

**SUPPLEMENTAL STATEMENT OF REASONS**  
**for**  
**PROPOSALS TO AMEND SECTIONS 16423, 16433, 16450 THROUGH**  
**16453, AND 16455 OF TITLE 8, CALIFORNIA CODE OF REGULATIONS**

On July 1, 2011, the Acting Director of the Department of Industrial Relations (“Acting Director”) commenced a rulemaking to amend certain regulations governing Labor Compliance Programs and fee-based monitoring and enforcement by the Department of Industrial Relations (“Department”) on state bond-funded and other specified public works projects. The period for submitting comments on the initial proposals closed on August 15, 2011.

Following the close of the initial public comment period, the Acting Director has made revisions to the initial proposals and is circulating those revisions for further public comment. The Acting Director is also providing this Supplemental Statement of Reasons to summarize and explain those revisions, which are largely for the purpose of conforming the regulations to statutory amendments to the SBX2-9 legislation (AB 346 [Solorio]) that were just adopted by the Legislature and are expected to be signed into law by the Governor.

**Labor Compliance Program Regulations:**

Section 16423: Several revisions have been made to conform the language of this regulation more closely to existing and prospective statutory language and to eliminate references to third party programs. The underlying historical purpose of this regulation has been to provide clarifying information about labor compliance programs (LCPs) that are required under Labor Code Section 1771.5 or other statutes that refer to Labor Code Section 1771.5.

Subpart (a) has been revised by adding the word “either” after “Awarding Body” in the first line, by adding the phrase “or has elected to enforce such a program,” after “1771.5,” in the third line, by substituting the word “these regulations” for the words “section 16425 below” in the fourth line, and by deleting all of the text following the word “below” at the end of the fourth line. The language being added to subpart (a) clarifies that the section applies either to an LCP that the Awarding Body has been required to initiate and enforce to meet a statutory requirement (such as Labor Code Section 1771.7 for projects funded by specified state school construction bonds) or has *elected* to initiate and enforce to obtain higher prevailing wage exemptions. The change from “section 16425” to “these regulations” clarifies that term “approved” programs include programs with extended approval under section 16427 or that received approval prior to November 18, 2004 under former section 16426 [now section 16425]. The language being deleted referred to the historical option of “fully contracting out responsibilities and decision-making authority to [an approved] third party program” and another proposed option for entering into a voluntary agreement for fee-based monitoring and enforcement by the Department. The “contracting out” language is being deleted in light of a 2010 regulatory change (deleting former subpart (c) of section 16421) that was made and subsequently implemented to stop providing separate approvals to private third party LCPs and instead evaluate only whether an Awarding Body has an approved program, an approach that is more consistent with the language found in

all LCP statutes. The recently added option of entering into a voluntary agreement with the Department for fee-based monitoring and enforcement is also being deleted in light of potential legal concerns over whether such an agreement can be used as an alternative for meeting a statutory LCP requirement.

Subpart (b) has been revised by deleting subparts (2) and (3) after the initial preamble, by making nonsubstantive typographical changes in the language following the two deleted subparts, by changing the phrase “projects in which the Awarding Body participates” to “projects under the authority of the Awarding Body” in two places, and by deleting text after the word “below” that referred to notice of a contract or agreement with a third party LCP. The purpose of the deletions is to eliminate references to contracting out options, for reasons explained in the preceding paragraph. The purpose of the changes in phraseology (from “projects in which the Awarding Body participates” to “projects under the authority of the Awarding Body”) is to conform this language to the previously proposed revision of the same phrase in subpart (e) of this section. As explained in the initial statement of reasons, the revised language is drawn directly from the statute and less susceptible to misinterpretation.

In subpart (c) the phrase “based on a consideration of the factors in sections 16425, 16426, or 16427 below” is being replaced by “pursuant to these regulations” in order to simplify the language and keep it consistent with a corresponding revision being made in subpart (a), as noted above.

In subpart (d) a reference to third party labor compliance programs is being deleted for the reasons explained above.

In subpart (e) an additional reference to section 16433 of the LCP regulations is being added after the statutory reference to Labor Code Section 1771.5(a), and additional language is being added at the end of the subpart to refer to the new SBX2-9 option of electing to accept specified statutory obligations and pay the Department for compliance monitoring and enforcement on all projects in order to obtain higher prevailing wage exemptions. The underlying purpose of this subpart has been to clarify when the higher exemptions in Labor Code Section 1771.5(a) and corresponding regulation at 8 Cal. Code Reg. section 16433 apply; and these proposed revisions make subpart (e) consistent with the statute and other regulation.

