

PUBLIC WORKS APPRENTICESHIP HEARING REGULATIONS

CALIFORNIA CODE OF REGULATIONS TITLE 8, CHAPTER 2, PART I, ARTICLE 10 (SECTIONS 232.01 through 232.70)

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GENERAL

232.01. Scope and Application of Rules.

(a) These Rules govern proceedings for review of Determinations of civil penalty or debarment under sections 1777.5 and 1777.7 of the Labor Code. The provisions of Labor Code section 1777.7 and these Rules apply to all such Determinations served on a contractor, subcontractor, or responsible officer on or after the effective date of these Rules and provide the exclusive method for an Affected Contractor, Subcontractor, or Responsible Officer to obtain review of any such Determination.

(b) These Rules do not govern debarment proceedings under Labor Code section 1777.1, nor prevailing wage enforcement under Labor Code section 1742, nor any criminal prosecution.

(c) These Rules do not preclude any remedies otherwise authorized by law to remedy violations of Division 2, Part 7, Chapter 1 of the Labor Code. These Rules do preclude challenge by an Affected Contractor, Subcontractor, or Responsible Officer to determinations of violations of Labor Code section 1777.5 except as provided herein.

(d) For easier reference, individual sections within these prevailing wage hearing regulations are referred to as "Rules" using only their last two digits. For example, this Section 17201 may be referred to as Rule 01.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.02. Definitions.

For the purpose of these Rules:

- (a) "Administrator" means the Administrator of Apprenticeship, who is the Director of the Department of Industrial Relations;
- (b) "Affected Contractor, Subcontractor, or Responsible Officer" means a contractor or subcontractor (as defined under Labor Code section 1722.1) or Responsible Officer (as defined herein at subpart (p)) to whom the Chief DAS has issued a Determination of civil penalty or debarment pursuant to Labor Code section 1777.7.;
- (c) "Awarding Body" means an awarding body or body awarding the contract (as defined in Labor Code section 1722);
- (d) "Chief DAS" means the Chief of the Division of Apprenticeship Standards, who may act through his or her designee or the Division of Apprenticeship Standards;
- (e) "DAS" means the Division of Apprenticeship Standards;
- (f) "Debarment" means the denial of the right to bid on or be awarded or to perform work as a subcontractor on any public works contract, that has been issued by the Chief DAS under Labor Code section 1777.7;
- (g) "Department" means the Department of Industrial Relations;
- (h) "Determination" means a civil penalty or debarment issued by the Chief DAS or his or her designee pursuant to Labor Code section 1777.7;
- (i) "Director" means the Director of the Department of Industrial Relations;
- (j) "Division" means the Division of Apprenticeship Standards;
- (k) "Hearing Officer" means any person appointed by the Director pursuant to Labor Code section 1777.7 to conduct hearings and other proceedings under Labor Code section 1777.7 and these Rules;
- (l) "Joint Labor-Management Committee" means a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (section 175a of Title 29 of the United States Code);
- (m) "Party" means an Affected Contractor, Subcontractor, or Responsible Officer against whom a Determination has issued, who has requested review of a Determination of civil penalty or debarment from which review is sought, and any other Person who has intervened under subparts (a), (b), or (c) of Rule 08 (Section 232.08).
- (n) "Person" means an individual, partnership, limited liability company, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character;
- (o) "Representative" means a person authorized by a Party to represent that Party in a proceeding before a Hearing Officer;
- (p) "Responsible Officer" means a person responsible for exercising supervision and control of a contractor's or subcontractor's operations as is necessary to secure compliance with the public works -- including public works apprenticeship -- obligations of a public works contractor or subcontractor set forth in Chapter 1 of Part 7 of Division 2 of the Labor Code, commencing with Section 1720. Such person may be a Responsible Officer against whom a Determination has issued, or may be a Responsible Officer who is requesting review on behalf of a contractor or subcontractor against whom a Determination has issued.

(q) "Rule" refers to a section within sections 232.01 -232.70 The Rule number corresponds to the last two digits of the full section number. (For example, Rule 08 is section 17208.)

(r) "Settlement Officer" means a Hearing Officer as defined in subpart (k) who conducts a settlement meeting under the provisions of Rule 21 (Section 232.21).

(s) "Surety" means a surety (as defined in Civil Code section 2787) that issues a bond for the performance of a public works job, but only where the Surety assumed the contract for performance of the public works job by an Affected Contractor, Subcontractor, or Responsible Officer, and where the Surety operated the job when the violations of Labor Code section 1777.5 occurred.

(t) "Working Day" means any day that is not a Saturday, Sunday, or State holiday, as determined with reference to Code of Civil Procedure sections 12(a) and 12(b) and Government Code sections 6700 and 6701.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.03. Computation of Time and Extensions of Time to Respond or Act.

(a) In computing the time within which a right may be exercised or an act is to be performed, the first day shall be excluded and the last day shall be included. If the last day is not a Working Day, the time shall be extended to the next Working Day.

(b) Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be: a postmark date imprinted on the envelope by the U.S. Postal Service if first-class postage was prepaid; or the date of delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(c) Where service of any notice, decision, pleading or other document is by first class mail, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five days if the place of address is within the State of California, and 10 days if the place of address is outside the State of California but within the United States. However, this Rule shall not extend the time within which the Administrator may reconsider or modify a decision to correct an error (other than a clerical error) under Labor Code section 1777.7(c)(4).

(d) Where service of any notice, pleading, or other document is made by an authorized method other than first class mailing, extensions of time to respond or act shall be calculated in the same manner as provided under section 1013 of the Code of Civil Procedure, unless a different requirement has been specified by the appointed Hearing Officer or by another provision of these Rules.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.04. Appointment of Hearing Officers; Delegation of Appointment Authority to Chief

Counsel.

(a) Upon receipt of a Request for Review of a Determination of civil penalty or debarment, the Administrator, acting through the Chief Counsel (see subpart (d) below), shall appoint an impartial Hearing Officer to conduct the review proceeding.

(b) The appointed Hearing Officer shall be an attorney employed by the Office of the Director - Legal Unit.

However, if no attorney employed by the Office of the Director - Legal Unit is available or qualified to serve in a particular matter, the appointed Hearing Officer may be any attorney or administrative law judge employed by the Department, other than an employee of the Division of Apprenticeship Standards ("DAS") or a person who has represented or advised the DAS on matters covered by Ch. 1 of Part 7 of Div. 2 of the Labor Code, commencing with Section 1720 within one year of the appointment, or who at any time has represented or advised the Affected Contractor, Subcontractor, or Responsible Officer regarding alleged violations of Ch. 1 of Part 7 of Div. 2 of the Labor Code, commencing with Section 1720.

(c) Any person appointed to serve as a Hearing Officer in any matter shall possess at least the minimum qualifications for service as an administrative law judge pursuant to Government Code section 11502(b) and shall be someone who is not precluded from serving under Government Code section 11425.30.

(d) The Administrator's authority under Labor Code section 1777.7(c) to appoint an impartial Hearing Officer is delegated in all cases to the Chief Counsel of the Office of the Director, or to the Chief Counsel's designated Assistant or Acting Chief Counsel when the Chief Counsel is unavailable or disqualified from participating in a particular matter. This delegation includes all related authority under Rule 40 [Section 232.40] below to appoint a different Hearing Officer to conduct all or any part of a review proceeding as well as the authority to consider and decide or to assign to another Hearing Officer for consideration and decision any motion to disqualify an appointed Hearing Officer.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.05. Authority of Hearing Officers.

