

FINAL STATEMENT OF REASONS
for
PROPOSED PUBLIC WORKS CONTRACTOR REGISTRATION REGULATIONS
(Title 8, California Code of Regulations, Sections 16410 through 16418)

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code Section 11346.9(d), the Chief Deputy Director/Acting Director (“Director”) of the Department of Industrial Relations (“DIR”) incorporates the Initial Statement of Reasons and the Addendum to the Initial Statement of Reasons that were prepared and circulated for comment in this rulemaking.

Revisions Following Initial Comment Period:

The following revisions were made after the initial public comment period and circulated for additional public comment.

Authority and Reference Notes were added to each proposed new section.

Section 16410: Largely in response to public comments, subsections (c) and (d) were redrafted to clarify the scope of the statutory obligation to register as a public works contractor. Language was added to the first sentence of subsection (c) to tie the obligation to register to bidding on or performing public work, as defined in the Labor Code. A second sentence was added as an introductory statement for the four paragraphs that follow. The purpose and intent was to clarify the overall scope of the registration requirement rather than have it understood only in the context of or limited to the specific items addressed in the following paragraphs.

The balance of subsection (c) regarding entities licensed by the Contractors State License Board was redesignated as paragraph (1) of subsection (c), with minor typographical modifications. What originally was proposed as subsection (d) was redesignated as paragraph (2) of subsection (c), also with typographical modifications, including changing “any person” to “Any entity or individual” and “employed” to “engaged” to be consistent with corresponding statutory usage. A new paragraph (3) was added to clarify the applicability of the registration requirement to joint employers of workers employed on public works, even though the joint employer itself may not have entered into the contract to perform public work. This provision was needed to address a question that has come up repeatedly with respect to the obligation to register, and is tied to the legal responsibility of joint employers to comply with the public works requirements of the Labor Code. A new paragraph (4) was added to clarify the responsibility of sole proprietors, including owner-owner operators, to register when subject to prevailing wage requirements. This provision also was needed to address a frequently asked question about registration requirements and highlight a distinction between federal law, in which owner-operators may be exempt from prevailing wage requirements, and state law, in which they are not.

Because the language previously proposed as subsection (d) was incorporated into paragraph (2) of subsection (c), subsections (e) and (f) were redesignated as (d) and (e) respectively.

Section 16411: In subsection (b), the words “if any” were added to the last line of the second sentence, after the words “State of California.” These words were added in response to public comments for the purpose of clarifying that the requirement to supply a professional license, permit, or authorization from the state only applies if the applicant for registration has such a license, permit, or authorization.

Section 16412: In subsection (a)(6), the last line was corrected to refer to “any additional penalty due under paragraphs (4) or (5)” rather than (5) or (6).

Section 16413: The headings “Incomplete Registration” and “Denial on Merits” were added to subsections (a) and (b) respectively to indicate and clarify that they address two different scenarios under which registration is denied or unsuccessful rather than potentially overlapping versions of the same scenario. The text of the subsections was not changed.

In subsection (c), specifying the time limit for appealing a denial on the merits, “Within thirty (30) days following receipt of any notice of denial . . .” was changed to “Within sixty (60) days following the issuance of any notice of denial . . .”. The date of issuance was substituted for date of receipt to be consistent with how other time limits customarily are calculated and because the issuance date is more certain and ascertainable than the date of receipt. Because this change shortened the deadline for response, a corresponding revision was made to lengthen that time from 30 to 60 days. Because most denials are without prejudice to reapplying, registrations are on a one-year cycle, and both the registration and appeals process are relatively simple, the Director did not see a need or reason for extending this deadline beyond 60 days.

Section 16414: In subsection (a)(3), the word “subcontracted” was changed to “entered into a subcontract”. This change in wording better reflects the intent of referring to the discrete act of entering into a contract as distinguished from having an ongoing contractor-subcontractor relationship. The change addresses the specific concern over a contractor becoming subject to revocation due to a subsequent lapse in the subcontractor’s registration.

A new subsection (b) was added to spell out the requirements for a notice of revocation issued by the Labor Commissioner. The first sentence requiring the notice to be in writing, to specify the basis for revocation, and describe the supporting evidence, is a restatement of a sentence in the original language of this subsection (now subsection (c)). Three additional sentences were added to require the Labor Commissioner to specify the period of disqualification, to set minimum and maximum periods of disqualification, and to require the Labor Commissioner to determine the length of disqualification in accordance with the same standards used for assessing penalties for non-registration under Labor Code Section 1775(a)(2)(A). Because the original proposals required the hearing officer to specify the length of disqualification in a decision upholding a revocation decision, it was necessary to specify how this would be determined in the first place. In addition, the Director believed it was necessary and appropriate to have this determination governed by the same statutory

standards that apply to determining penalties for working without being registered (under Labor Code Section 1775(a)(2)(A)) and to substantive prevailing wage violations (under Labor Code Section 1775(a)(2)). A maximum disqualification period of 24 months was set in recognition that any effort to disqualify a contractor for a longer period of time would be handled as a disbarment under Labor Code Section 1777.1 and Title 8, California Code of Regulations, sections 16800 – 16802.