Section 16433: References to Labor Code Section 1771.55(a) are being deleted from subpart (a) and the reference note following the text of the regulation. These references will become obsolete upon the adoption of AB 436, which among other things will repeal Labor Code Section 1771.55 and incorporate its provisions into a revised Section 1771.5.

In the text of subpart (a), the phrase “projects in which the Awarding Body participates” is being changed to “projects under its authority” to conform with the proposed revision of the same language in section 16423 and for the same reason of conforming the regulatory phrasing to the statute and making it less susceptible to misinterpretation. In addition, the phrase “shall not require” is being revised to “may choose not to require” to conform with the language of Labor Code Section 1771.5(a) as it is being amended by AB 436.

## **SBX2-9 Regulations:**

Repeal and readoption of regulations in Article 1: The Acting Director is proposing to repeal all of these regulations and, with one exception, to adopt substitute regulations in their place that will become effective on January 1, 2012, the anticipated effective date of AB 436 and of these regulatory amendments. The reason for repealing and readopting the regulations is to avoid potential confusion over whether the preexisting regulations would be deemed to be effective for any period of time between the expiration of the emergency rulemaking (which temporarily repealed all of the SBX2-9 regulations) on November 1, 2011, and the effective date of anticipated statutory changes on January 1, 2012.

The proposed substitute regulations being circulated for public comment have underlining and lining out to show how the preexisting text was revised at the start of this rulemaking as well as the further revisions that are being proposed at this time. The specific further revisions to each section are also explained below. In addition, clean versions of the proposed revised text are being provided to make it easier to see how the revised text will appear.

No revisions are proposed for the Chapter 2 regulations (sections 16460 – 16464) that specify how the Department will conduct compliance monitoring and enforcement under SBX2-9. Because the operational effect of these regulations has been contingent at all times upon the provisions of Chapter 1 (sections 16450 – 16455) going into effect, there is no separate or corresponding need to repeal and readopt the regulations in Chapter 2.

Section 16450: This section sets forth the categories of public works projects to which the SBX2-9 regulations apply. The Acting Director is proposing to restructure this regulation by placing all the existing applicability provisions in subpart (a) and placing two exceptions to the requirements of SBX2-9 in new subparts (b) and (c).

As redrafted, subpart (a) now begins with the preamble “Except as provided in subparts (a) and (b) of this section,” and then adds to the introductory language “contracts for public works awarded on or after January 1, 2012, or the effective date of these regulations, whichever is later.” The phrase “contracts for public works awarded . . .” tracks the language incorporated into the SBX2-9 statutes by AB 436. The effective date language has also been placed in the introductory language to indicate that the same date applies to all categories of projects to which the SBX2-9 regulations will apply. The phrase “or the effective date of these regulations, whichever is later,” is contingency language to reflect the possibility that adoption of the revised regulations might be delayed beyond the first of the year. However, the Acting Director anticipates that the final version of this regulation will have a single specified effective date and that the contingency language will be omitted.

The items currently listed as subparts (a), (b), and (d) are now listed as items (1), (2), and (3), with the date information deleted and the introductory phrasing changed from “any” or “all” “public works projects” to “the project.” A statutory reference at the end of (a)(3) is also being corrected in light of statutory amendments enacted by AB 436. Former subpart (c), which was intended to cover the option of contracting with the Labor Commissioner for compliance moni-

toring and enforcement in lieu of meeting a statutory LCP requirement, is being deleted in its entirety due to legal questions over the validity of providing that option. The separate regulation that specifically addressed that option, section 16453, is also being deleted in its entirety with no substitute being proposed.

The new subpart (b) will completely exclude projects funded by the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 [Proposition 84] from the requirements of SBX2-9. This exception is expressly provided for and required by Labor Code Section 1771.3(c), as amended by AB 436, and it excludes the prior option of contracting with the Department for compliance monitoring and enforcement in order to meet Proposition 84's LCP requirement.<sup>1</sup>

The new subpart (c) sets forth another exception to the requirements of SBX2-9, as amended by AB 436, for projects covered by project labor agreements.<sup>2</sup> The introductory language to this subpart expresses an exception to the exception, so that Awarding Bodies will still be required to provide the project notices specified in regulatory section 16451(c). This will enable the Department to keep track of individual projects that would be subject to the requirements of SBX2-9 but for this exception. It also would not significantly increase or affect reporting responsibilities, since the notice required by section 16451 can be provided as part of the same notice used to comply with Labor Code Section 1773.3 (for projects of \$30,000 or more using apprenticeable crafts or trades), and most if not all projects covered by a project labor agreement would also be subject to Labor Code Section 1773.3's notice requirement.