(a) In any proceeding assigned for hearing and decision under the provisions of Labor Code section 1777.7, the appointed Hearing Officer shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Administrator, to hold a prehearing conference, to issue a subpoena and subpoena duces tecum for the attendance of a Person and the production of testimony, books, documents, or other things, to compel the attendance of a Person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the Parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a Party or witness and introduce into the hearing record documentary or other evidence, to request a Party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to exercise such other and additional authority as is delegated to Hearing Officers under these Rules or by an express written delegation by the Administrator, and to prepare a recommended decision, including a notice of findings, findings, and an order for approval by the Administrator.

(b) There shall be no right of appeal to or review by the Administrator of any decision, order, act, or refusal to act by an appointed Hearing Officer other than through the Administrator's review of the record in issuing or reconsidering a written decision under Rules 60 [Section 232.60] and 61 [Section 232.61] below.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.06. Access to Hearing Records.

(a) Hearing case records shall be available for inspection and copying by the public, to the same extent and subject to the same policies and procedures governing other records maintained by the Department. Hearing case records normally will be available for review in the office of the appointed Hearing Officer; provided however, that a case file may be temporarily unavailable when in use by the appointed Hearing Officer or by the

Administrator or his or her designee.

(b) Nothing in this Rule shall authorize the disclosure of any record or exhibit that is required to be kept confidential or is otherwise exempt from disclosure by law or that has been ordered to be kept confidential by an appointed Hearing Officer.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.07. Ex Parte Communications.

(a) Except as provided in this Rule, once a Request for Review is filed, and while the proceeding is pending, there shall be no direct or indirect communication regarding any issue in the proceeding to the appointed Hearing Officer or the Administrator, from the Chief DAS or any other Party or other interested Person, without notice and the opportunity for all Parties to participate in the communication.

(b) A communication made on the record in the hearing is permissible.

(c) A communication concerning a matter of procedure or practice is presumed to be permissible, unless the topic of the communication appears to the Hearing Officer to be controversial in the context of the specific case. If so, the Hearing Officer shall so inform the other participant and may terminate the communication or continue it until after giving all Parties notice and an opportunity to participate. Any written communication concerning a matter of procedure or practice, and any written response, or a written memorandum identifying the participants and stating the substance of any such oral communication or response, shall be added to the case file so that all Parties have a reasonable opportunity to review it. Unless otherwise provided by statute or these Rules, the appointed Hearing Officer may determine a matter of procedure or practice based upon a permissible ex-parte communication. The term "matters of procedure or practice" shall be liberally construed.

(d) A communication from the Chief DAS to the Hearing Officer or the Administrator which is deemed permissible under Government Code section 11430.30 is permitted only if any such written communication and any written response, or a written memorandum identifying the participants and stating the substance of any such oral communication or response, is added to the case file so that all Parties have a reasonable opportunity to review it.

(e) If the Hearing Officer or the Administrator receives a communication in violation of this Rule, he or she shall comply with the requirements of Government Code section 11430.50.

(f) To the extent not inconsistent with Labor Code section 1777.7, the provisions of Article 7 of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11430.10) of the Government Code governing ex parte communications in administrative adjudication proceedings shall apply to review proceedings conducted under these Rules.

(g) This Rule shall not be construed as prohibiting communications between the Administrator and the Chief DAS or between the Administrator and any other interested Person on issues or policies of general interest that coincide with issues involved in a pending review proceeding; *provided that* (1) the communication does not directly or indirectly seek to influence the outcome of any pending proceeding; (2) the communication does not directly or indirectly identify or otherwise refer to any pending proceeding; and (3) the communication does not occur at a time when the Director or the other party to the communication knows that a proceeding in which the other party to the communication is interested is under active consideration by the Administrator.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.08. Intervention and Participation by other Interested Persons.

(a) A bonding company and any Surety on a bond that secures the performance of the job covered by the Determination shall be permitted to intervene as a matter of right in any pending review filed by the Affected Contractor, Subcontractor, or Responsible Officer from the Determination in question; provided that, intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 232.31] below and within either 15 days after the bonding company or Surety was served with a copy of the Determination, or 15 days after the filing of the request for review, whichever is later. Thereafter, any request to intervene by such a bonding company or Surety shall be treated as a motion for permissive participation under subpart (c) of this Rule. A bonding company or Surety shall have the burden of proof with respect to any claim that it did not receive notice of the Determination until after the filing of the Request for Review.

(b) The employee(s), labor union, or Joint Labor-Management Committee, or apprenticeship program (joint or unilateral) who filed the formal complaint which led the Chief DAS to issue the Determination of civil penalty or debarment shall be permitted to intervene in a pending review filed by the Affected Contractor, Subcontractor, or Responsible Officer from the Determination of civil penalty or debarment in question; provided that, intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 232.31] below and there is no good cause to deny the request. Thereafter, any request to intervene by such employee(s), labor union, or Joint Labor-Management Committee shall be treated as a motion for permissive participation as an interested Person under subpart (d) of this Rule.

(c) Any other Person may move to participate as an interested Person in a proceeding in which that Person claims a substantial interest in the issues or underlying controversy and in which that Person's participation is likely to assist and not hinder or protract the hearing and determination of the case by the Hearing Officer and the Administrator. Interested Persons who are permitted to participate under this Rule shall *not* be regarded as Parties to the proceeding for any purpose, but may be provided notices and the opportunity to present arguments under such terms as the Hearing Officer deems appropriate.

(d) Rights to intervene or participate as an interested Person are only in accordance with this Rule. Intervention or permissive participation under this Rule shall not expand the scope of issues under review nor shall it extend any rights or interests which have been forfeited as a result of an Affected Contractor, Subcontractor, or Responsible Officer's own failure to file a timely Request for Review. The Hearing Officer may impose conditions on an intervenor's or other interested Person's participation in the proceeding, including but not limited to those conditions specified in Government Code §11440.50(c).

(e) No Person shall be required to seek intervention in a review proceeding as a condition for pursuing any other remedy available to that Person for the enforcement of the public works apprenticeship requirements of section 1777.5 of the Labor Code.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.09. Representation at Hearing.

(a) A Party may appear in person or through an authorized Representative, who need not be an attorney at law; however, a Party shall use the form Authorization for Representation by Non-Attorney [8 CCR 232.09(b) to authorize representation by any non-attorney who is not an owner, officer, or managing agent of that Party.

(b) Upon formal notification that a Party is being represented by a particular individual or firm, service of subsequent notices in the matter shall be made on the Representative, either in addition to or instead of the Party, unless and until such authorization is terminated or withdrawn by further written notice. Service upon an

authorized Representative shall be effective for all purposes and shall control the determination of any notice period or the running of any time limit for the performance of any acts, regardless of whether or when such notice may also have been served directly on the represented Party.

(c) An authorized Representative shall be deemed to control all matters respecting the interests of the represented Party in the proceedings.

(d) Parties and their Representatives shall have a continuing duty to keep the appointed Hearing Officer and all other Parties to the proceeding informed of their current address and telephone number.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.10. Proper Method of Service.