The text originally proposed as subsection (b) was redesignated as subsection (c), and language from the original text that was incorporated into the new subsection (b) was deleted from this subsection. The subsequent subsections (c), (d), and (e) were redesignated as (d), (e), and (f) respectively, and the cross-references to other subsections were corrected. Revisions were also made to newly designated subsection (e) to correct an erroneous cross-reference in the first sentence and to change the appeal time limits in the fourth sentence from 30 days following receipt to 60 days following issuance. The latter change was made for the same reasons that the deadlines were revised and lengthened in section 16413: the date of issuance is customary as well as more certain and ascertainable; and 60 days provides adequate time within the overall framework of the public works contractor registration program and these regulations to file a notice of appeal.

Revisions After First 15-day Comment Period:

The following revisions were made after the first 15-day public comment period and circulated for additional public comment.

Section 16410: In the first sentence of subsection (c), a typographical error was corrected by inserting the word “or” between the words “bid on” and “perform”, so that it reads “bid on or perform public work”. The same sentence was clarified by deleting the words “as defined” and substituting the phrase “that is subject to the requirement to pay prevailing wages as described”, so that it more accurately reads “. . . public work that is subject to the requirement to pay prevailing wages as described in Labor Code Sections 1771, 1772, and 1774.”

Section 16411: In the first sentence of subsection (a), “legal address” was changed to “mailing address”, and an additional item “business email address” was added at the end sentence. These changes conform the regulatory language to information that is already obtained during the public works contractor registration process. In addition, an email address is needed in order for revocation and hearing notices to be served in that manner, as required by Section 16414.

Section 16412: In paragraph (6) of subsection (a), the unnecessary phrase “Effective June 1, 2019” was deleted from the start of the second sentence. Subsection (b) was deleted in its entirety as unnecessary and potentially inaccurate. The following subsections (c) through (f) were redesignated as (b), (c), (d), and (e) respectively.

Section 16413: The first sentence of subsection (a) was clarified by replacing the word “pay” with the word “submit” and by changing the citation at the end of the sentence from “16412”

to “16412(a)”. The second sentence of subsection (a) was also clarified by inserting the words “completing the application” between the words “to” and “submitting”, so that it reads “without prejudice to completing the application or submitting a new application”.

Subsection (b) was clarified and further distinguished from subsection (a) by deleting the concluding phrase “pay the fees, including any applicable penalties, required by Labor Code Section 1725.5 and section 16412(a) of these regulations” and replacing it with “upon the subsequent cancelation or dishonor of any fee payment submitted with the application.”

In subsection (f), an unnecessary second citation to Labor Code Section 1725.5 was deleted so that the concluding phrase reads “has paid the fees and any penalties required by section 16412(a) of these regulations.”

Section 16414: In subsection (b), the fourth sentence was clarified by adding the word “substantive” before the word “standards” and by further refining the statutory citation, so that it reads “the substantive standards specified in Labor Code Section 1775(a)(2)(A)(i) and (ii)”.

The last sentence of subsection (d) (providing for no extension of the effective date for Saturdays, Sundays, or holidays) was deleted as inconsistent with law.

Further Revisions After Second 15-day Comment Period:

The following nonsubstantive revisions were made after the second 15-day public comment period.

Section 16413: At the end of subsection (a), the word “fee” was changed to “fees.”

Section 16416: A typographical error in the first sentence of subsection (b) was corrected by inserting the word “days” between the words “ten (10)” and “prior”, so that it reads “at least ten (10) days prior”. The reference note for this section was corrected by deleting the references to Code of Civil Procedure Section 1094.5 and Labor Code Section 1775, so that it now reads “Reference: Sections 1725.5, 1742, and 1771.1, Labor Code.”

LOCAL MANDATES DETERMINATION

The proposals do not impose any mandate on local agencies or school districts. These proposals govern only the public works contractor registration process, including notice requirements and appeal rights of contractors who are denied registration or whose previously-approved registrations are revoked.