In the reference notes following the text of this regulation, references to Labor Code Sections 1771.55, 1771.75, 1771.8, 1771.85, and 1771.9 are being deleted because those sections are being repealed by AB 436. A reference to Public Resources Code Section 75075 is being added because the regulation will now specifically reference the requirements of that statute.

Section 16451: In the title of this section, the word "Fees" is being deleted and replaced by the words "Requirements of Subchapter." This revision more accurately describes the scope of the regulation, which in the case of projects covered by project labor agreements, will require notices for projects that otherwise are excepted from SBX2-9 fee requirements.

Subpart (a) of this section specifies what information is to be included in a project notice provided by an Awarding Body to the Director. The introductory language of this subpart has been revised by adding the following phrase after the word "subchapter" in the second line, "including projects that are subject only to the notice requirement in this subpart as specified in section 16450(c) above". This additional language further clarifies that projects covered by the project labor agreement exception in SBX2-9, as amended by AB 436, are still subject to the notice requirement in this subpart.

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<sup>1</sup> Proposition 84's LCP requirement is found in Public Resources Code Section 75075.

<sup>2</sup> The specific language used in the SBX2-9 statutes and this regulation is a project in which "the awarding body has entered into a collective bargaining agreement that binds all contractors and subcontractors performing work on the project and that includes a mechanism for resolving disputes about the payment of wages."

The language of subpart (a)(1) has been revised by changing the phrase “project funded in whole or in part from a bond issued by the state to fund public works projects” to read “project paid for in whole or in part out of public funds, within the meaning of Labor Code Section 1720(b), that are derived from a bond issued by the state”. This revision tracks the revised language of Labor Code Section 1771.3(a)(1), as amended by AB 436.

An additional subsection (I) has been added to subpart (a)(3) to include within the notice whether the project is subject to a project labor agreement. This information serves the specific purpose of enabling the Director and public to track projects that would be subject to SBX2-9 requirements but for the project labor agreement exception.

The prior language of subpart (a)(4), which was intended to cover the option of contracting with the Labor Commissioner for compliance monitoring and enforcement in lieu of meeting a statutory LCP requirement, is being deleted in its entirety due to legal questions over the validity of providing that option. In its place, new language has been added stating that, “In lieu of submitting a written notice as specified in subpart (a)(3), the Awarding Body may complete and transmit the notice on line using the format and instructions for completing and transmitting the form specified on the Department’s website.” Following the 2009-2010 rulemaking, the Department developed an on-line reporting form, and this language clarifies that reports may be submitted on line *instead of* (rather than in addition to) sending paper forms.

In the reference notes following the text of this regulation, references to Labor Code Sections 1771.55, 1771.75, 1771.8, 1771.85, and 1771.9 are being deleted because those sections are being repealed by AB 436.

Section 16452: In the last line of subpart (a), the word “a” has been changed to “each” to more clearly reflect the fact that fees will be charged on a project-by-project basis.

Subpart (b) has been almost completely redrafted to read as follows: “For projects that are paid for in whole or in part out of public funds derived from any bond issued by the state, the Department shall determine the rate or rates to charge in accordance with the requirements and subject to the limitations set forth in Labor Code Section 1771.3(a)(3).” The intent and purpose of this subpart is simply to inform the public that the fee requirements for bond-funded projects will be determined in accordance with statutory specifications and limitations but are not being set forth in these regulations. The redrafted language more simply and clearly expresses this point than the initial proposal. The redrafted language also tracks language used in Labor Code Section 1771.3, as amended by AB 436.

Subpart (c) has been revised by adding the following introductory language: “Subject to any further limitation on state bond-funded projects established in accordance with subpart (b) above”. The purpose of adding this language is to clarify that the maximum fee specified in this subpart is subordinate to any further limitation on fees for bond-funded projects. This alters the preexisting regulatory rule under which a project would be subject to the higher fee if more than one fee requirement applied, and it is intended to comply with the revised requirements of Labor

Code Section 1771.3, as amended by AB 436.

In the reference notes following the text of this regulation, references to Labor Code Sections 1771.55, 1771.75, 1771.8, 1771.85, and 1771.9 are being deleted because those sections are being repealed by AB 436.