(a) Unless a particular method of service is specifically prescribed by statute or these Rules, service may be made by: (1) personal delivery; (2) priority or first class mailing postage prepaid through the U. S. Postal Service; (3) any other means authorized under Code of Civil Procedure section 1013; or (4) if authorized by the Hearing Officer pursuant to Rule 11 [Section 232.11] below, by facsimile or other electronic means.

(b) Service is complete at the time of personal delivery or mailing, or at the time of transmission as determined under Rule 11 [Section 232.11] below.

(c) Proof of service shall be filed with the document and may be made by: (1) affidavit or declaration of service; (2) written statement endorsed upon the document served and signed by the party making the statement; or (3) copy of letter of transmittal.

(d) Service on a Party who has appeared through an attorney or other Representative shall be made upon such attorney or Representative.

(e) In each proceeding, the Hearing Officer shall maintain an official address record which shall contain the names and addresses of all Parties and their Representatives, agents, or attorneys of record. Any change or substitution in such information must be communicated promptly in writing to the Hearing Officer. The official address record may also include the names and addresses of interested Persons who have been permitted to participate under Rule 08(d) [Section 232.08].

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.11. Filing and Service of Documents by Facsimile or Other Electronic Means.

(a) In individual cases the Hearing Officer may authorize the filing and service of documents by facsimile or by other electronic means, subject to reasonable restrictions on the time of transmission and the page length of any document or group of documents that may be transmitted by facsimile or other electronic means, and subject to any further requirements on the use of cover sheets or the subsequent filing and service of originals or hard copies of documents as the Hearing Officer deems appropriate. Filing and service by facsimile or other electronic means shall not be authorized under terms that substantially disadvantage any Party appearing or participating in the proceeding as a matter of right. A document transmitted by facsimile or other electronic means shall not be considered received until the next Working Day following transmission unless it is transmitted on a Working Day and the entire transmission is completed by no later than 4:00 p.m. Pacific Time.

(b) Filings and service by facsimile or other electronic means shall not authorized or accepted as a substitute for

another method of service that is required by statute or these Rules, unless the Party served has expressly waived its right to be served in the required manner.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.12. Administrative Adjudication Bill of Rights.

(a) The provisions of the Administrative Adjudication Bill of Rights found in Article 6 of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11425.10) of the Government Code shall apply to these review proceedings to the extent not inconsistent with a state or federal statute, a federal regulation, or a court decision which applies specifically to the Department. The enumeration of certain rights in these Rules may expand but shall not be construed as limiting the same or similar provision of the Administrative Adjudication Bill of Rights; nor shall the enumeration of certain rights in these Rules be construed as negating other statutory rights not stated.

(b) Ex parte communications shall be permitted between the appointed Hearing Officer and the Administrator in accordance with Government Code section 11430.80(b).

(c) The presentation or submission of any written communication by a Party or other interested Person during the course of a review proceeding shall be governed by the requirements of Government Code §11440.60 (b) and (c).

(d) Unless otherwise indicated by express reference within the body of one of these Rules, the provisions of Chapter 5 of Title 2, Division 3, Part 1 (commencing with section 11500) of the Government Code shall not apply to these review proceedings.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

DETERMINATIONS AND REQUEST FOR REVIEW

232.20. Service and Contents of Determinations.

(a) A Determination of civil penalty or debarment shall be served on the contractor, subcontractor, and responsible officer, if applicable, by first class and certified mail pursuant to the requirements of Code of Civil Procedure section 1013. A copy of the notice shall also be served by certified mail on any bonding company issuing a bond that secures the performance of the job covered by the Determination and to any Surety on the bond if its identities of such companies are known or reasonably ascertainable. The identity of any Surety issuing a bond for the benefit of an Awarding body as designated obligee shall be deemed "known or reasonably ascertainable," and the Surety shall be deemed to have received the notice required under this subpart if sent to the address appearing on the face of the bond.

(b) A Determination of civil penalty or debarment shall be in writing and shall include the following information:

(1) a description of the nature of the violation and basis for the Determination; and

(2) the amount of penalties due, including a specification of amounts to be withheld from available contract payments, and any period of debarment.

(c) A Determination of civil penalty or debarment shall also include the following information:

(1) the name and address of the office of the Administrator to whom a Request for Review must be sent, as well as the name and address of the office of the Chief DAS on whom a copy of the Request for Review must be served;

(2) information on the procedures for obtaining review of the Determination;

(3) notice of the Opportunity to Request a Settlement Meeting under Rule 21 [Section 232.21] below; and

(4) the following statement which shall appear in bold or another type face that makes it stand out from the other text:

Failure by a contractor, subcontractor, or responsible officer to submit a timely Request for Review will result in a final order which shall be binding on the contractor, subcontractor, or responsible officer. Labor Code section 1777.7(c)(1).

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.21. Opportunity for Early Settlement.

(a) Any Party may request a meeting with the Chief DAS for the purpose of attempting to settle the dispute regarding the Determination.

(b) A settlement meeting may be conducted subject only to the agreement of the Parties, including agreement to any particular Hearing Officer to act as the Settlement Officer, and agreement to waive any right to disqualify the Office of the Director -- Legal Unit from representing the Director or any division of the Department other than DAS in the event any part of the dispute goes to court. The settlement meeting may be held in person or by telephone.

(c) Nothing herein shall preclude the Parties from meeting or attempting to settle a dispute at any time.

(d) Neither the making or pendency of a request for a settlement meeting, nor the fact that the Parties have met or have failed or refused to meet as authorized by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 [Section 232.22] below.

(e) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, such a settlement meeting shall be admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, such a settlement meeting, other than a final settlement agreement, shall be admissible or subject to discovery in any administrative or civil proceeding. Where a separate Settlement Officer has conducted the settlement meeting, all communications by and between the parties and the Settlement Officer are completely confidential, and not to be shared by the parties or by the Settlement Officer with the Hearing Officer, other attorneys working in the Office of the Director -- Legal Unit, or clients of the Office of the Director -- Legal Unit.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.22. Filing of Request for Review.

(a) Any Request for Review of an Determination of civil penalty or debarment shall be transmitted in writing to the office of the Administrator within 30 days after service of the Determination. Failure to request review within 30 days shall result in the Determination becoming final and not subject to further review under these

Rules.

(b) A Request for Review shall be transmitted to the office of the Administrator, as designated on the Determination from which review is sought, at the following address:

Department of Industrial Relations
Office of the Director -- Legal Unit
Attention: Lead Hearing Officer
P.O. Box 420603
San Francisco, CA 94142-0603

(c) A Request for Review shall be deemed filed on the date of mailing, as determined by the U.S. Postal Service postmark date on the envelope or the overnight carrier's receipt in accordance with Rule 03(b) [Section 232.03 (b)] above, or on the date of receipt by the designated office of the Administrator, whichever is earlier.

(d) An additional copy of the Request for Review must be served on the Chief DAS, at the address as designated on the Determination from which review is sought.

(e) A Request for Review either shall clearly identify the Determination from which review is sought, including the date of the Determination, or it shall include a copy of the Determination as an attachment. A Request for Review shall also set forth the basis upon which the Determination is being contested. A Request for Review shall be liberally construed in favor of its sufficiency; however, the Hearing Officer may require the Party seeking review to provide a further specification of the issues or claims being contested and a specification of the basis for contesting those matters.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.23. Transmittal of Request for Review to Department.