SUMMARY AND RESPONSE TO COMMENTS

During the initial public comment period, the Director received written and oral comments from the following individuals and entities: Kipling Clark; Paula Jurado of the Los Angeles County

Metropolitan Transportation Authority (LA Metro); Peter Beaupre, PE of Prosser Building & Development, Inc.; Domingo Leon, P.E. of D'Leon Consulting Engineers; Phil Blair of Blair Drywall & Painting; Jerry VanWagoner of Cal-West Fire Alarm Service; Kathy Smith of WSP USA; Charles L. Rea [written] and Suzanne Seivright [oral] on behalf of California Construction and Industrial Materials Association (CalCIMA); Michael Walton [written] and Michael Kurey [oral] on behalf of Construction Employers Association [CEA]; A. Cy. Askari, PE, PhD of Graph Company; Deborah E.G. Wilder of Contractor Compliance & Monitoring, Inc. (CCMI); Kate Mergen [written] and Chris Smith [oral] on behalf of Associated General Contractors of California (AGC); Chris Walker on behalf of the California Sheet Metal and Air Conditioning Contractors National Association (CAL SMACNA); and Teresa Dunham of the Department of General Services, State of California, Real Estate Division. The Director also received a late written comment from Maria Gutierrez of Urban Graffiti Enterprise.

During the 15-day comment period that followed the issuance of modifications on June 19, 2019, the Director received written comments from the following individuals and entities: Paula Jurado of LA Metro; Deborah Wilder of CCMI; Charley Rea of CalCIMA; Chris Jenson of the City of Los Angeles, Office of Contract Compliance; Anthony Narducci on behalf of the Northern California Masonry & Tile Industry Labor Management Cooperation Committee Trusts; Paul Aherne of Rutan & Tucker on behalf of CEA; Andrea Matsuoka of Weinberg, Roger & Rosenfeld; and Bradford E. Barnum on behalf of the Associated General Contractors of America, San Diego Chapter. The Director also received a late written comment from Mark Jimenez of the Department of Finance, State of California, related to how impacts were reported on the Form 399 (Economic and Fiscal Impact Statement).

No comments were received during the 15-day comment period that followed the issuance of further modifications on December 20, 2019. One late comment was received from Bill Harris.

Comments and responses are grouped below by topic and section, and within each topic or section, the comments and responses are also divided between the initial proposals and subsequent revisions.

General and Other Uncategorized Comments during the Initial 45-day Public Comment Period:

Phil Blair, Blair Drywall & Painting: I no longer do public works for many reasons, including inability to compete with unlicensed or inappropriate licensed contractors who get some of the work. Thanks for no help in my area (Lake County).

Director's Response: While it is unclear whether this comment is directed specifically at the public works contractor registration program, these proposals clarify registration requirements and create procedures for revoking the registration of contractors who use unregistered subcontractors. In addition, members of the public, including contractors harmed by unscrupulous competitors, may submit complaints of suspected public works violations to the Labor Commissioner for investigation and potential enforcement. Information about submitting a complaint is available on DIR's website at <https://www.dir.ca.gov/dlse/HowToFilePWComplaint.htm>.

Maria Gutierrez, Urban Graffiti Enterprises [late]: "[T]he only issue is if the State does not enforce the DIR registration." Maybe require a certificate to be submitted with the Request for Proposal to show the contractor is registered. There is much abuse and apathy due to lack of enforcement.

Director's Response: These proposals help serve the purpose of enforcing registration requirements by creating procedures for revoking a previously-approved registration. Requiring a certificate to be submitted with a Request for Proposal is a condition that an awarding body could impose; and awarding bodies and others can also check current registration status on DIR's website at <https://cadir.secure.force.com/ContractorSearch>. The responsibility of awarding bodies to use registered contractors is not addressed by these proposals but is covered by Labor Code Section 1773.3, which includes the assessment of penalties and potentially debarment for awarding bodies that use contractors for public works in violation in violation of the registration requirements.

Jerry VanWagoner, Cal-West Fire Alarm Service: We avoid all Public Works as system requires far too much paperwork and was an unpleasant money-losing experience when we participated in 2014. In particular, we had to go after general contractor's bond to get paid, and we had to pay fees twice, for registration in May and renewal two months later. Over 40% of GCs are from out-of-state, and we also object to fast track program that bypasses environmental impact study, causing program to go from private to public.

Director's Response: These comments are outside the scope of these proposals, except for the comment on paying fees twice, which is addressed under Section 16410 below.

Michael Walton, Construction Employers Association (CEA): "CEA supports the creation of a level playing field in the public works arena, and views the registration process pursuant to Labor Code Section 1725.5 as an essential tool for vetting contractor applications."

Director's Response: CEA's support is appreciated. This comment does not address any specific part of the proposal, and no further response is required.

Suzanne Seivright, California Construction and Industry Materials Association (CalCIMA) [oral]: Ready-mix producers considered a subcontractor even though ready mix production is not a contracting business.