Section 16453. The text of this section is being deleted in its entirety, and no replacement text is proposed. This regulation provided the option of contracting with the Labor Commissioner for compliance monitoring and enforcement in lieu of meeting a statutory LCP requirement under specified circumstances and subject to specified conditions and limitations. However, in light of legal questions over the validity of providing this option, which is not expressly authorized by statute, the option is being withdrawn.

Section 16454. This section covers the statutory option for Awarding Bodies to accept certain responsibilities (specifically to have language about public works requirements in contract and bid documents and to conduct pre-job conferences) and then pay for monitoring and enforcement by the Department on their projects in order to enjoy higher exemptions from prevailing wage requirements. The statutory references in the title and text of the regulations are being revised to conform to statutory amendments adopted in AB 436, which will repeal Labor Code Section 1771.55 and incorporate the requirements that are specifically referred to in this regulation into Labor Code Section 1771.5(f). Corresponding changes are being made in the reference notes following the text of this regulation.

Section 16455: In subparts (a) and (b), the phrase “An Awarding Body that operates an approved Labor Compliance Program” is being changed to “An Awarding Body that requests and receives approval from the Director to continue operating a previously approved Labor Compliance Program”. The purpose for this change is to track revised language in the SBX2-9 statutes as amended by AB 436. This revision will require a process of requesting and reconfirming an Awarding Body’s entitlement to a waiver based on its continued operation of a qualifying labor compliance program when the SBX2-9 requirements go into effect. In the second and third lines of subpart (a), “all public works projects” has been changed to “every public works project”, and in both subparts (a) and (b), the phrase “in which the Awarding Body participates” has been changed to “under its authority” to make the regulatory text consistent with the underlying statute and avoid implication of a different or broader meaning. The words “the requirements of” have been inserted between “subject to” and “this subchapter” in the third and fourth lines of subpart (b) for added clarity, and “pursuant to subparts (a) or (b) of section 16450” has been changed to “pursuant to subparts (a)(1) and (a)(2) of section 16450” to conform with proposed changes to section 16450.

In the second line of subpart (c), the words “it contracts” are being deleted and replaced with the phrase “the Director determines that the Awarding Body does not meet the conditions for a fee waiver under subpart (a) or (b) above, or is contracting”. The purpose of this revision is to clarify that ineligibility to receive a fee waiver is a matter to be determined by the Director of Industrial Relations. The word “However” has been added at the start of the following sentence to make the text more readable and signal that the next set of items are stated as qualifications or

exceptions to the general rule that has just been expressed.

Subpart (d) has been revised to read as follows. “An Awarding Body that is entitled to a waiver of the Department’s fees for compliance monitoring and enforcement, as specified in this section, may retain, request, or seek reimbursement of any fees or funding provided for the support of labor compliance monitoring and enforcement activities, to the extent authorized by any funding agency and any other applicable law.” During the initial rulemaking process, some Awarding Bodies with approved LCPs asked what would happen to waived fees and whether the fee limitations in SBX2-9 would also apply to funds provided to support LCPs.<sup>3</sup> The purpose of this subpart was to respond to this question to the extent of disclaiming any interest or entitlement of the Department in the waived fees and leaving Awarding Bodies free to seek or retain those fees for their own compliance monitoring and enforcement activities. Concern has been expressed about the Department appearing to give Awarding Bodies a regulatory entitlement to funds provided by other agencies; and the language has been clarified in response to that concern. However, the Acting Director does not believe the regulation can reasonably be read or understood as creating or affecting any entitlement to funds over which the Department has no legal authority or control.

In subpart (e), the word “automatically” has been deleted from the first line, and the words “requested and received approval for continued operation under subpart (a) or subpart (b) above” has been inserted in place of the concluding phrase “provided notice under section 16423(b) above with respect to whether it intends to enforce or continue enforcing its Labor Compliance Program for all its public works projects or only those projects that are subject to a fee under this subchapter.” The purpose of this revision is to make the language more consistent with revisions to the fee waiver provisions in SBX2-9, as amended by AB 436. As noted above, the statutory revisions will require a non-automatic process of requesting and reconfirming an Awarding Body’s entitlement to a waiver based on its continued operation of a qualifying labor compliance program when the SBX2-9 requirements go into effect.

In the reference notes following the text of this regulation, references to Labor Code Sections 1771.55, 1771.75, 1771.8, 1771.85, and 1771.9 are being deleted because those sections are being repealed by AB 436.

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<sup>3</sup> See, for example, 2 Cal. Code Reg. §185971.4, through which the State Allocation Board provides specified percentage-based grant augmentations to support the LCPs that are required for school bond-funded construction under Labor Code Section 1771.7.