Within ten (10) days following its receipt of a Request for Review, the Chief DAS shall transmit to the Office of the Director - Legal Unit, the Request for Review and copies of the Determination of civil penalty or debarment at the following address.

Department of Industrial Relations
Office of the Director - Legal Unit
Attention: Lead Hearing Officer
P.O. Box 420603
San Francisco, CA 94142-0603

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.24. Disclosure of Evidence.

(a) Within ten (10) days following its receipt of a Request for Review, the Chief DAS shall also notify the Affected Contractor, Subcontractor, or Responsible Officer, if applicable, of its opportunity and the procedures for reviewing evidence to be utilized by the Chief DAS at the hearing on the Request for Review.

(b) The Chief DAS shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor, Subcontractor, or Responsible Officer the option, at the Affected Contractor, Subcontractor, or Responsible Officer own expense, to either (A) obtain copies of all such evidence

through a commercial copying service or (B) inspect and copy such evidence at the office of the Chief DAS during normal business hours; or if (2) the Chief DAS at its own expense forwards copies of all such evidence to the Affected Contractor, Subcontractor, or Responsible Officer.

(c) The evidence required to be provided under this Rule shall include the identity of witnesses whose testimony the Chief DAS intends to present, either in person at the hearing or by declaration or affidavit. This provision shall not be construed as requiring the Chief DAS to prepare or provide any separate listing of witnesses whose identities are disclosed within the written materials made available under subpart (a).

(d) The Chief DAS shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; provided that, this deadline may be extended by written request or agreement of the Affected Contractor, Subcontractor, or Responsible Officer. The Chief DAS's failure to make evidence available for review as required by Labor Code section 1777.7(c) and this Rule, shall preclude the Chief DAS from introducing such evidence in proceedings before the Hearing Officer or the Administrator.

(e) This Rule shall not preclude the Chief DAS from relying upon or presenting any evidence first obtained after the initial disclosure of evidence under subparts (a) through (d), provided that, such evidence is promptly disclosed to the Affected Contractor, Subcontractor, or Responsible Officer. This Rule also shall not preclude the Chief DAS from presenting previously undisclosed evidence to rebut new or collateral claims raised by another Party in the proceeding.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.25. Withdrawal of Request for Review; Reinstatement.

(a) An Affected Contractor, Subcontractor, or Responsible Officer may withdraw a Request for Review by written notification at any time before a decision is issued or by oral motion on the hearing record. The Hearing Officer may grant such withdrawal by letter, order or decision served on the Parties.

(b) For good cause, a Request for Review so dismissed may be reinstated by the Hearing Officer or the Administrator upon a showing that the withdrawal resulted from misinformation given by the Chief DAS or otherwise from fraud or coercion. A motion for reinstatement must be filed within 60 days of service of the letter, order or decision granting withdrawal of the Request for Review or, in the event of fraud which could not have been suspected or discovered with the exercise of reasonable diligence, within 60 days of discovery of such fraud. The motion shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.

(c) Notwithstanding any application or showing made under subpart (b) of this Rule, neither the Hearing Officer nor the Administrator may reinstate any Request for Review where the underlying Determination has become final and entered as a court judgment.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.26. Dismissal or Amendment of Determinations.

(a) Upon motion to the appointed Hearing Officer, the Chief DAS may dismiss or amend an Determination as follows:

(1) A Determination may be dismissed or amended to eliminate or reduce a charge of violation from serious and knowing to knowing, an amount of monetary penalty, or a period of debarment that is not

warranted under the facts and circumstances of the case, or that has been satisfied, or to conform to an order of the Hearing Officer or the Administrator.

(2) For good cause, an Determination may be amended to revise or increase a charge from knowing to serious and knowing, an amount of monetary penalty, or a period of debarment based upon a recomputation or the discovery of new evidence subsequent to the issuance of the original Assessment or Notice.

(b) The Hearing Officer shall grant any motion to dismiss or amend an Determination downward under subparts (a)(1) absent a showing that such dismissal or amendment will result in the forfeiture of substantial substantive rights of another Party to the proceeding. The Hearing Officer may grant a motion to amend a Determination upward under subpart (a)(2) under such terms as are just, including where appropriate the extension of an additional opportunity for early settlement under Rule 21 [Section 232.21]. Unless the Hearing Officer determines otherwise, an amended Determination shall be deemed fully controverted without need for filing an additional or amended Request for Review.

(c) The Administrator may, upon the record on review of the Determination and without amendment, increase or decrease the penalty -- whether civil penalty or debarment -- based upon consideration of the factors listed in Labor Code section 1777.7(f).

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.27. Early Disposition of Untimely Assessment, Withholding, or Request for Review.

(a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may issue an Order to Show Cause why a Determination or a Request for Review should not be dismissed as untimely under the relevant statute.

(b) An Order to Show Cause issued under subpart (a) of this Rule shall be served on all Parties who have appeared or been served with any prior notice in the matter and shall provide the Parties with at least 10 days to respond in writing to the Order to Show Cause and an additional 5 days following the service of such responses to reply to any submission by any other Party. Evidence submitted in support or opposition to an Order to Show Cause shall be by affidavit or declaration under penalty of perjury. There shall be no oral hearing on an Order to Show Cause issued under this Rule unless requested by a Party or by the Hearing Officer.

(c) After the time for submitting responses and replies to the Order to Show Cause has passed or after the oral hearing, if any, the Hearing Officer may do one of the following: (1) recommend that the Administrator issue a decision setting aside the Determination or dismissing the Request for Review as untimely under the statute; (2) find the Determination or Request for Review timely and direct that the matter proceed to hearing on the merits; or (3) reserve the timeliness issue for further consideration and determination in connection with the hearing on the merits.

(d) A decision by the Administrator which sets asides an Determination or which dismisses a Request for Review as untimely shall be subject to reconsideration and to judicial review in the same manner as any other Final Order or Decision of the Administrator. A determination by the Hearing Officer that the Determination or Request for Review was timely or that the timeliness issue should be reserved for further consideration and determination in connection with the hearing on the merits shall *not* be subject to appeal or review except as part of any reconsideration or appeal from the Decision of the Administrator made after the hearing on the merits.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.28. Finality of Determinations When No Timely Request for Review is Filed; Authority of Awarding Body to Disburse Withheld Funds.

(a) Upon the failure of an Affected Contractor, Subcontractor or Responsible Officer to file a timely Request for Review under Labor Code section 1777.7(c) and Rule 22 [Section 232.22] above, the Determination of civil penalty or debarment shall become a "final order" as to the Affected Contractor, Subcontractor, or Responsible Officer that the Chief DAS may certify and file with the superior court in accordance with Labor Code section 1777.7(c)(6).

(b) Where a Determination of civil penalty or debarment has become final as to at least one but not as to every Affected Contractor, Subcontractor, or Responsible Officer, the Awarding Body shall continue to withhold and retain the amounts required to satisfy any penalties at stake in a review proceeding initiated by any other Affected Contractor, Subcontractor, or Responsible Officer until there is a final order in that proceeding that is no longer subject to judicial review.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.29. Intentionally left blank.