Director's Response: This comment raises a question of terminology that pertains to coverage and is outside the scope of these proposals. Historically, the law recognized a distinction between bona fide materials suppliers and subcontractors employed in the execution of a public works contract. (See E.G. Sansone Co. v. Department of Transportation, 55 Cal.App.3d 434 (1976).) However, Labor Code Section 1720.9 expressly extended public

*works requirements to entities that haul and deliver ready-mix concrete.*¹

Peter Beaupre, PE, Prosser Building & Development, Inc.: Include a mandatory educational component, with a one-hour training video explaining what to pay employees from the [prevailing wage determination] charts that lack information.

Director's Response: This recommendation was not accepted. Mandatory education would require legislation and would be a major costly addition to the existing registration requirements. There are many voluntary training opportunities available throughout the state, some of which are listed on DIR's website at https://www.dir.ca.gov/Public-Works/Training_and_Tutorials.html.

Chris Smith, Associated General Contractors of California (AGC) [oral]: “As drafted, the punitive damages that are implemented with these changes put good, honest companies at risk of their revocation. The lack of clarity around the requirement to pay prevailing wage is predominant around public works projects, especially in areas of trucking, quality control, and inspections. These changes would allow DIR to make rulings on work previously performed, and if a determination of prevailing wage is ordered, companies can be held responsible without reasonable considerations.”

Director's Response: These proposals do not impose or implement punitive damages, though the comment may refer to revoking a public works contractor's registration, as addressed under section 16414(a)(3) below. Labor Code Section 1725.5(d) addresses how registration requirements are applied in the event of an after-the-fact determination that public work is subject to prevailing wage requirements,² and these regulatory proposals cannot override the statute or authorize retroactive punishment in this circumstance.

General and Other Uncategorized Comments during the 15-day Public Comment Period following Issuance of the June Revisions:

Paula Jurado, Los Angeles County Metropolitan Transportation Authority (LA Metro): (1) Allow contractors to pick the work classifications they can perform at the time of registration. It is difficult to determine what type of work contractors will be doing when I enter the PWC-100 as an awarding agency. (2) Clarify when contractors who are working on federally funded (DBRA) contracts must be registered. Our agency requires that all our contractors be registered, regardless of contract funding per the FAQs on the registration database.

Director's Response: The first comment appears to refer to information filled out by the awarding agency on the PWC-100 public works project registration form, and is outside the scope of the 15-day modifications and the proposed regulations as a whole. With regard to

¹ The validity of this statute was upheld in the face of an equal protection and preemption challenge by ready-mix concrete suppliers in *Allied Concrete and Supply Co. v. Baker*, 904 F.3d 1053 (9th Cir. 2018).

² This particular provision was added to Section 1725.5 after AGC raised the same concern about draft legislation to enact the public works contractor registration program.

this concern, the awarding agency and general contractor should be aware of the work classifications for which a contractor or subcontractor is hired, and prevailing wages must be determined and paid based upon the type of work performed, regardless of how a contractor customarily classifies its work or workers. With regard to second comment, the only clarification DIR can provide with respect to federally-funded projects, is that California's requirements apply and contractors must be registered when those projects "are controlled or carried out by California awarding bodies of any sort." (8 Calif. Code Reg. § 16001(b).)

Deborah E.G. Wilder, Contractor Compliance & Monitoring, Inc. (CCMI): Support the changes made.

Anthony Narducci, The Masonry & Tile Industry Labor Management Cooperation Committee Trusts: No objections to the subject proposed changes.

Director's Response: CCMI's support and the non-opposition of the organizations represented by Mr. Narducci are appreciated. These comments do not address any specific part of the modifications, and no further response is required.

Mark Jimenez, Department of Finance [late]: Under the Economic Impact Statement. C.1 and C.2 need modifications. C.1 It is not correct to add the purpose of regulations as part of benefits. Additionally, for consistency, the STD 399 must report the benefits described on the addendum. The addendum highlights savings for contractors on court and attorney expenses. It also mentions benefits for the agency on fewer phone calls and emails, which would imply less staff time. C.3 must include the actual monetary benefits that contractors will obtain from savings on court and attorney expenses: \$75,000-\$120,000.

Under the fiscal impact statement, the agency will save time from lower phone calls and emails, which must be mentioned under B.4. The addendum already describes these benefits in page 2. STD 399 must show consistency on its fiscal impact report.

Director's Response: The Form 399 [Economic and Fiscal Impact Statement] was revised as suggested and resubmitted to the Department of Finance for approval.

Comments on Section 16410 during the Initial 45-day Public Comment Period:

Deborah E.G. Wilder (CCMI): Add a subsection as follows: "Registration is required for any business entity or individual who will subcontract any work to a business or person to perform prevailing wage work, even if the original business will not perform prevailing wage work itself. This shall also include joint employers, such as temporary employment agencies."

Director's Response: This recommendation was accepted and incorporated (with slightly revised wording) into paragraph (3) of subsection (c) of section 16410.

Kipling Clark: Exempt Division of State Architect and Office of Statewide Health Planning & Development Inspectors, who are not protected by prevailing wage and do not file paperwork with DIR.

