Action and documentation submitted in support of the emergency regulatory action that was approved by the Office of Administrative Law on November 4, 2010 in OAL File No. 2010-1028-01 E.

STATEMENT UNDER TITLE 1, CALIFORNIA CODE OF REGULATIONS, §48

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Title 1, California Code of Regulations, section 55(b) sets forth the requirements for submitting comments to the Office of Administrative Law on the proposed emergency action. Comments must be in writing, must identify the topic of this rulemaking, and must be submitted directly to the Office of Administrative Law as follows:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Fax: (916) 323-6826
e-mail: staff@oal.ca.gov

In addition, a copy of the comments must be transmitted to the Department's contact person for this rulemaking. To ensure prompt receipt and consideration of your comments, the Department requests that you transmit a copy either by e-mail to SBX2-9comments@dir.ca.gov, or by fax, to the attention of John Cumming, at 415/703-4277.

AUTHORITY AND REFERENCE

Authority: Sections 54, 55, 1771.55(b), and 1773.5, Labor Code.

Reference: Sections 17250.30 and 81704, Education Code; section 6531, Government Code; sections 1771.3, 1771.55, 1771.75, 1771.85, and 1771.9, Labor Code; sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code; and section 75075, Public Resources Code.

UPDATED INFORMATIVE DIGEST AND DISCLOSURES

The Acting Director readopts and incorporates by reference the Informative Digest/Policy Overview Statement and the Disclosures Regarding the Proposed Action as set forth in the Notice of Proposed Emergency Action issued on October 21, 2010. Since the issuance of that Notice, the Department has suspended any and all activities of the Compliance Monitoring Unit (“CMU”) and has returned any and all fees that had been submitted by awarding bodies to pay for CMU services.