PREHEARING PROCEDURES

232.30. Scheduling of Hearing; Continuances and Tolling.

(a) The appointed Hearing Officer shall establish the place and time of the hearing on the merits, giving due consideration to the needs of all Parties and the statutory time limits for hearing and deciding the matter. Parties are encouraged to communicate scheduling needs to the Hearing Officer and all other Parties at the earliest opportunity. It shall not be a violation of Rule 07 [Section 232.07]'s prohibition on ex parte communications for the Hearing Officer or his or her designee to communicate with Parties individually for purposes of clearing dates and times and proposing locations for the hearing. The Hearing Officer may also conduct a prehearing conference by telephone or any other expeditious means for purposes of establishing the time and place of the hearing.

(b) Once a hearing date is set, a request for a continuance that is not joined in by all other Parties or that is for more than 30 days will not be granted absent a showing of extraordinary circumstances, giving due regard to the potential prejudice to other Parties in the case and other Persons affected by the matter under review. Absent an enforceable waiver (*see* subpart (d) below), no continuance will be granted nor any proceeding otherwise delayed if doing so is likely to prevent the Hearing Officer from commencing the hearing on the matter within the statutory time limit.

(c) A request for a continuance that is for 30 days or less and is joined by all Parties shall be granted upon a showing of good cause. Notwithstanding subpart (b) above, a unilateral request for a continuance made by the Party who filed the Request for Review shall be granted upon a showing of good cause if the new date for commencing the hearing is no more than 150 days after the date of service of the Determination of civil penalty or debarment

(d) If a Party makes or joins in any request that would delay or otherwise extend the time for hearing or deciding a review proceeding beyond any prescribed time limit, such request shall also be deemed a waiver by that Party of that time limit.

(e) The time limits for hearing and deciding a review proceeding shall also be deemed tolled (1) when proceedings are suspended to seek judicial enforcement of a subpoena or other order to compel the attendance, testimony, or production of evidence by a necessary witness; (2) when the proceedings are stayed or enjoined by any court order; (3) between the time that a proceeding is dismissed and then ordered reinstated under Rule 25 [Section 232.25] above; (4) upon the order of a court reinstating or requiring rehearing of the merits of a proceeding; or (5) during the pendency of any other cause beyond the Administrator's direct control (including but not limited to natural disasters, temporary unavailability of a suitable hearing facility, or absence of budget authority) that prevents the Administrator or any appointed Hearing Officer from carrying out his or her responsibilities under these Rules.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.31. Prehearing Conference.

Hearing Officer intends to cover in the prehearing conference, but the failure of the Notice to enumerate some matter shall not preclude its discussion or consideration at the conference. The Notice shall advise the Parties that failure to appear at the prehearing conference may subject the Parties to default, pursuant to Rule 46 [Section 232.46].

(c) With or without a prehearing conference, the Hearing Officer may issue such procedural Orders as are appropriate for the submission of evidence or briefs and conduct of the hearing, consistent with the substantial rights of the affected Parties.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.32. Consolidation and Severance.

(a) The Hearing Officer may consolidate for hearing and decision any number of proceedings where the facts and circumstances are similar and consolidation will result in conservation of time and expense. Where the Hearing Officer proposes to consolidate proceedings on his or her own motion, the Parties shall be given reasonable notice and an opportunity to object before consolidation is ordered.

(b) The Hearing Officer may sever consolidated proceedings for good cause.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.33. Prehearing Motions; Cut Off Date.

(a) Any motion made in advance of the hearing on the merits, any opposition thereto, and any further reply shall be in writing and directed to the appointed Hearing Officer. No particular format shall be required; however, the following information shall appear prominently on the first page: (1) the case name (*i.e.*, names of the Parties); (2) any assigned case number; (3) the name of the Hearing Officer to whom the paper is being submitted; (4) the identity of the Party submitting the paper; (5) the nature of the relief sought; and (6) the scheduled date, if any, for the hearing on the merits of the Request for Review. The motion shall also include a Proof of Service, as defined in Rule 10 [Section 232.10] above, showing that copies have been served on all other Parties to the proceeding.

(b) Prehearing motions shall be served and filed no later than 20 days prior to the hearing on the merits of the Request for Review. Any opposition shall be served and filed no later than 10 days after service of the motion or at least 7 days prior to the hearing on the merits, whichever is earlier. The Hearing Officer may in his or her

discretion decide the motion in writing in advance of the hearing on the merits or reserve the matter for further consideration and determination at the hearing on the merits.

(c) There shall be no right to a separate oral hearing on any prehearing motion, except in those instances in which an oral hearing has been specially requested by a Party or the Hearing Officer and in which the enforcement or forfeiture of a fundamental right is at stake. When the Hearing Officer determines that such an oral hearing is necessary or appropriate, it may be conducted by telephone or other manner that is convenient to the Parties.

(d) With the exception of timeliness challenges under Rule 27 [Section 232.27], prehearing motions which seek to dispose of a Request for Review or any related claim or defense are disfavored and ordinarily will not be considered prior to the hearing on the merits.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.34. Evidence by Affidavit or Declaration.

(a) At any time 20 or more days prior to commencement of a hearing, a Party may serve upon all other Parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subpart (b). Unless another Party, within 10 days after service of such notice, delivers to the proponent a request to cross-examine the affiant or declarant, the right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified in person. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefor is made as herein provided, the affidavit or declaration may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subpart (a) shall be substantially in the following form with the appropriate information inserted in the places enclosed by brackets:

"The accompanying affidavit or declaration of [name of affiant or declarant] will be introduced as evidence at the hearing in [title and other information identifying the proceeding]. [Name of affiant or declarant] will not be called to testify orally, and you will not be entitled to question the affiant or declarant unless you notify [name of the proponent, Representative, agent or attorney] at [address] that you wish to cross-examine the affiant or declarant. Your request must be mailed or delivered to [name of proponent, Representative, agent or attorney] on or before [specify date at least 10 days after anticipated date of service of this notice on the other Parties]."

(c) If a timely request is made to cross-examine an affiant or declarant under this Rule, the burden of producing that witness at the hearing shall be upon the proponent of the witness. If the proponent fails to produce the witness, the affidavit or declaration may be introduced in evidence, but shall be given only the same effect as other hearsay evidence under Rule 44 [Section 18244].

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.35. Subpoena and Subpoena Duces Tecum.

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for the production of documents at any reasonable time and place or at a hearing.

(b) Subpoenas and subpoenas duces tecum shall be issued by the Hearing Officer at the request of a Party, or by the attorney of record for a Party, in accordance with sections 1985 to 1985.6, inclusive, of the Code of Civil

Procedure. The burden of serving a subpoena that has been issued by the Hearing Officer shall be upon the Party who requested the subpoena.

(c) Service of subpoenas and subpoenas duces tecum, objections thereto, and mileage and witness fees shall be governed by the provisions of Government Code sections 11450.20 through 11450.40.

(d) Subpoenas and subpoenas duces tecum shall be enforceable through the Contempt and Monetary Sanctions provision set forth in Rule 47 [Section 232.47] below. A Party aggrieved by the failure or refusal of any witness to obey a subpoena or subpoena duces tecum shall have the burden of showing to the satisfaction of the Hearing Officer that the subpoena or subpoena duces tecum was properly issued and served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.36. Written Notice to Party in Lieu of Subpoena.

(a) In the case of the production of a Party of record in the proceeding or of a Person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the Party or Person. For purposes of this Rule, a Party of record in the proceeding or Person for whose benefit a proceeding is prosecuted or defended includes an officer, director, or managing agent of any such Party or Person.