Paula Jurado, LA Metro: Include regulations about need for professional firms, like engineers and architects to register.

Teresa Dunham, Department of General Services, State of California, Real Estate Division: Request clarity on which bidders of architectural and engineering contracts solicited pursuant to Government Code Section 4525 are contractors subject to registration requirements of Labor Code Section 1725.5. We get pushback from bidding community and have challenges getting a firm stance from DIR. Would like more definitive information on website re preconstruction coverage.

Director's Response: These comments concern who is covered by public works prevailing wage requirements, which is outside the scope of these proposals. With certain specified exceptions, the requirement to register with DIR as a public works contractor applies to every contractor who bids on or performs any public work that is subject to the requirement to pay prevailing wages. The language of subsection (c) of section 16410 was revised in the second set of modifications to more accurately express this concept.

Public work itself is extensively defined in Labor Code Sections 1720 and following, while Labor Code Sections 1771, 1772, and 1774 establish the basic parameters for who is deemed employed on public work and entitled to prevailing wages. The registration requirement can apply to state-certified inspectors, engineers, and architects, when they perform certain kinds of preconstruction, testing, or inspection work that is subject to prevailing wage requirements. However, it would not apply to work that is not covered by prevailing wage requirements or to professionals who do not perform any covered work; hence these professions cannot be blanketly included or excluded. What work is covered by prevailing wage requirements is addressed in other statutes and regulations, as well as in the Director's coverage determinations posted at <https://www.dir.ca.gov/oprl/PWDecision.asp>.

Suzanne Seivright, CalCIMA: Ready-mix producers are considered subcontractors even though ready mix production is not a contracting business.

Director's Response: This comment raises a question of terminology that pertains to coverage and is outside the scope of these proposals. Historically, the law recognized a distinction between bona fide materials suppliers and subcontractors employed in the execution of a public works contract. (See E.G. Sansone Co. v. Department of Transportation, supra.) However, Labor Code Section 1720.9 expressly extended public works requirements to entities that haul and deliver ready-mix concrete.³

Peter Beaupre, PE, Prosser Building & Development, Inc.: Change registration period from fiscal year to 12 months following the date of registration. It is unfair to contractor to have to register in June and then renew in July for small one-off project. The Contractors State License Board (CSLB) uses 24 month rolling renewal.

³ The validity of this statute was upheld in the face of an equal protection and preemption challenge by ready-mix concrete suppliers in *Allied Concrete and Supply Co. v. Baker*, 904 F.3d 1053 (9th Cir. 2018).

A. Cy Askari, PE, PHD, Graph Company: Make public works registration date the same as license registration or renewal date and effective for two years. Have CSLB (or other licensing agency) collect these fees for DIR, which will save DIR the cost of collecting fees.

Director's Response: As noted in the Initial Statement of Reasons, fiscal year registration meets state budgetary needs and has been in operation since the program's inception in 2014. Changing to rolling renewals would be costly to DIR. Smaller projects are now exempted from the obligation to use registered contractors, while for most public works contractors, registration is not a one-time, only when necessary, expense.

Multi-year registration went into effect beginning with the 2019/20 fiscal year. Having CSLB register and collect fees was considered when the public works contractor registration system was first conceived, but these registration requirements are DIR-specific and administered through a complete DIR registration system that includes automated fee collection. Registration through other agencies might be worth further study, but it would also have to address public works contractors who are not licensed by CSLB.

Kathy Smith, WSP USA: "I would like to respond to section 16410 subsection-C, which specifies that registration is required for each separately license[d] business entity or name that will engage in public works. (I was going to respond to the above but it does help with our issues of PWC-100, only the registration)"

Director's Response: This comment does not appear to request any change in the proposals, and therefore no response is necessary.

Domingo Leon, P.E., D'Leon Consulting Engineers: Oppose subsection (d) requiring registration of independent contractors. Registration is too costly for outside small consultants.

Director's Response: Labor Code Section 1725.5 requires that all contractors bidding on or performing public work, including outside consultants, must be registered if they are not employed by someone else (who covers the costs of employment, including workers' compensation). Misclassification has too often been used by unscrupulous contractors to avoid prevailing wage requirements, as well as general wage and hour requirements, all to the detriment of workers and the state. The public works contractor registration system helps to prevent this practice to protect workers and law-abiding contractors.

Deborah E.G. Wilder, CCMI: Add the word "company" to the first sentence of subsection (d) so that it reads, "Registration is required for any company or person hired or employed as an independent contractor ..." This would address confusion or assumption that unlicensed firms are not subject to prevailing wage requirements.

Director's Response: In response to this comment, "person" was changed to "entity or individual". The referenced subsection was redesignated as paragraph (2) of subsection (c).