(b) Service of written notice to attend under this Rule shall be made in the same manner and subject to the same conditions provided in section 1987 of the Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(c) The Hearing Officer shall have authority under Rule 47 [Section 232.47] below to sanction a Party who fails or refuses to comply with a written notice to attend that meets the requirements of this Rule and has been timely served in accordance with section 1987 of the Code of Civil Procedure. However, the Hearing Officer may not initiate contempt proceedings against the witness for failing to appear based solely on non-compliance with a written notice to attend served on the Party's attorney. A Party seeking sanctions for another Party's failure or refusal to comply with a written notice to attend shall have the burden of showing to the satisfaction of the Hearing Officer that the written notice to attend was properly issued and timely served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.37. Depositions and Other Discovery.

(a) There shall be no right to take oral depositions or obtain any other form of discovery that is not expressly authorized under these Rules.

(b) Oral depositions may be conducted only by stipulation of all Parties to the proceedings or by order of the appointed Hearing Officer upon a showing of substantial good cause. Oral depositions will be permitted only for purposes of obtaining the testimony of witnesses who are likely to be unavailable to testify at the hearing.

(c) Nothing in this Rule shall preclude the use of deposition testimony or other evidence obtained in separate proceedings, if such evidence is otherwise relevant and admissible.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

HEARINGS

232.40. Notice of Appointment of Hearing Officer; Objections.

(a) Notice of the Appointment of a Hearing Officer under Rule 04 [Section 232.04] above shall be provided to the Parties as soon as practicable and no later than when the matter is noticed for a prehearing conference or hearing.

(b) The Administrator or Chief Counsel under Rule 04 [Section 232.04] may appoint a different Hearing Officer to conduct and hear the review or to conduct and dispose of any preliminary or procedural matter in a given case.

(c) A Party wishing to object to the appointment of a particular Hearing Officer, including for any one or more of the grounds specified in sections 11425.30 and 11425.40 of the Government Code or section 1777.7 of the Labor Code, shall within 10 days after receiving notice of the appointment and no later than the start of any hearing on the merits, whichever is earlier, file a motion to disqualify the appointed Hearing Officer together with a supporting affidavit or declaration. The motion shall be filed with the Chief Counsel of the Office of the Director at the address indicated in Rule 23 [Section 232.23] above. Notwithstanding the foregoing time limits, if a Party subsequently discovers facts constituting grounds for the disqualification of the Hearing Officer, including but not limited to that the Hearing Officer has received a prohibited ex parte communication in the pending case, the motion shall be filed as soon as practicable after the facts constituting grounds for disqualification are discovered.

(d) Upon receipt of a motion to disqualify the Hearing Officer, the Administrator may: (1) consider and decide the motion or appoint another Hearing Officer to consider and decide the motion, in which case the challenged Hearing Officer shall first be given an opportunity to respond to the motion, but no proceedings shall be conducted by the challenged Hearing Officer until the motion is determined; or (2) appoint another Hearing Officer to hear the Request for Review, in which case the motion shall be deemed moot.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.41. Time and Place of Hearing.

(a) A hearing on the merits of a timely Request for Review shall be commenced within 90 days after the date it is received by the office of the Administrator. The hearing shall be conducted at a suitable location within the county where the appointed Hearing Officer maintains his or her regular office, unless the hearing is moved to a different county in accordance with subpart (b) below.

(b) Upon the agreement of the Parties or upon a showing of good cause by either the Party who filed the Request for Review or the Chief DAS, the hearing shall be conducted at a suitable location within either (1) the county where a majority of the subject public works employment was performed, or (2) any other county that is proximate to or convenient for the Parties and necessary witnesses.

(c) A suitable location under this section means one that is open and accessible to members of the public and which includes appropriate facilities for the recording of testimony. Any facility that is regularly used by any state agency or by the Awarding Body for public hearings and that will reasonably accommodate the anticipated number of Parties and witnesses involved in the proceeding, is presumed suitable in the absence of a contrary showing. Parties seeking to change the location of a hearing under subpart (b) shall make reasonable efforts to

identify, agree upon, and arrange for the availability of a suitable location within a county specified in subpart (b)(1) or (b)(2).

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.42. Open Hearing; Confidential Evidence and Proceedings; and Exclusion of

Witnesses.

(a) Subject to the qualifications set forth below, the hearing shall be open to the public. If all or part of the hearing is conducted by telephone, television, or other electronic means, the Hearing Officer shall conduct the hearing from a location where members of the public may be physically present, and members of the public shall also have a reasonable right of access to the hearing record and any transcript of the proceedings.

(b) Notwithstanding the provisions of subpart (a), the Hearing Officer may order closure of a hearing or make other protective orders to the extent necessary to: (1) preserve the confidentiality of information that is privileged, confidential, or otherwise protected by law; (2) ensure a fair hearing in the circumstances of the particular case; or (3) protect a minor witness or a witness with a developmental disability from intimidation or other harm, taking into account the rights of all persons.

(c) Upon motion of any Party or upon his or her own motion, the Hearing Officer may exclude from the hearing room any witnesses not at the time under examination. However, a Party to the proceeding and the Party's Representative shall not be excluded.

(d) This section does not apply to any prehearing or settlement conference.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.43. Conduct of Hearing.

(a) Testimony shall be taken only on oath or affirmation under penalty of perjury.

(b) Every Party shall have the right to call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which Party first called the witness to testify; and to rebut any opposing evidence. A Party may be called by an opposing Party and examined as if under cross-examination, whether or not the Party called has testified or intends to testify on his or her own behalf.

(c) The Hearing Officer may call and examine any Party or witness and may on his or her own motion introduce exhibits.

(d) The Hearing Officer shall control the taking of evidence and other course of proceedings in a hearing and shall exercise that control in a manner best suited to ascertain the facts and safeguard the rights of the Parties. Prior to taking evidence, the Hearing Officer shall define the issues and explain the order in which evidence will be presented; provided that, for good cause the Hearing Officer later may vary the order of presentation as circumstances warrant.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.44. Evidence Rules; Hearsay.

(a) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(b) The rules of privilege shall be recognized to the same extent and applied in the same manner as in the courts of this state.

(c) The Hearing Officer may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(d) Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it either would be admissible over objection in a civil action or no Party raises an objection to such use. Unless previously waived, an objection or argument that evidence is insufficient in itself to support a finding because of its hearsay character shall be timely if presented at any time before submission of the case for decision.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.45. Official Notice.

(a) A Hearing Officer may take official notice of (1) the Director's General Prevailing Wage Determinations, the Director's Precedential Coverage Decisions, precedential decisions of the Administrator, and wage data, studies, and reports issued by the Division of Labor Statistics and Research; (2) any other generally accepted technical fact within the fields of labor and employment that are regulated by the Director under Divisions 1, 2, and 3 of the Labor Code; and (3) any fact which either must or may be judicially noticed by the courts of this state under Evidence Code sections 451 and 452.

(b) The Parties participating in a hearing shall be informed of those matters as to which official notice is proposed to be taken and given a reasonable opportunity to show why and the extent to which official notice should or should not be taken.

(c) The Hearing Officer or the Director shall state in a decision, order, or on the record the matters as to which official notice has been taken.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.46. Failure to Appear; Relief from Default.

(a) Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may enter a default for failure to appear, or proceed in that Party's absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party.

(b) For good cause and under such terms as are just, the appointed Hearing Officer or the Director may relieve a Party from the effects of any failure to appear and order that a review proceeding be reinstated or reheard. A Party seeking relief from non-appearance shall file a written motion at the earliest opportunity and no later than 10 days following a proceeding of which the Party had actual notice. Such application shall be supported by an affidavit or declaration based on the personal knowledge of the declarant, and copies of the application and any supporting materials shall be served on all other Parties to the proceeding. No application shall be granted unless and until the other Parties have been afforded a reasonable opportunity to make a showing in opposition.

An Order reinstating a proceeding or granting a rehearing under this section may be conditioned upon providing reimbursement to the Department and the other Parties for the costs associated with the prior non-appearance.

(c) Notwithstanding any application or showing made under subpart (b) of this Rule, neither the Hearing Officer nor the Administrator may reinstate any Request for Review where the underlying Determination of civil penalty or debarment has become final and entered as a court judgment.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.47. Contempt and Monetary Sanctions.

(a) If any Person in proceedings before a Hearing Officer disobeys or resists any lawful order or refuses, without substantial justification, to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceedings, or violates the prohibition against ex parte communications under Rule 07 [Section 232.07] above, the Hearing Officer may do any one or more of the following: (1) certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20; (2) exclude the Person from the hearing room; (3) prohibit the Person from testifying or introducing certain matters in evidence; and/or (4) establish certain facts, claims, or defenses if the Person in contempt is a Party.

(b) Either the Hearing Officer by separate order or the Administrator in his or her decision may order a Party, the Party's authorized Representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another Party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in section 128.5 of the Code of Civil Procedure. Such order or the denial of such an order shall be subject to judicial review in the same manner as a decision of the Administrator on the merits. The order shall be enforceable in the same manner as a money judgment or by the contempt sanction.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.48. Interpreters.

(a) Proceedings shall be conducted in the English language. The notice advising a Party of the hearing date shall also include notice of the Party's right to request an interpreter for a Party or witness who cannot speak or understand English, or who can do so only with difficulty, or who is deaf or hearing impaired as defined under Evidence Code section 754.

(b) A request for an interpreter for a Party or witness shall be submitted as soon as possible after the requesting Party becomes aware of the need for an interpreter and prior to the commencement of the hearing. The request should include information that (1) will enable the Hearing Officer and Department to obtain an interpreter with appropriate skills; and (2) will assist the Hearing Officer in determining whether the Department or the requesting Party should pay for the cost of the interpreter.

(c) Upon receipt of a timely request, the Hearing Officer shall direct the Department to provide an interpreter and shall also decide whether the Department or the requesting Party shall pay the cost of the interpreter, based upon an equitable consideration of all the circumstances, including the requesting Party's ability to pay.

(d) A person is qualified to serve as an interpreter if he or she (1) is on the current State Personnel Board List of Certified Administrative Hearing Interpreters maintained pursuant to Government Code section 11435.25; and (2) has also been examined and determined by the Department to be sufficiently knowledgeable of the

terminology and procedures generally used in these proceedings.

(e) In the event that a qualified interpreter under subpart (d) is unavailable or if there are no certified interpreters for the language in which assistance is needed, the Hearing Officer may qualify and appoint another interpreter to serve as needed in a single hearing or case.

(f) Before appointment of an interpreter, the Hearing Officer or a Party may conduct a brief supplemental examination of the prospective interpreter to see if that person has the qualifications necessary to serve as an interpreter, including whether he or she understands terms and procedures generally used in these proceedings, can explain those terms and procedures in English and the other language being used, and can interpret those terms and procedures into the other language. An interpreter shall not have had any prior substantive involvement in the matter under review, and shall disclose to the Hearing Officer and the Parties any actual conflict of interest or appearance of conflict. Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest. A conflict may exist if an interpreter is an employee of, acquainted with, or related to a Party or witness to the proceeding, or if an interpreter has an interest in the outcome of the proceeding.

(g) The Hearing Officer shall disqualify an interpreter if the interpreter cannot understand and interpret the terms and procedures used in the hearing or prehearing conference, has disclosed privileged or confidential communications, or has engaged in conduct which, in the judgment of the Hearing Officer, creates an appearance of bias, prejudice, or partiality.

(h) Nothing in this section limits any further rights extended by Evidence Code section 754 to a Party or witness who is deaf or hard of hearing.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.49. Hearing Record; Recording of Testimony and other Proceedings.

(a) The Hearing Officer and the Administrator shall maintain an official record of all proceedings conducted under these Rules. In the absence of a determination under subpart (b) below, all testimony and other proceedings at any hearing shall be recorded by audiotape. However, no recording by audiotape or otherwise shall be required of a duly noticed hearing at which none of the Parties appear. Recorded testimony or other proceedings need not be transcribed unless requested for purposes of further court review of a decision or order in the same case.

(b) Upon the application of any Party or upon his or her own motion, the Hearing Officer may authorize the use of a certified court reporter, videotape, or other appropriate means to record the testimony and other proceedings. Any application by a Party under this subpart shall be made at a prehearing conference or by prehearing motion filed no later than 10 days prior to the scheduled date of hearing. Upon the granting of any such application, it shall be the responsibility of the Party or Parties who made the application to procure and pay for the services of a qualified person and any additional equipment needed to record the testimony and proceedings by the requested means. Ordinarily the granting of such application will be conditioned on the applicant's paying for certified copies of the transcript for the official record and for the other Parties. The failure of a requesting Party to comply with this requirement shall not be cause for delaying the hearing on the merits, but instead shall result in the proceedings being tape recorded in accordance with subpart (a).

(c) The Parties may, at their own expense, arrange for the recording of testimony and other proceedings through a different means other than the one authorized by the Hearing Officer, *provided that* it does not in any way interfere with the Hearing Officer's control and conduct of the proceedings, and *further provided that*, it shall

not be regarded as an official record for any purpose absent a stipulation by all of the Parties or order of the Hearing Officer.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.50. Burdens of Proof on Wages and Penalties.

(a) The Chief DAS has the burden of coming forward with evidence that the Affected Contractor, Subcontractor, or Responsible Officer (1) was served with a Determination of civil penalty or debarment in accordance with Rule 20 [Section 232.20]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 232.24]; (3) that such evidence provides prima facie support for the Determination of civil penalty or debarment; (4) where the civil penalty is set above zero, that the Chief DAS has considered all of the circumstances listed in Labor Code section 1777.7(f); (5) where debarment is sought, that the violation is serious, and that the Chief DAS has considered all of the circumstances listed in Labor Code section 1777.7(f); and, (6) where a Determination has issued against a prime contractor for the violations of a subcontractor, that the evidence provides prima facie support to show knowledge of the prime contractor or failure by the prime contractor to comply with requirements as listed under Labor Code section 1777.7(d).

(b) If the Chief DAS meets its initial burden under subpart (a), the Affected Contractor, Subcontractor, or Responsible Officer has the burden of producing evidence to disprove a knowing violation of Labor Code section 1777.5, to disprove the circumstances relied on by the Chief DAS under Labor Code section 1777.7(f), and to disprove knowledge of the prime contractor or failure of the prime contractor to comply with the requirements as listed under Labor Code section 1777.7(d).