Comment on Section 16410 during the first 15-day Public Comment Period:

Paula Jurado, LA Metro: Make it clearer that contractors/architects/engineering firms who hire contractors performing prevailing wage work must be registered also.

Director's Response: The language of subsection (c)(3) of this section, which was added in the initial 15-day modifications, provides this clarification to the extent feasible in regulatory text. As previously noted, spelling out coverage requirements is outside the scope of these proposals and addressed in other statutes, regulations, and coverage determinations.

Chris Jenson, City of Los Angeles, Office of Contract Compliance: Correct apparent typo in subsection (c) by inserting word "or" in first line so that it reads "who will bid on or perform public work ...".

Director's Response: Correction made in second set of modifications.

Comment on Section 16410 during the second 15-day Public Comment Period:

Bill Harris, ASLA: I do not believe architects and engineers, who are not covered by prevailing wages, should be required to be responsible for subconsultants, such as surveyors, because those subs already are required to report. This is unnecessary and redundant.

Director's Response: This comment was late and did not pertain to the second set of modifications. Nevertheless, the Director responds by noting that the duty to register is tied to bidding on or contracting to perform public work, whether or not the contracting party will perform the actual work or subcontract it to someone else. Contractors are jointly responsible for violations of their subcontractors (Labor Code Section 1743) and therefore need to be tracked. Moreover, as previously noted, architects and engineers may be subject to prevailing wages for certain work and therefore are not inevitably exempt from registration.

Comments on Section 16411 during the Initial 45-day Public Comment Period:

Charles L. Rea, California Construction and Industrial Materials Association (CalCIMA) [written]: The apparent intent of the second sentence of subsection (b) is to address situations where the applicant does not have a CSLB contractor license. However, it is unclear what number a ready mixed concrete producer should use, since they do not have a professional license or specific permit from the state.

Suzanne Seivright, CalCIMA [oral]: The second sentence of subsection (b) is an area of concern and a lot of questions, because it intends to address situations where applicants don't have a CSLB contractor's license. It remains unclear what number ready-mix producers would enter, because in addition to not being contractors, they also do not have a professional license or specific permit number from the state. However, there are other identifying numbers such as tax ID number, corporation number, or a resale number that might possibly work for ready-mix suppliers, but it's still not clear what would be acceptable.

Director's Response: In response to these comments, the words "if any" were added to the

second sentence. The purpose of this subsection, as stated, is only to obtain a license or permit number for the contractor's business or occupation (where applicable) and not personal or corporate IDs. If an applicant does not have a license or permit number because no state license or permit is required for the applicant's business or work, then the applicant should choose the answer "None" from the drop-down list on the application form.

Comment on Section 16411 during the first 15-day Public Comment Period:

Charles L. Rea, CalCIMA: Addition of "if any" appears to address previous comment.

Director's Response: *The Director having CalCIMA's feedback on the revision. No additional response is required.*

Comments on Section 16412 during the Initial 45-day Public Comment Period:

A. Cy Askari, PE, PHD, Graph Company: Reduce fees to attract smaller contractors to pool of registered public works contractors. Set a gross income level with verification requirement to pay reduced fees.

Director's Response: *The basic fees are set by statute (Labor Code Section 1725.5) and designed to meet DIR's funding needs with respect to public works. (See Labor Code Section 1771.3(c). The principal purpose of subsection (a) of this proposed regulation is just to reorganize and restate the statutory fees. Other licensing systems, such as the State Bar of California, have fee scaling for licensees with limited income. However, public works contractor is not a distinct profession, and attracting casual low-level participants is not necessarily a worthwhile policy goal given the overall costs of public works contracting and the prevalence of violations among casual participants who do not learn or follow the requirements (and whose workers suffer as a result).*

Deborah E.G. Wilder, CCMI: Correct cross-reference in subsection (a)(6) from "(5) and (6)" to "(4) and (5)".

Director's Response: *Correction made.*

Comment on Section 16412 during the first 15-day Public Comment Period:

Chris Jenson, City of Los Angeles, Office of Contract Compliance: Add quotation marks around the word "processed" in the second line of this regulation.

Director's Response: *This comment is outside the scope of the 15-day modifications, and the proposed stylistic modification appears to serve no particular need and therefore is unnecessary.*

Comments on Section 16413 during the Initial 45-day Public Comment Period:

None.