(c) All burdens of proof and burdens of producing evidence shall be construed in a manner consistent with relevant sections of the Evidence Code, and the quantum of proof required to establish the existence or non-existence of any fact shall be by a preponderance of the evidence, unless a higher standard is prescribed by law.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.51. Intentionally left blank.

232.52. Oral Argument and Briefs.

(a) Parties may submit prehearing briefs of reasonable length under such conditions as the appointed Hearing Officer shall prescribe. Parties shall also be permitted to present a closing oral argument of reasonable length at or following the conclusion of the hearing.

(b) There shall be no automatic right to file a post-hearing brief. However, the Hearing Officer may permit the Parties to submit written post-hearing briefs, under such terms as are just. The Hearing Officer shall have discretion to determine, among other things, the length and format of such briefs and whether they will be filed simultaneously or on a staggered (opening, response, and reply) basis.

(c) In addition to or as an alternative to post-hearing briefs, the Hearing Officer may also prepare proposed findings or a tentative decision or may designate a Party to prepare proposed findings and thereafter give the Parties a reasonable opportunity to present arguments in support of or opposition to any proposed findings or tentative decision prior to the issuance of a decision by the Director under Rule 60 [Section 232.60] below.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.53. Conclusion of Hearing; Time for Decision.

(a) The hearing shall be deemed concluded and the matter submitted either upon the completion of all testimony and post-hearing arguments or upon the expiration of the last day for filing any post-hearing brief or other authorized submission, whichever is later. Thereafter, the Administrator shall have 45 days within which to issue a written decision affirming, modifying, or dismissing the Determination of civil penalty or debarment.

(b) For good cause, the Hearing Officer may vacate the submission and reopen the hearing for the purpose of receiving additional evidence or argument, in which case the time for the Administrator to issue a written decision shall run from the date of resubmission.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

DECISION OF THE ADMINISTRATOR

232.60. Decision.

(a) The appointed Hearing Officer shall prepare a recommended decision for the Administrator's review and approval. The decision shall consist of a notice of findings, findings, and an order, and shall be in writing and include a statement of the factual and legal basis for the decision, consistent with the requirements of Labor Code section 1777.7 and Government Code section 11425.50.

(b) A recommended decision shall have no status or effect unless and until approved by the Administrator and issued in accordance with subpart (c) below.

(c) A copy of the decision shall be served by first class mail on all Parties in accordance with the requirements of Code of Civil Procedure section 1013. If a Party has appeared through an authorized Representative, service shall be made on that Party at the last known address on file with the Chief DAS in addition to service on the authorized Representative.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.61. Reconsideration.

(a) Upon the application of any Party or upon his or her own motion, the Administrator may reconsider or modify a decision issued under Rule 60 [Section 232.60] above for the purpose of correcting any error therein.

(b) The decision must be reconsidered or modified within 15 days after its date of issuance pursuant to Rule 60 (c) [Section 232.60(c)]. Thereafter, the decision may not be reconsidered or modified, except that a clerical error may be corrected at any time.

(c) The modified or reconsidered decision shall be served on the Parties in the same manner as a decision issued under Rule 60 [Section 232.60].

(d) A Party is not required to apply for reconsideration before seeking judicial review of a decision of the Administrator. An application for reconsideration made by any Party shall *not* extend the time for seeking judicial review pursuant to Labor Code section 1777.7(c)(5) unless the Administrator issues a modified or reconsidered decision within the 15-day time limit prescribed in subpart (b) of this section.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.62. Final Decision; Time for Seeking Review.

(a) The decision of the Administrator issued pursuant to Section Rule 60 [Section 232.60] above shall be the final decision of the Director from which any Party may seek judicial review pursuant to the provisions of Labor Code section 1777.7(c)(6) and Code of Civil Procedure section 1094.5; provided however, that if the Administrator has issued a modified decision pursuant to and within the 15-day limit of the Administrator's reconsideration authority under Section Rule 61 [Section 232.61] above and Labor Code section 1777.7(c)(6), the right of review and time for seeking such review shall extend from the date of service of the modified decision rather than from the original decision.

(b) The modification of a decision to correct a clerical error after expiration of the 15-day time limit on the Administrator's reconsideration authority shall *not* extend the time for seeking judicial review.

(c) The time for seeking judicial review shall be determined from the date of service of the decision of the Administrator under Code of Civil Procedure section 1013, including any applicable extension of time provided in that statute.

(d) Any petition seeking judicial review of a decision under these Rules may be served (1) upon the Administrator by serving the Office of the Director - Legal Unit where the appointed Hearing Officer who conducted the hearing on the merits regularly maintains his or her office; and (2) upon the Chief DAS by the serving the regular office of the attorney who represented the Chief DAS at the hearing on the merits. The intent of this subpart is to authorize and designate a preferred method for giving the Administrator and the Chief DAS formal notice of a court action seeking review of a decision of the Administrator under these Rules; it does not preclude the use any other service method authorized by law.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.63. Preparation of Record for Review.

(a) Upon notice that a Party intends to seek judicial review of a decision of the Administrator and the payment of any required deposit, the Department, under the direction of the Hearing Officer, shall immediately prepare a hearing record consisting of all exhibits and other papers and a transcript of all testimony which the Party has designated for the inclusion in the record on review.

(b) The Party who has requested the record or any part thereof shall bear the cost of its preparation, including but not necessarily limited to any court reporter transcription fees and reasonable charges for the copying, binding, certification, and mailing of documents. Absent good cause, no record will be released to a Party or filed with a court until adequate funds to cover the cost of preparing the record have been paid by the requesting Party to the Department or to any third party designated to prepare the record. However, upon notice that a Party seeking judicial review has been granted *in forma pauperis* status under California Rule of Court 985, the Department shall bear the cost of preparing and filing the record where necessary for a proper review of the proceedings.

(c) The pendency of any request for the Department to prepare a hearing record shall *not* extend the time limits for filing a petition for review under Labor Code section 1777.7(c)(5) and Code of Civil Procedure section 1094.5.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

232.64. Request for Participation by Administrator in Judicial Review Proceeding.

Although the Administrator should be named as the Respondent in any action seeking judicial review of a final decision, the Administrator ordinarily will rely upon the Parties to the hearing (as Petitioner and Real Party in Interest) to litigate the correctness of the final decision in the writ proceeding and on any appeal. The Administrator may participate actively in proceedings raising issues that specifically concern the Administrator's authority under the statutes and regulations governing the payment of prevailing wages on public work contracts, or the validity of related laws, regulations, or the Director's decisions as to public works coverage or generally applicable prevailing wage rates, or the Administrator's precedential decisions under Labor Code section 1777.7(g). Any Party may request the Administrator to file a response in the action by including a separate written request with any court pleading being served on the Administrator in accordance with Rule 62(d) [Section 232.62(d)]. Any such separate written request should specify briefly what issues are raised by the petition that extend beyond the facts of the case and warrant the Administrator's participation.

NOTE: Authority cited: Labor Code sections 3071 and 1777.7(f). Reference: Labor Code 1777.5 and 1777.7.

STATUTE OF LIMITATIONS.

232.70. Statute of Limitations for Determinations.

(a) A determination for violation of Labor Code section 1777.5 shall be issued and served on the Affected Parties no later than three years after date of accrual.