Comments on Section 16413 during the first 15-day Public Comment Period:

Andrea Matsuoka, Weinberg, Roger & Rosenfeld: The grounds for a denial on the merits versus a denial without prejudice are unclear because the proposed regulations include a failure to pay registration fees under sections 16413(a) and 16413(b). Thus, a failure to pay fees could result in either a denial without prejudice pursuant to section 16413(a) or a denial on the merits pursuant to section 16413(b). If this was a drafting error, the DIR should correct that mistake. Alternatively, if the DIR intended that certain kinds of failures to *pay fees (e.g. repeat failures or failures to pay a certain kind of fee) would trigger a denial on the merits while all other failures to pay fees would trigger a denial without prejudice, the DIR should amend the regulations to make this distinction clear. The proposed regulations also do not define a "denial on the merits" or state the consequences of such a denial. Presumably, the DIR intended a denial on the merits to be a denial with prejudice. However, the proposed regulations do not expressly state this. The proposed regulations also do not state the consequences of a denial on the merits or how exactly a contractor would be prejudiced by such a denial. One possible consequence could be a registration disqualification period, similar to what is proposed in section 16414. DIR should define a denial on the merits as a denial with prejudice and, more importantly, state the consequences of such a denial.

Director's Response: Subsections (a) and (b) were first modified by the addition of headings to distinguish between an incomplete application and a complete one that nevertheless results in disqualification (i.e. denial on the merits). In response to this comment, additional language was added in the second set of modifications to distinguish between failure to submit a payment, which makes the application incomplete, and the subsequent rejection or cancellation of a fee payment (such as by protesting a credit card charge) that results in denial of a completed application. Denial on the merits can also be based on an applicant's failure to meet one of the other eligibility requirements, which in some cases may be immediately correctable (such as obtaining worker's compensation coverage) but in others may not be (such as being under an extended debarment). Consequently, the suggestion to add the words "with prejudice" was not accepted as it would erroneously connote a finality and inability to correct a disqualifying factor that would not apply in many cases.

Under these proposals, the effect of a denial on the merits is to have a set of appeal rights to challenge the grounds for denial. The regulation does not preclude a denied applicant from simply submitting a new application, but that requires a new fee and may or may not result in a successful registration depending on the reasons for denial. The other consequence of a denial is that the contractor remains unregistered and ineligible to bid on or perform public work until the denial is overturned or a new successful application is submitted. This is similar to applicants who fail to qualify for other kinds of licenses -- such as drivers or attorneys. They cannot exercise the privilege conveyed by the license but are not precluded from reapplying (in contrast to someone who loses a license due to some sort of misfeasance).

Comments on Section 16414 during the Initial 45-day Public Comment Period:

Michael Walton, CEA [written]: CEA supports the revocation criteria in subsections (a)(1)

and (a)(2), provided the term of revocation is clearly established.

Michael Kurey, CEA [oral]: No revocation period is listed in the regulations.

Director's Response: In response to these comments, a new subsection (b) was added, setting forth minimum and maximum periods of disqualification along with parameters for determining the length of disqualification.

Michael Walton, CEA [written]: Subsection (3) exceeds legislative authority and intent by allowing revocation for a clerical error or other inadvertent administrative oversight. The penalties in Labor Code § 1771.1(h)(1) are a sufficient deterrent against using unregistered contractors. The threat of debarment for inadvertent errors is unnecessary and harmful to the construction industry.

Michael Kurey, CEA [oral]: The statutes have very substantial financial penalties for contractors who do not comply with the registration requirements. Revocation may be appropriate for contractors who are deceitful or who cannot comply with the registration requirements, such as insurance. However, it is not appropriate for entering into a contract with an unregistered subcontractor under any condition. This could be due to a mistake by a new person five levels down the chain of command.

Kate Mergen, AGC California: Remove the phrase "or by reason of a failure to inquire" from subsection (a)(3). It imposes further obligations to take on additional liabilities through verification, and there are a lot of uncertainties around scopes of work subject to prevailing wage requirements.

Chris Walker, California Sheet Metal and Air Conditioning Contractors National Association (CAL SMACNA): Remove subsection (a)(3). While fines and penalties were statutorily considered for upper-tier contractors or subcontractors for the actions of lower-tier subcontractors (Labor Code § 1771.1(h)), revocation was not discussed or authorized in statute. Adoption would be draconian and unauthorized, and would lead to revocation for inadvertent mistakes by a "once-registered" lower tier sub, such as a lapse of registration on July 1.

Director's Response: The word "subcontracted" was changed to "entered into a subcontract" to better reflect the intent that it refers to a discrete event, when there is an opportunity first to ascertain and verify the subcontractor's registration status, rather than a subsequent lapse in the subcontractor's registration status. Otherwise, the recommendations were not accepted. The statutory prohibition against using unregistered subcontractors, which preexisted the penalty provisions of Labor Code Section 1771.1, provides DIR with the necessary authority to enforce the prohibition by revoking the registration of contractors who are culpable for a violation. "[B]y reason of a failure to inquire" is itself a reasonable expectation and measure of culpability, because it is something already required of contractors in other contexts, including ascertaining that a subcontractor is properly licensed and has necessary insurance coverage for the work to be performed, and because it is easy to check a public works contractor's registration status on DIR's website.

Revocation on this basis serves the purpose of reaching general contractors who might otherwise treat the financial penalties in Labor Code Section 1771.1 as just a cost of doing business. This is also intended as a lesser punishment than another statutory remedy, which is full debarment under Labor Code Section 1777.1.

Kate Mergen, AGC California: Contractors and subcontractors need the ability to update contact information outside the registration process, and there needs to be guaranteed response time of 24 hours. This guarantee is necessary because of short time frames for revocation process.

Director's Response: *A recent upgrade in DIR's Public Works Contractor Registration system provides this capability.*

Deborah E.G. Wilder, CCMI: Change 10 day deadline to 10 "business" days or 15 days. While general reference to "days" is understood to mean calendar days, the difference between calendar and business days is still confusing to contractors. A regular mailing prior to a holiday weekend could leave little or no time to review and respond by the time it is received by the contractor.

Kate Mergen, AGC California [written]: Change 10-day time period to 90-day time period used by CSLB. 10 days deprives contractors of right to due process, and can be impacted by issues of mail distribution or magnitude of problem to be addressed by small business in short period of time. The California Supreme Court is currently considering review of three different prevailing wage cases [citations provided] over the question of whether certain work is covered or not.

Chris Smith, AGC California [oral]: Change 10-day time period for appeal to 90-days for everyone, which more closely aligns with the Contractors State License Board.

Director's Response: *The overall time limit for appealing a notice of revocation was changed from 30 days following receipt to 60 days following issuance of the notice. The ten day time limit for filing an appeal with the effect of staying revocation was modified only to the extent of removing the non-extension rule (for Saturdays, Sundays, and holidays) based on its inconsistency with Government Code Section 6707. The ten day limit affords contractors the right to a pre-revocation hearing, but limits the ability of a presumptively disqualified or ineligible contractor to continue working while deciding whether to appeal. The prevalent use of email, which is the expected and preferred technology under these proposals and can be received and sent from anywhere in the world, largely eliminates concerns over delayed receipt or diminished time periods for responding. Moreover, the process of initiating an appeal is relatively simple and does not require a lot of advance preparation time. Because public works contractor registration operates on a one year cycle, and work on specific projects can be of very short duration, the longer time periods that may be afforded for*

*responding to certain CSLB actions are not appropriate in this context.*⁴

Comments on Section 16414 during the first 15-day Public Comment Period:

Paul Aherne, Rutan & Tucker on behalf of CEA: Delete subsection (a)(3) in its entirety [reiterating comments submitted by Michael Walton during the initial comment period].

Director's Response: This comment does not address the specific modification made to this subsection, but instead repeats the request for removal of the entire provision, that were made by representatives of CEA and CAL SMACNA during the initial comment period. The Director believes this provision is necessary and appropriate for the reasons noted above in response to those prior comments.

Bradford E. Barnum, Associated General Contractors of America, San Diego Chapter: The ten-day turn-around time for an appeal to stay revocation [in subsection (d)] is unrealistic. This timeframe commences from the date the Labor Commissioner sends notice, not when it is received. There are also no special delivery requirements for the notice.

Director's Response: This comment is outside the scope of the initial 15-day modifications, which did not revise the substance of this provision, although the non-extension rule was later removed in the second set of modifications. The Director notes also that subsection (c) of this section requires email service of these notices, using the most recent contact information provided by the subject contractor. The contractor controls this information, including the ability to update it in DIR's Public Works Contractor Registration system. Consequently the notifications should be received almost instantaneously upon issuance unless the subject contractor fails to check its email or has changed its email address without notifying DIR.

Comments on Section 16416 during the Initial 45-day Public Comment Period:

None.

Comments on Section 16416 during the first 15-day Public Comment Period:

Deborah E.G. Wilder, CCMI: Correct apparent typo in first sentence of subsection (b) by inserting word "days", so that it reads "ten (10) days prior".

Chris Jenson, City of Los Angeles, Office of Contract Compliance: [Same suggestion]

Director's Response: Correction made.

ALTERNATIVES THAT WOULD LESSEN ECONOMIC IMPACT ON SMALL BUSINESS

⁴ The Director also notes that Business and Professions Code Sections 7090.1(a)(3) and 7099.8(a) only give contractors 15 days to appeal certain disciplinary citations issued by the CSLB.

No alternatives were proposed to the Director that would lessen any adverse economic impact on small business.

ALTERNATIVE IMPACTS DETERMINATION

The Director has determined that no reasonable alternative that has been considered or otherwise been identified and brought to the Director's attention would be (1) more effective in carrying out the purpose for which these regulations were proposed, (2) as effective as and less burdensome to affected private persons than these proposals, or (3) more cost-effective to affected private persons but equally effective in implementing the statutory policy.